



Class Ruling

Income tax: scrip for scrip roll-over: exchange of shares and options in Peplin Limited (Australia) for shares and options in Peplin Incorporated (USA)

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	23
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	45
Appendix 2:	
Detailed contents list	49

❶ 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);
 - section 104-25 of the ITAA 1997;
 - section 109-5 of the ITAA 1997;
 - section 109-10 of the ITAA 1997;
 - section 115-30 of the ITAA 1997;
 - section 116-20 of the ITAA 1997; and
 - Subdivision 124-M of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the shareholders and option holders in Peplin Ltd who:

- (a) participate in the scheme that is the subject of this Ruling;
- (b) hold their shares or options on capital account;
- (c) are 'residents of Australia' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- (d) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions as used in Subdivision 124-M of the ITAA 1997.

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 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.

7. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Attorney General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

8. This Ruling applies from 1 July 2007 to 30 July 2008. The Ruling continues to apply after 30 July 2008 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:

- request for Class Ruling dated 30 July 2007;
- draft Information Memorandum of Peplin Limited dated 2 August 2007;
- Peplin Limited Annual Report (year ended 30 June 2006);
- Peplin Limited Half Year Report (six months ended 31 December 2006);
- Peplin Ltd Employee Share Plan;
- Peplin Ltd Directors and Officers Plan; and
- correspondence and e-mails received in relation to the application for a Class Ruling.

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

10. Peplin Ltd is a public company incorporated in Australia on 7 December 1999.

11. Peplin Ltd had shares and options listed on the Australian Securities Exchange (ASX) as well as unlisted options.

12. The majority of Peplin Ltd shareholders were Australian (83% approximately). USA shareholders held approximately 16% of issued shares with the remaining 1% of shareholders being residents in a range of countries.

13. At 22 June 2007, there were in excess of 3,500 shareholders in Peplin Ltd but only 3 shareholders had a direct interest greater than 10%.

14. As at 30 July 2007 there were approximately 17.1 million listed options in Peplin Ltd.

15. Unlisted options are options that have been issued under Peplin Ltd's Employee Share Option Plan, and Directors and Officers Plans. As at 30 July 2007, there were approximately 15.04 million unlisted options on issue which, if exercised, would represent approximately 7.5% of the share capital of Peplin Ltd.

16. Peplin Ltd undertook a restructure subject to shareholder, option holder and court approvals. Under the restructure, Peplin Incorporated (Peplin US) was incorporated in Delaware USA, and became the owner of all Peplin Ltd shares. In the draft Information Memorandum dated 2 August 2007 recommending the restructure to shareholders and option holders, the Directors indicated that the proposed restructure would enhance Peplin Ltd's ability to:

- access equity capital available in the US and International markets;
- attract and retain key staff with industry knowledge and experience;
- effectively manage and grow its business through alignment of executive locations with key markets;
- pursue acquisitions, in-licencing and other growth diversifying opportunities;
- bring its reporting into line with industry peers; and
- remain an Australian listed publicly owned company while growing internationally.

17. The restructure was subject to and was implemented through two separate Court sanctioned schemes of arrangement under the *Corporations Act 2001*, one involving shareholders (the Share Scheme) and the other involving holders of listed options (the Option Scheme), with holders of unlisted options entering into a private treaty. At the time of the restructure, all current shareholders and option holders were in substantially the same financial position immediately prior to and after the restructure.

18. Under the Share Scheme, shareholders in Australia, New Zealand and the USA (together representing approximately 99% of Peplin Ltd's shareholders) had their shares in Peplin Ltd transferred to Peplin US. Under an exchange ratio they received either:

- one CHESS Depositary Interest (Share CDI) for each Peplin Ltd share; or
- one Peplin US share (common stock) for every 20 Peplin Ltd shares they held.

Fractional interests were rounded up to the nearest whole share.

19. Under the Option Scheme, each listed option holder with a registered address in Australia, New Zealand or the USA:

- had their listed options cancelled; and

- received one CHESS Depositary Interest (Option CDI) for each listed option in Peplin Ltd (an Option CDI represented a one-twentieth interest in an underlying option in Peplin US in accordance with the exchange ratio).

20. Shareholders and listed option holders who had a registered address in jurisdictions other than Australia, New Zealand or the USA are referred to as Ineligible Foreign Shareholders and Ineligible Foreign Option Holders. Although they were eligible to vote on and participate in the Share Scheme and the Option Scheme, they did not receive Peplin US shares or CDIs. Instead CDIs representing their shares or options in Peplin US were issued to a nominee. The nominee was to sell those CDIs at such a price and on such terms as the nominee determined and then distributes the proceeds to the Ineligible Foreign Shareholders and Ineligible Foreign Option Holders.

21. Under the private treaty with unlisted option holders, all such option holders had their options in Peplin Ltd cancelled. Under an exchange ratio they received one option to acquire a Peplin US share under a Stock Option Plan adopted by Peplin US for every 20 options they held in Peplin Ltd.

22. The implementation date was 16 October 2007. This was the date on which the shares were exchanged and listed and unlisted options were cancelled and reissued.

Ruling

Exchange of shares

23. CGT event A1 happened when a shareholder disposed of a Peplin Ltd share to Peplin US under the scheme described in this Ruling (subsection 104-10(1)).

24. The event happened when all the shares in Peplin Ltd were transferred to Peplin US on the Implementation Date (subsection 104-10(3)).

25. A shareholder made a capital gain from the CGT event A1 happening if the capital proceeds for a Peplin Ltd share exceeded its cost base (subsection 104-10(4)).

26. A shareholder made a capital loss if the capital proceeds were less than the share's reduced cost base (subsection 104-10(4)).

27. Where a Peplin Ltd share was exchanged for a Share CDI, the capital proceeds for each Peplin Ltd share was the market value of the Share CDI (paragraph 116-20(1)(b)).

28. The 5 day volume weighted average price for a Share CDI for the period 17 October 2007 to 23 October 2007 was \$0.90. The Commissioner accepts \$0.90 as being the market value of the share CDI on the Implementation Date.

29. Where a Peplin Ltd share was exchanged for an interest in a share in Peplin US, the capital proceeds for each Peplin Ltd share was the fraction of the market value of the Peplin US share which accorded with the exchange ratio (paragraph 116-20(1)(b)).

30. No publicly traded market existed for Peplin US shares on or around the Implementation Date. However, under the exchange ratio 20 Peplin Ltd shares could be converted to one Peplin US share. The Commissioner accepts \$18.00 as being the market value of a Peplin US share on the Implementation Date. The Commissioner therefore accepts \$0.90 as the fraction of the market value of the Peplin US share which accords with the exchange ratio (one-twentieth of \$18.00).

Cancellation and reissue of listed and unlisted options

31. CGT event C2 happened when an option holder's option was cancelled under the scheme described in this Ruling (paragraph 104-25(1)(a)).

32. CGT event C2 happened when the option was cancelled on the Implementation Date (paragraph 104-25(2)(b)).

33. An option holder made a capital gain if the capital proceeds from the cancellation of the option were more than its cost base (subsection 104-25(3)).

34. An option holder made a capital loss if the capital proceeds were less than the option's reduced cost base (subsection 104-25(3)).

35. The capital proceeds for each listed option cancelled under the scheme described in this Ruling was the market value of the Option CDI with which it was replaced (paragraph 116-20(1)(b)).

36. An option CDI represents a one-twentieth interest in a Peplin US option.

37. The value of an Option CDI on the Australian Securities Exchange as at 16 October 2007 was \$0.33. The Commissioner accepts \$0.33 as being the market value of an Option CDI on the Implementation Date.

Availability of roll-over

38. A Peplin Ltd shareholder or option holder may choose scrip for scrip roll-over under Subdivision 124-M provided:

- (a) they made a capital gain from the relevant CGT event happening to their share or option; and
- (b) any capital gain that is made from a future CGT event happening in relation to the replacement shares or options received under the Share Scheme or Option Scheme would not be disregarded (except because of a roll-over).

Cost base and reduced cost base of replacement assets

39. If a shareholder chooses scrip for scrip roll-over, the first element of the cost base and the reduced cost base of each Share CDI will be the cost base and the reduced cost base of the Peplin Ltd share that was disposed of under the scheme described in this Ruling and for which roll-over was chosen (subsections 124-785(2) and (4)).

40. If a shareholder chooses scrip for scrip roll-over, the first element of the cost base of the share in Peplin US will be a reasonable attribution of the cost bases and reduced cost bases of the Peplin Ltd shares that were exchanged under the scheme specified in this Ruling, in accordance with the exchange ratio, and for which roll-over was chosen (subsections 124-785(2) and (4)).

41. If an option holder chooses scrip for scrip roll-over, the first element of the cost base and the reduced cost base of each Option CDI will be the cost base and the reduced cost base of the listed option that was cancelled under the scheme described in this Ruling and for which roll-over was chosen (subsections 124-785(2) and (4)).

42. If an option holder chooses scrip for scrip roll-over, the first element of the cost base and the reduced cost base of each option in Peplin US will be a reasonable attribution of the cost bases and reduced cost bases of the unlisted Peplin Ltd options that were cancelled and replaced under the scheme described in this Ruling, in accordance with the exchange ratio, and for which roll-over was chosen (subsections 124-785(2) and (4)).

Acquisition date of replacement assets

43. If roll-over is not chosen (or is not available), the acquisition date of the replacement assets (Share CDIs, shares in Peplin US, Option CDIs and options in Peplin US) is the date that they were issued to each Peplin Ltd shareholder and option holder (section 109-5 and section 109-10).

44. If roll-over is chosen, for the purpose of determining if a capital gain made on any later disposal of the replacement assets is a discount capital gain, the acquisition date of the replacement assets is the date of acquisition of the original Peplin Ltd shares that were disposed of and Peplin Ltd options that were cancelled under the scheme described in this Ruling (item 2 of the table in subsection 115-30(1)).

Commissioner of Taxation26 November 2008

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.*

45. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

46. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder or option holder to disregard a capital gain from a share or an option that is disposed of as part of a corporate takeover or merger if the shareholder or option holder receives a replacement share or option in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share or option.

47. Subdivision 124-M contains a number of conditions that determine whether scrip for scrip roll-over is available under an arrangement. The main conditions and exceptions that are relevant to the circumstances of the restructure of Peplin Ltd are:

- (a) shares or options are exchanged for shares or options in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

48. Under the scheme the conditions for roll-over under Subdivision 124-M are satisfied.

Appendix 2 – Detailed contents list

49. 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	8
Scheme	9
Ruling	23
Exchange of shares	23
Cancellation and reissue of listed and unlisted options	31
Availability of roll-over	38
Cost base and reduced cost base of replacement assets	39
Acquisition date of replacement assets	43
Appendix 1 – Explanation	45
Appendix 2 – Detailed contents list	49

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- arrangement
- capital proceeds
- CGT event
- company
- cost base
- interests
- option
- option holder
- ordinary share
- original interest
- replacement interest
- resident
- roll-over
- scrip for scrip roll-over
- share
- shareholder

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(a)
- ITAA 1997 104-25(2)(b)
- ITAA 1997 104-25(3)
- ITAA 1997 109-5
- ITAA 1997 109-10
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)(b)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001

ATO references

NO: 2008/17755

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip