


CR 2008/76 - Income tax: scrip for scrip: exchange of pSivida Ltd shares, options or warrants for equivalent New pSivida Inc securities

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Class Ruling

Income tax: scrip for scrip: exchange of pSivida Ltd shares, options or warrants for equivalent New pSivida Inc securities

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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 took 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; 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 (securityholders) of shares, options or warrants (pSivida securities) in respect of pSivida Ltd (pSivida) who:
- (a) participated in the scheme of arrangement approved by pSivida shareholders and the Federal Court of Australia (the scheme) as described in paragraphs 8 to 25 of this Ruling;
 - (b) were residents of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* at the time the scheme was undertaken;
 - (c) held their pSivida securities on capital account;
 - (d) are not employees of the pSivida group;
 - (e) exchanged their pSivida securities for New pSivida Inc (New pSivida) equivalent securities (New pSivida securities) under the scheme to which this Ruling applies; and
 - (f) were not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M.

Qualifications

4. The class of entities defined in this Ruling may rely on its contents, provided the scheme actually carried out was carried out in accordance with the scheme described in paragraphs 8 to 25 of this Ruling.
5. If the scheme actually carried out was 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 was not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

7. This Ruling applies from 18 April 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 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 settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- Class Ruling application dated 16 April 2008;
- the Annual Report of pSivida Ltd for the financial year ending 30 July 2007;
- the Information Memorandum from pSivida Ltd dated 2 May 2008;
- Independent Expert Report dated 15 April 2008;
- Federal Court of Australia Court Order dated 10 June 2008; and
- correspondence and emails in relation to the application.

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

9. pSivida was an Australian public company limited by shares and was listed on the Australian Securities Exchange (ASX). It was also listed on the NASDAQ Stock Market and the Frankfurt Stock Exchange in the form of American Depositary Shares.

10. pSivida held 100% shareholdings in three subsidiary companies: pSiMedica Ltd, a company incorporated in the United Kingdom (UK); pSivida Inc, a company incorporated in the United States (USA); and pSiNutria Ltd, a company incorporated in Australia.

11. As at 28 September 2007, pSivida had 3,709 holders of fully paid ordinary shares, 62 holders of unlisted options and 180 holders of unlisted warrants.

12. As at 2 May 2008, the date of the Information Memorandum, 730,518,775 shares in pSivida were on issue.

13. All pSivida securities were issued after 19 September 1985.

Key events

14. On 18 April 2008, pSivida announced that it proposed to become incorporated in the United States.
15. On 6 June 2008, the reincorporation proposal was approved via an extraordinary general meeting.
16. On 10 June 2008, the proposed scheme became effective, pursuant to the Federal Court of Australia order made on 12 June 2008 under paragraph 411(4)(a) of the *Corporations Act 2001* (the court order of 12 June 2008).
17. On 11 June 2008, pSivida ceased trading at close of trading on the ASX. The closing ASX price was \$0.093.
18. On 11 June 2008, New pSivida commenced trading on the NASDAQ on a 'when-issued' basis.
19. On 12 June 2008, New pSivida was listed on the ASX. CHESD Depository Interests (share-CDIs) in respect of the shares in New pSivida began trading on the ASX.
20. The 'Record Date' for working out entitlements in New pSivida was 18 June 2008.
21. On 19 June 2008, the 'Implementation Date':
 - all shares in pSivida were transferred to New pSivida pursuant to the order made by the Federal Court of Australia.
 - one New pSivida share was issued to each pSivida shareholder for every forty shares in pSivida which they held as at the Record Date.
 - pSivida shareholders who would otherwise have ended up holding a fractional share in New pSivida in respect of their remaining pSivida shares, were instead given cash consideration, calculated as follows:
$$\text{(Remaining pSivida shares / 40)} \times \$3.79$$
\$3.79 being the closing price for trading of New pSivida CDIs on the ASX on the Record Date.
 - at midnight, all assets and liabilities of pSivida were transferred to New pSivida pursuant to the court order of 12 June 2008. Options and warrants in respect of pSivida shares constituted liabilities pursuant to paragraph 413(1)(a) of the *Corporations Act 2001*.
 - securityholders of options and warrants in respect of pSivida shares became entitled to one equivalent security in respect of New pSivida shares for every forty pSivida securities held as at the Record Date. No cash was paid in respect of fractional entitlements to New pSivida options or warrants.

Foreign shareholders

22. Subject to the exception in paragraph 23 of this Ruling, pSivida shareholders whose addresses were recorded in the respective registers as outside Australia, USA, Canada, France, Germany, Hong Kong, Ireland, Jersey, Malaysia, New Zealand, Singapore, Thailand and UK (foreign shareholders) did not directly receive shares or share-CDIs in New pSivida.

23. Foreign shareholders may have received shares or share-CDIs in respect of New pSivida if New pSivida was satisfied before the Record Date that the relevant foreign shareholder could be lawfully issued such shares or share-CDIs in respect of New pSivida under the laws of their respective jurisdictions.

24. Where a foreign pSivida shareholder could not directly receive New pSivida shares or share-CDIs their entitlements to New pSivida shares or share-CDIs were instead issued to a nominee company (ABN Amro Morgans Ltd).

25. ABN Amro Morgans Ltd sold the shares and share-CDIs and distributed the relevant proceeds in respect of their entitlements to the foreign shareholders.

Ruling

Disposal of pSivida shares, options and warrants

26. CGT event A1 happened when a pSivida shareholder disposed of their pSivida shares on the Implementation Date (subsections 104-10(1) and (2) and paragraph 104-10(3)(b)).

27. CGT event C2 happened when a pSivida securityholder's ownership of the options or warrants ended on the Implementation Date (subsection 104-25(1)).

Scrip for scrip roll-over

28. Subject to paragraph 29 of this Ruling, if a securityholder made a capital gain from the disposal or ending of their pSivida securities, scrip for scrip roll-over can be chosen to the extent that the capital gain is referable to the receipt of equivalent securities in New pSivida (sections 124-780 and 124-790).

29. Scrip for scrip roll-over cannot be chosen if any capital gain the securityholder may make from the New pSivida securities would be disregarded, except because of a roll-over (subsection 124-795(2)).

Appendix 1 – Explanation

① *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.*

CGT event A1 happened on the disposal of pSivida shares

30. CGT event A1 happened when a pSivida shareholder disposed of their pSivida shares (subsections 104-10(1) and (2)).

31. The time when CGT event A1 happened was when the pSivida shares were transferred to New pSivida on the Implementation Date (paragraph 104-10(3)(b)).

32. A pSivida shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of a pSivida share exceeded its cost base. The pSivida shareholder made a capital loss if those capital proceeds were less than the share's reduced cost base (subsection 104-10(4)).

33. The capital proceeds under subsection 116-20(1) for each pSivida share is either:

- one fortieth of the market value of the New pSivida share received in exchange for the pSivida share (worked out at the time of the CGT event); or
- the cash received in respect of fractional entitlements where pSivida shares were not exchanged for equivalent shares in New pSivida.

CGT event C2 happened when ownership of pSivida options or warrants ended

34. CGT event C2 happened when a pSivida securityholder's ownership of the option or warrant ended (subsection 104-25(1)).

35. The time when CGT event C2 happened was when the ownership of the pSivida option or warrant ended on the Implementation Date (subsection 104-25(2)).

36. A pSivida securityholder made a capital gain when CGT event C2 happened if the capital proceeds from the ending exceeded the cost base of the option or warrant. The pSivida securityholder made a capital loss if those capital proceeds were less than the reduced cost base of the option or warrant (subsection 104-25(3)).

37. Subject to paragraph 38 of this Ruling, the capital proceeds under subsection 116-20(1) is one fortieth of the market value of the New pSivida option or warrant received in respect of the ending of the pSivida option or warrant (worked out at the time of the CGT event).

38. Where no cash or New pSivida option or warrant was received in respect of fractional entitlements to a New pSivida option or warrant, the capital proceeds is the market value of the relevant pSivida option or warrant at the time of the CGT event (subsection 116-30(1)).

Scrip for scrip roll-over

39. Subdivision 124-M contains a number of conditions that go to whether scrip for scrip roll-over may be available under an arrangement. The Commissioner considers that the exchange of pSivida securities for New pSivida securities meets these conditions.

40. Subject to the qualification in paragraph 41 of this Ruling, if a pSivida securityholder made a capital gain from the disposal or ending of their pSivida securities, scrip for scrip roll-over can be chosen to the extent that the capital gain is referable to the receipt of equivalent New pSivida securities (sections 124-780 and 124-790). Only the part of the capital gain that is referable to the receipt of New pSivida securities is eligible for scrip for scrip roll-over.

41. Scrip for scrip roll-over cannot be chosen if any capital gain the pSivida securityholder might make in respect of the New pSivida security would be disregarded, except because of a roll-over (subsection 124-795(2)).

Discount capital gain

42. pSivida securityholders who made capital gains that are not disregarded (that is, capital gains for which scrip for scrip roll-over is not, or cannot, be chosen) can treat the amount of those gains as 'discount capital gains' provided that the conditions in Subdivisions 115-A to 115-C are satisfied.

Cost base of New pSivida shares, options or warrants

43. The method for calculating the cost base and reduced cost base of a New pSivida security received in exchange for the pSivida securities depends on whether the relevant pSivida securityholder chooses scrip for scrip roll-over.

Scrip for scrip roll-over is not chosen

44. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each New pSivida security is equal to the market value of property (that is, the pSivida security) given in exchange for the New pSivida security (subsections 110-25(2) and 110-55(2)).

Scrip for scrip roll-over is chosen

45. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each New pSivida security is the sum of the cost bases of the pSivida securities reasonably attributable to the acquisition of the New pSivida security (subsections 124-785(2) and 124-785(4)).

46. pSivida shareholders received one New pSivida share for every forty pSivida shares held at the Record Date. Similarly, pSivida securityholders received one New pSivida option or warrant for every equivalent forty pSivida securities held at the Record Date. In the case of pSivida shareholders, the first element of the cost base of a New pSivida share is obtained by adding the cost bases of the forty pSivida shares that were exchanged for the New pSivida share. The first element of the cost base of New pSivida options and New pSivida warrants is worked out similarly.

47. The first element of the reduced cost base of the replacement New pSivida share, option or warrant is calculated in the same manner (subsection 124-785(4)).

Acquisition date of New pSivida shares, options or warrants

48. The acquisition date of New pSivida securities acquired in exchange for pSivida securities is the Implementation Date of 19 June 2008 (section 109-10).

49. However, for the purposes of determining eligibility to a discount capital gain, pSivida securityholders who choose scrip for scrip roll-over are taken to have acquired their New pSivida securities when they acquired the corresponding original pSivida securities (item 2 in the table in subsection 115-30(1)).

Appendix 2 – Detailed contents list

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References

- Previous draft:*
- ITAA 1997 104-10(2)
- Not previously issued as a draft
- ITAA 1997 104-10(3)(b)
 - ITAA 1997 104-10(4)
- Related Rulings/Determinations:*
- TR 2006/10
- ITAA 1997 104-25
 - ITAA 1997 104-25(1)
 - ITAA 1997 104-25(2)
 - ITAA 1997 104-25(3)
- Subject references:*
- arrangement
 - CGT capital proceeds
 - CGT events
 - CGT cost base
 - CGT roll-over relief
 - CGT discount
 - CGT event A1 - disposal of CGT asset
 - CGT events C1-C3 – end of CGT asset
 - market value cost base
 - ordinary shares
 - scrip for scrip roll-over
 - shareholders
- ITAA 1997 109-10
 - ITAA 1997 110-25(2)
 - ITAA 1997 110-55(2)
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 Subdiv 115-B
 - ITAA 1997 Subdiv 115-C
 - ITAA 1997 115-30(1)
 - ITAA 1997 116-20(1)
 - ITAA 1997 116-30(1)
 - ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-780
 - ITAA 1997 124-785(2)
 - ITAA 1997 124-785(4)
 - ITAA 1997 124-790
 - ITAA 1997 124-795(2)
 - Corporations Act 2001 411(4)(a)
 - Corporations Act 2001 413(1)(a)
- Legislative references:*
- ITAA 1936 6(1)
 - ITAA 1997 104-10
 - ITAA 1997 104-10(1)
 - TAA 1953
 - Copyright Act 1968
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ATO references

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