

CR 2003/89 - Income tax: scrip for scrip roll-over: merger of Jupiters Limited and TABCORP Holdings Limited

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Class Ruling

Income tax: scrip for scrip roll-over: merger of Jupiters Limited and TABCORP Holdings Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the tax law identified below applies to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is Subdivision 124-M of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Class of persons

3. The class of persons to which this Ruling applies is the ordinary shareholders of Jupiters Limited ('Jupiters') who:

- (a) are 'residents of Australia' within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936'), or are 'non-residents' of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936 and whose Jupiters ordinary shares have the necessary connection with Australia under section 136-25 of the ITAA 1997;
- (b) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M; and

- (c) participate in the scheme of arrangement for Jupiters ordinary shareholders under the planned merger of Jupiters and TABCORP Holdings Limited ('TABCORP').

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 16.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Class Ruling applies to the year ended 30 June 2004.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. The description is based on the documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or

parts of documents incorporated into this description of the arrangement are:

- (a) Class Ruling application dated 27 June 2003 from Jupiters requesting the ATO to make a Class Ruling in relation to the capital gains scrip for scrip roll-over provisions as they apply to the merger of Jupiters and TABCORP;
- (b) Merger Implementation Agreement between Jupiters and TABCORP; and
- (c) Amendment Deed to the Merger Implementation Agreement between Jupiters and TABCORP.

10. Two separate schemes of arrangement will be entered into as part of the planned merger of Jupiters and TABCORP:

- the Ordinary Share Scheme; and
- the RPS Scheme.

11. The RPS Scheme does not form part of the arrangement that is the subject of this Ruling.

Details of the Ordinary Share Scheme

12. Under the arrangement that is the subject of this Ruling, Tabcorp Investments No.2 Pty Ltd ('Tabcorp Sub') will acquire 100% of Jupiters ordinary shares. Neither Tabcorp Sub nor any other company in the wholly-owned TABCORP group will own ordinary shares in Jupiters prior to the implementation of the merger.

13. Jupiters ordinary shareholders can choose the consideration they receive for their Jupiters shares from one of the following options:

Option 1: Cash and Shares Option – \$5.25 cash for each of 54.286% of their Jupiters ordinary shares and 0.525 TABCORP shares for each of the remaining 45.714% of their shares.

Option 2: Maximum Cash Option – \$5.25 for each and every Jupiters ordinary share to the extent that it is available from a cash pool of approximately \$574,000,000. To the extent that this option is chosen and the cash pool is depleted, shareholders will receive TABCORP shares on a pro rata basis to the extent that the elections for additional cash cannot be satisfied.

Option 3: Maximum Shares Option – 0.525 TABCORP shares for each and every Jupiters ordinary share to the extent that TABCORP shares are available from a share pool of approximately 48,400,000 shares. To the extent that this option is chosen and the share pool is depleted, shareholders will receive cash on a pro rata basis to the extent that the elections for additional TABCORP shares cannot be satisfied.

14. If a shareholder does not make an election in respect of one of these options, they will receive the consideration provided for under Option 1.

15. Jupiters ordinary shareholders will also receive consideration in relation to the sale by Jupiters of its telephone and on-line sports betting business known as 'Centrebet'. The form that this consideration will take will depend upon whether the sale of Centrebet occurs on or before 31 October 2003.

16. If the sale occurs on or before this date, the ordinary shareholders will receive the net proceeds from the sale of Centrebet as an additional dividend. If the sale does not occur on or before this date, a related entity of TABCORP will issue an unsecured note to each ordinary shareholder. The note will be redeemed by the issuer upon the completion of the sale of Centrebet for a portion of the net proceeds from the sale, should that occur prior to 30 September 2004.

Ruling

17. Subject to the qualifications in paragraphs 4 to 6 of this Ruling, Jupiters ordinary shareholders who are within the class of persons to which this Ruling applies can choose roll-over under Subdivision 124-M for a share acquired (or taken to have been acquired for capital gains tax purposes) on or after 20 September 1985 if:

- (a) apart from the roll-over which Subdivision 124-M provides, they would make a capital gain in relation to the disposal of their Jupiters ordinary share, and
- (b) might make a capital gain from a replacement TABCORP share which would not be disregarded (except because of a roll-over).

18. If the sale of Centrebet is finalised on or before 31 October 2003, roll-over under section 124-785 will be available in respect of those Jupiters shares that are exchanged for an interest in a TABCORP share. Roll-over will not be available in respect of those Jupiters shares that are exchanged for cash.

19. If the sale of Centrebet is not finalised on or before 31 October 2003, a partial roll-over under section 124-790 will be available for those Jupiters shares exchanged for an interest in a TABCORP share and an unsecured note. Roll-over will not be available in respect of those Jupiters shares that are exchanged for cash and an interest in an unsecured note.

Explanation

Availability of scrip for scrip roll-over

20. Scrip for scrip roll-over enables a shareholder to disregard a capital gain they make from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives in exchange a replacement share. The capital gain is disregarded completely if the only capital proceeds the shareholder receives is a replacement share. If the shareholder receives some other form of capital proceeds, the capital gain is disregarded in part. The roll-over also provides that the cost base and reduced cost base of the new shares is based on the cost base and reduced cost base of the original shares at the time of the roll-over.

21. Subdivision 124-M contains a number of conditions for, and exceptions to, the eligibility of a shareholder to choose scrip for scrip roll-over. Below is an outline of the main conditions and exceptions that are relevant to the circumstances of the arrangement that is the subject of this Ruling.

22. **Subparagraph 124-780(1)(a)(i) requires an entity to exchange a share in a company for a share in another company.**

23. Each of the three consideration options outlined in paragraph 13 potentially provide for consideration that may take the form of TABCORP shares.

24. This requirement will be satisfied by a Jupiters shareholder in relation to those Jupiters ordinary shares that are exchanged for an interest in a TABCORP share (although only a partial roll-over may be available - see paragraph 49). Roll-over will not be available for those shares that are exchanged for cash.

25. **Paragraphs 124-780(1)(b) and 124-780(2)(a) require that shares in an original entity (Jupiters) be exchanged in consequence of a single arrangement that results in the acquiring entity (Tabcorp Sub) becoming the owner of 80% or more of the voting shares in the original entity.**

26. In the context of the scrip for scrip roll-over provisions, the merger of Jupiters and TABCORP pursuant to the Merger Implementation Agreement is considered to be a 'single arrangement'.

27. The only Jupiters shares that satisfy the definition of ‘voting shares’ in subsection 995-1(1) are the Ordinary Shares.
28. Accordingly, if the merger is implemented, this requirement will be satisfied because Tabcorp Sub will become the owner of all of the Jupiters ordinary shares.
29. **Paragraph 124-780(1)(b) and 124-780(2)(b) require that the exchange of shares be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (Jupiters) could participate.**
30. This requirement will be satisfied because all of the owners of Jupiters ordinary shares will dispose of those shares in exchange for TABCORP shares as a result of the merger.
31. **Paragraphs 124-780(1)(b) and 124-780(2)(c) require that the exchange of shares is in consequence of a single arrangement in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity (Jupiters).**
32. This requirement will be satisfied as each Jupiters ordinary shareholder has the same choices available to them as to the consideration they receive for their shares.
33. Although the TABCORP shares to which some overseas shareholders would otherwise be entitled will be issued to a nominee for sale, they are able to participate on substantially the same terms.
34. **Paragraphs 124-780(1)(c) and 124-780(3)(a) require the original interest holder (a Jupiters ordinary shareholder) to have acquired its original interest (a Jupiters ordinary share) on or after 20 September 1985.**
35. This condition will be satisfied by a Jupiters ordinary shareholder in relation to the ordinary shares they acquired on or after 20 September 1985. Paragraph 17 limits this Ruling to shares acquired after this date.
36. **Paragraphs 124-780(1)(c) and 124-780(3)(b) require that, apart from the roll-over, the original interest holder (a Jupiters ordinary shareholder) would make a capital gain from a CGT event happening in relation to the original interest (a Jupiters ordinary share).**
37. Whether a Jupiters ordinary shareholder would, apart from the roll-over, make a capital gain, from the disposal of any of its shares to Tabcorp Sub is a question of fact that is dependent on the specific circumstances of each shareholder – in particular the cost base of each ordinary Jupiters share and the value of the capital proceeds received. This ruling is limited in this regard by paragraph 17(a).

38. **Paragraphs 124-780(1)(c) and 124-780(3)(c) require that the replacement interest is in the acquiring entity (Tabcorp Sub) or the ultimate holding company of the wholly-owned group of which it is a member (TABCORP).**

39. This requirement will be satisfied as the replacement interest received by the Jupiters ordinary shareholders will be in TABCORP, which is the ultimate holding company of Tabcorp Sub.

40. **Paragraphs 124-780(1)(c) and 124-780(3)(d) require that the original interest holder (a Jupiters ordinary shareholder) choose to obtain the roll-over.**

41. Paragraph 17 limits this Ruling to shares in respect of which roll-over is chosen.

42. **Additional requirements if the original interest holder (a Jupiters ordinary shareholder) and the acquiring entity (Tabcorp Sub) did not deal with each other at arm's length and:**

- (a) **neither the original entity (Jupiters) nor the replacement entity (TABCORP) had at least 300 members before the arrangement started (paragraph 124-780(4)(a)); or**
- (b) **the original interest holder (a Jupiters ordinary shareholder), the original entity (Jupiters) and the acquiring entity (TABCORP Sub) are all members of the same linked group just before the arrangement started (paragraph 124-780(4)(b)).**

43. Paragraph 124-780(4)(a) will not apply because both Jupiters and TABCORP will have more than 300 members just before the arrangement started. (Section 124-810 will not apply to Jupiters as its ownership is not concentrated in the manner contemplated by that section.)

44. Paragraph 124-780(4)(b) will not apply because Jupiters and Tabcorp Sub were not members of the same linked group (within the meaning in section 170-260) just before the merger started.

45. **Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain the original interest holder (a Jupiters ordinary shareholder) might make from their replacement interest (TABCORP share) would be disregarded.**

46. This exemption may apply if, for example, the TABCORP shares are trading stock. Paragraph 17(b) limits this Ruling in this regard.

47. **Paragraph 124-795(2)(b) provides that the roll-over is not available if the original interest holder (a Jupiters ordinary shareholder) and the acquiring entity (Tabcorp Sub) are members of the same wholly-owned group just before the original interest holder stops owning their original interest (a Jupiters ordinary share), and the acquiring entity is a foreign resident.**

48. This Ruling is made on the basis that neither TABCORP nor any TABCORP group company held any ordinary shares in Jupiters before the arrangement. TABCORP Sub is also not a foreign resident for the purposes of paragraph 124-795(2)(b).

Partial roll-over

49. **Subsection 124-790(1) provides that the original interest holder (a Jupiters ordinary shareholder) will obtain only a partial roll-over if its capital proceeds include something other than a replacement interest (a TABCORP share).**

50. If the sale of Centrebet is not finalised on or before 31 October 2003, Jupiters ordinary shareholders may, in addition to an interest in a TABCORP share, receive an interest in an unsecured note (ineligible proceeds) as capital proceeds for a Jupiters share. Roll-over will not be available to the extent the capital proceeds includes the unsecured note.

51. In working out the amount of the capital gain from a Jupiters share for which roll-over is not available a reasonable part of the cost base of the Jupiters share can be attributed to the ineligible proceeds. The following method of attributing the cost base of each Jupiters share between the ineligible proceeds and scrip consideration received is considered reasonable in accordance with subsection 124-790(2).

52. The Jupiters shareholder would firstly work out the total capital proceeds they receive for each Jupiters share, that is, the market value of the TABCORP share plus the market value of any unsecured note on the date on which the shareholder ceased to own their Jupiter shares.

53. The Jupiters shareholder will then work out the percentage of the total capital proceeds they receive for each Jupiters share that was represented by ineligible proceeds. It is reasonable to attribute to the ineligible proceeds that percentage of the cost base of each Jupiters share.

Cost base/reduced cost base of TABCORP shares

54. The first element of the cost base and reduced cost base of a TABCORP replacement share is worked out having regard to that portion of the cost base of a Jupiters share that was not taken into account in working out the capital gain in respect of the ineligible proceeds: subsections 124-785(2), (3) and (4).

Non-resident Jupiters ordinary shareholders

55. Non-residents are subject to capital gains tax in Australia to the extent that their assets have the 'necessary connection with Australia'. Section 136-25 outlines when an asset will have that connection.

56. Generally, a share in an Australian resident public company has the necessary connection with Australia if the shareholder (together with their associates) beneficially owned at least 10% by value of the shares at any time during the five years before a CGT event happens.

57. A Jupiters ordinary shareholder who is a non-resident and makes a capital gain from their Jupiters ordinary shares can choose scrip for scrip roll-over. The exception in section 124-795 does not apply because TABCORP (the replacement entity) is an Australian resident. Where the shares are issued to a nominee for sale, there is no roll-over in respect of the sale by the nominee.

58. For a non-resident that chooses scrip for scrip roll-over, category 9 in the table in section 136-25 modifies the usual 'necessary connection with Australia' test for a replacement TABCORP share. The effect of category 9 is that it automatically treats the non-resident's TABCORP shares as having the necessary connection with Australia if their Jupiters ordinary shares had such a connection. It is not relevant to consider whether the shareholder (together with their associates) owns 10% of the TABCORP shares when a later CGT event happens to them.

Detailed contents list

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Commissioner of Taxation

8 October 2003

- Previous draft:*
- ITAA 1997 124-780(1)(a)(i)
 - ITAA 1997 124-780(1)(b)
 - ITAA 1997 124-780(1)(c)
- Not previously issued as a draft
- Related Rulings/Determinations:*
- ITAA 1997 124-780(2)(a)
 - ITAA 1997 124-780(2)(b)
 - ITAA 1997 124-780(2)(c)
- CR 2001/1; TR 92/1; TR 97/16
- Subject references:*
- arrangement
 - capital proceeds
 - CGT event
 - common stakeholder
 - company
 - cost base
 - interests
 - ordinary share
 - original interest
 - replacement interest
 - resident
 - roll-over
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 - scrip
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 - significant stake
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 - share
 - shareholder
 - takeover
 - ITAA 1997 124-780(3)(a)
 - ITAA 1997 124-780(3)(b)
 - ITAA 1997 124-780(3)(c)
 - ITAA 1997 124-780(3)(d)
 - ITAA 1997 124-780(4)
 - ITAA 1997 124-780(4)(a)
 - ITAA 1997 124-780(4)(b)
 - ITAA 1997 124-785
 - ITAA 1997 124-785(2)
 - ITAA 1997 124-785(3)
 - ITAA 1997 124-785(4)
 - ITAA 1997 124-790
 - ITAA 1997 124-790(1)
 - ITAA 1997 124-790(2)
 - ITAA 1997 124-795(2)(a)
 - ITAA 1997 124-795(2)(b)
 - ITAA 1997 124-810
 - ITAA 1997 136-25
 - ITAA 1997 170-260
 - Copyright Act 1968
 - TAA 1953 Part IVAAA

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780

ATO references

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