CR 2008/89 - Income tax: scrip for scrip roll-over: exchange of shares in Sunshine Gas Limited for shares in Queensland Gas Company Limited

Class Ruling

Income tax: scrip for scrip roll-over: exchange of shares in Sunshine Gas Limited for shares in Queensland Gas Company Limited

Contents Para

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 provisions 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 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 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 in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies consists of the ordinary shareholders of Sunshine Gas Limited (Sunshine) who:

- were residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* on the date that they disposed of their Sunshine shares under the scheme to which this Ruling relates; and
- held their Sunshine shares on capital account on that date.

In this Ruling, a shareholder belonging to this class of entities is referred to as a 'Sunshine shareholder'.

Qualifications

4. 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 20 of this Ruling.

5. 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 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 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, PricewaterhouseCoopers. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application, dated 11 September 2008;
- Takeover Bid Implementation Agreement, dated 20 August 2008;
- Bidder’s Statement for Sunshine, dated 5 September 2008;
- Notice of freeing off-market bid from defeating conditions, dated 10 October 2008;
- Notice of compulsory acquisition following takeover bid (Form 6021), dated 30 October 2008; and
- Correspondence with the Applicant from 8 October 2008 to 27 October 2008.

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

9. Sunshine is an Australian resident company, which is listed on the Australian Securities Exchange (ASX).

10. As at 3 September 2008, Sunshine had 310,185,176 fully paid ordinary shares on issue. Each share carried the same rights to vote, receive dividends and receive capital. Sunshine did not have any other class of shares on issue, nor did it have on issue any options over Sunshine shares or other interests.

11. Queensland Gas Company Limited (QGC) is an Australian resident company, which is listed on the ASX.

12. On 20 August 2008, QGC entered into a Takeover Bid Implementation Agreement with Sunshine, and publicly announced the takeover offer. QGC proposed to acquire all of the issued shares in Sunshine (the Offer).

13. On 5 September 2008, QGC lodged the Bidder's Statement (subsequently amended).

14. If they accepted the Offer, Sunshine shareholders could elect to receive in exchange either:

- five QGC shares for every eight Sunshine shares they disposed of to QGC (Scrip Alternative); or
- $1.65 cash for every Sunshine share, and two QGC shares for every seven Sunshine shares, they disposed of to QGC (Cash and Scrip Alternative).

15. The Offer was subject to several defeating conditions, but was declared unconditional on 10 October 2008.

16. Sunshine shareholders whose address on the shareholder register was in a jurisdiction other than Australia or New Zealand and for whom QGC did not make a determination under section 12.10 of the Bidder's Statement (Ineligible Foreign Shareholders) were not entitled to receive QGC shares as consideration for their Sunshine shares. However, the QGC shares that they would otherwise have received were issued to a Nominee, who sold the QGC shares on their behalf and paid the net proceeds (after deduction of brokerage and other sale expenses) to each Ineligible Foreign Shareholder, in accordance with subsection 619(3) of the *Corporations Act 2001*.

17. QGC became eligible to compulsorily acquire Sunshine shares under the *Corporations Act 2001*, and began the compulsory acquisition process on 30 October 2008. The affected Sunshine shareholders will have a choice of which alternative form of consideration they will receive. If a Sunshine shareholder does not make a valid election, QGC will provide them with the Scrip Alternative.

18. All of the ordinary shares in Sunshine were acquired on or after 20 September 1985.

19. Sunshine did not have a 'significant stakeholder' or 'common stakeholder' in relation to the scheme within the meaning of those expressions in section 124-783.

20. For the purposes of subsections 124-780(4) and 124-780(5), both Sunshine and QGC:

- had at least 300 members just before the arrangement (the Offer) started; and
- were not members of the same linked group (as defined in section 170-260) just before that time.

Ruling

CGT event A1 happened on the disposal of Sunshine shares to QGC

21. CGT event A1 happens if there is a disposal of a CGT asset. (section 104-10).

22. Where a Sunshine shareholder accepted the Offer, the disposal of Sunshine shares (and hence CGT event A1) happened on the day when the Sunshine shareholder entered into a contract with QGC by accepting the Offer (paragraph 104-10(3)(a)).

23. Where QGC compulsorily acquired Sunshine shares under the *Corporations Act 2001*, the disposal of the affected Sunshine shares (and hence CGT event A1) happened when QGC became the owner of those shares (subsection 104-10(6)).

Capital gain or capital loss

24. A Sunshine shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Sunshine share exceed its cost base. A Sunshine shareholder will make a capital loss if the capital proceeds from the disposal of a Sunshine share are less than its reduced cost base (subsection 104-10(4)).

Capital proceeds

25. Under subsection 116-20(1), the capital proceeds from CGT event A1 happening are the total of the money, and the market value of any other property (such as the QGC shares), received or entitled to be received in respect of the disposal of each Sunshine share. The market value of the property is worked out as at the time of CGT event A1 happening (either the date when the Sunshine shareholder accepted the Offer, or QGC became the owner of Sunshine shares under the compulsory acquisition process).

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

Capital gain referable to QGC shares received under the Scrip Alternative – full scrip for scrip roll-over

26. Subject to the qualification in paragraph 27 of this Ruling, Sunshine shareholders who elect to receive the Scrip Alternative (or receive it under the compulsory acquisition process) and who made a capital gain from the disposal of their Sunshine shares to QGC may choose scrip for scrip roll-over (section 124-780 and subsection 124-785(1)).

27. Scrip for scrip roll-over cannot be chosen if any capital gain a Sunshine shareholder might make from the replacement QGC shares would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

28. If scrip for scrip roll-over is chosen, the capital gain a Sunshine shareholder made upon the disposal of their Sunshine shares to QGC is disregarded completely (subsection 124-785(1)).

Capital gain referable to QGC shares received under the Cash and Scrip Alternative – partial scrip for scrip roll-over

29. Subject to the qualification in paragraph 30 of this Ruling, Sunshine shareholders who elect to receive the Cash and Scrip Alternative and who made a capital gain from the disposal of their Sunshine shares to QGC may choose partial scrip for scrip roll-over (section 124-780 and subsection 124-790(1)).

30. Scrip for scrip roll-over cannot be chosen if any capital gain a Sunshine shareholder might make from the replacement QGC shares would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

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

Capital gain referable to cash received under the Cash and Scrip Alternative

32. The part of the capital gain that is referable to the receipt of cash is not disregarded by Sunshine shareholders who elect to receive the Cash and Scrip Alternative. This is because the cash received constitutes ineligible proceeds under subsection 124-790(1).

33. The part of the capital gain on a Sunshine share that is referable to the receipt of cash is the ineligible proceeds ($1.65 per Sunshine share) less the part of the cost base of the Sunshine share reasonably attributable to the receipt of cash. In working out the part of the cost base of a Sunshine share that is reasonably attributable to the receipt of cash, the Commissioner accepts the following formula:

$$\text{Cost base of Sunshine share reasonably attributable to receipt of cash} = \text{Cost base of the Sunshine share at the time of CGT event A1} \times \frac{\$1.65}{\$1.65 + \text{market value of the part of a QGC share that is reasonably attributable to the disposal of the Sunshine share}}$$

Discount capital gain

34. A Sunshine shareholder who made 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 Sunshine shares must have been acquired by the shareholder at least 12 months before their disposal to QGC.

Cost base of QGC shares

Scrip for scrip roll-over is not chosen

35. Where scrip for scrip roll-over is not chosen, or cannot be chosen, the first element of the shareholder's cost base and reduced cost base of each QGC share is equal to the market value of the property (the Sunshine shares) given in respect of acquiring each QGC share, worked out as at the time of the acquisition (subsections 110-25(2) and 110-55(2)).

Scrip for scrip roll-over is chosen

36. For Sunshine shareholders who elect to receive the Scrip Alternative (or receive it under the compulsory acquisition process) and choose the roll-over, the first element of the cost base and reduced cost base of a replacement QGC share is worked out by reasonably attributing to it the cost base of the Sunshine shares for which it was exchanged (subsections 124-785(2) and 124-785(4)).

37. For Sunshine shareholders who elect to receive the Cash and Scrip Alternative and choose the roll-over, the first element of the cost base and reduced cost base of a replacement QGC share is equal to the part of the cost base of the Sunshine shares exchanged for the relevant QGC share. This is the part of the cost base of the Sunshine shares that does not relate to the cash proceeds received (subsections 124-785(2), 124-785(3) and 124-785(4)).

Acquisition date of QGC shares

38. Sunshine shareholders acquired the QGC shares which they received in exchange for their Sunshine shares on the date when a contract is entered into, or if there is no contract, when the QGC shares are issued to them (item 2 of the table in section 109-10).

39. For Sunshine shareholders who accepted the Offer, the acquisition date will be when they entered into a contract with QGC. For Sunshine shareholders whose shares were compulsorily acquired by QGC, the acquisition date will be when QGC issued shares to them as consideration for their Sunshine shares.

40. However, for the purposes of applying the CGT discount to any later disposal of their QGC shares, Sunshine shareholders who choose scrip for scrip roll-over are taken to have acquired their QGC shares when they acquired the original Sunshine shares involved in the roll-over (item 2 of the table in subsection 115-30(1)). This applies to Sunshine shareholders who received QGC shares under either the Scrip Alternative or the Cash and Scrip Alternative.

Commissioner of Taxation
17 December 2008

Appendix 1 – Explanation

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.

Scrip for scrip roll-over – Subdivision 124-M

41. 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.

42. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger 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.

43. 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) shares are exchanged 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.

44. The Offer satisfies the requirements for roll-over under Subdivision 124-M. Further, the Offer raises no novel issues of tax law interpretation and no further explanation of the application of those tax laws beyond that contained in the Ruling part of this document is necessary.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- scrip for scrip roll-over

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 104-10
- ITAA 1997 104-10(3)(a)
- ITAA 1997 104-10(4)
- ITAA 1997 104-10(6)
- ITAA 1997 109-10
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-55
- ITAA 1997 110-55(2)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780
- ITAA 1997 124-780(4)
- ITAA 1997 124-780(5)
- ITAA 1997 124-783
- ITAA 1997 124-785(1)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(3)
- ITAA 1997 124-785(4)
- ITAA 1997 124-790(1)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 170-260
- Corporations Act 2001 619(3)
- TAA 1953
- Copyright Act 1968

ATO references
NO: 2008/18532
ISSN: 1445-2014
ATOlaw topic: Income tax – scrip for scrip roll-over