CR 2012/38 - Income tax: Merger of Xstrata plc and Glencore International plc - Xstrata plc Long Term Incentive Plan

This document has changed over time. This is a consolidated version of the ruling which was published on *13 June 2012*

Class Ruling

Income tax: Merger of Xstrata plc and Glencore International plc – Xstrata plc Long Term Incentive Plan

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 provisions

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

- Subdivision 83A-C of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83A-110 of the ITAA 1997;
- section 83A-120 of *the* ITAA 1997;
- section 83A-130 of *the* ITAA 1997;
- section 130-80 of the ITAA 1997;
- subsection 995-1(1) *of* the ITAA 1997;
- section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997);

- subsection 6(1) of *the Income Tax Assessment Act 1936* (ITAA 1936);
- former section 139CB of the ITAA 1936;
- former section 139CD of the ITAA 1936; and
- former section 139E of the ITAA 1936.

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

Class of entities

3. The class of entities to which this Ruling applies is all persons who:

(a) are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936 and are not temporary residents within the meaning of subsection 995-1(1);

(b) have acquired options to acquire shares in Xstrata plc (Xstrata Options) under the terms of the Xstrata plc Long Term Incentive Plan (LTIP);

(c) before 1 July 2009, acquired Xstrata Options which are qualifying rights within the meaning of former section 139CD of the ITAA 1936 and

- did not make an election under former section 139E of the ITAA 1936 in relation to their Xstrata Options; and
- have not had a cessation time within the meaning of former section 139CB of the ITAA 1936 occur in relation to the Xstrata Options;

(d) on or after 1 July 2009, acquired Xstrata Options which are subject to Subdivision 83A-C;

(e) are employed by the Xstrata group of companies at the time the Xstrata Options were acquired and will not cease employment with the Xstrata group of companies as a result of the Scheme described in paragraphs 9 to 24 of this Ruling; and

(f) release the Xstrata Options in consideration for vested options to acquire shares in Glencore International plc (Glencore Options) pursuant to the implementation of the merger of Xstrata plc with Glencore International plc described in paragraphs 9 to 24 of this Ruling.

(Note: Division 230 will generally not apply to individuals, unless they make an election for it to apply to them.)

In this Ruling, a person belonging to this class of entities is referred to as a participant.

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 24 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.

Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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:

- an application for a Class Ruling by Minter Ellison on behalf of Xstrata plc dated 20 April 2012;

- Plan Rules for the Xstrata plc Long Term Incentive Plan;
- News Release dated 7 February 2012;
- Draft Option Deed of Grant; and
- Draft Letter to participants.

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

Xstrata Merger with Glencore International plc

10. Xstrata plc (Xstrata) is the ultimate holding company of the Xstrata group of companies (Xstrata Group). The Xstrata Group is a diversified mining and metals group operating in a number of countries, including in Australia, through several wholly owned subsidiaries. Its registered office is in London, U.K.

11. On 7 February 2012, Xstrata and Glencore International plc (Glencore) announced a 'merger of equals' (the Merger) under which Glencore would acquire all of the issued and to be issued share capital in Xstrata that it did not already own. The Merger will be effected by way of a Court sanctioned scheme of arrangement of Xstrata under Part 26 of the *Companies Act 2006 (United Kingdom).*

12. Xstrata shares not already beneficially owned by the Glencore group of companies will be cancelled and new Xstrata shares issued to Glencore. These new Xstrata shares will be issued to Glencore as consideration for the issue by Glencore of new Glencore shares to Xstrata shareholders who have their Xstrata shares cancelled as a result of the Merger.

13. Xstrata shareholders will receive 2.8 Glencore shares for every Xstrata share they hold.

LTIP

Xstrata Options prior to the Merger

14. Xstrata operates the LTIP under which participants who are employees of the Xstrata Group receive Xstrata Options to acquire ordinary shares in Xstrata. Xstrata Options to which this ruling applies are Market Value Options and Bonus Options as defined and described in the Plan Rules for the Xstrata plc Long Term Incentive Plan (Plan Rules). Xstrata Options have been granted both before and after 1 July 2009 and are not transferable.

15. Participants have not provided any consideration for the grant of Xstrata Options.

16. Immediately prior to the court sanction date for the Merger, Xstrata Options acquired by participants before 1 July 2009 will be vested but unexercised, while those acquired after 1 July 2009 will be unvested and therefore not exercisable.

17. Xstrata Options acquired before 1 July 2009 are qualifying rights within the meaning of former section 139CD of the ITAA 1936. Xstrata Options acquired on or after 1 July 2009 are subject to Subdivision 83A-C.

18. Immediately after Xstrata Options were granted to participants, no participant had a legal or beneficial interest in more the 5% of the shares in Xstrata or is in a position to cast, control or control the casting of, more than 5% of the maximum of votes that might be cast at a general meeting of Xstrata.

Xstrata Options under the Merger

19. The Plan Rules specify how Xstrata Options are to be dealt with in the event of a transaction such as the Merger happening to the share capital of Xstrata.

20. In accordance with the Rules and as a result of the Merger, participants have been provided with the following choices in relation to their Xstrata Options. Either,

- all the Xstrata Options can be exercised, whether vested or not, immediately upon the Merger receiving court sanction, up to six months after the date of the court sanction. Participants can choose to exercise their Xstrata Options and receive Xstrata shares. These shares will be subject to the terms of the Merger and, upon the Merger becoming effective, will be cancelled and 2.8 Glencore shares issued to participants as replacements for their Xstrata shares;

or,

- participants can choose to release their Xstrata Options in exchange for Glencore Options on economically equivalent terms.

21. Where a participant makes the latter choice to release their Xstrata Options in exchange for Glencore Options, then under the Plan Rules:

- the Glencore Options are deemed to be equivalent to the Xstrata Options;
- the Glencore Options are treated as having been acquired at the same time as the Xstrata Options they replaced;
- like the Xstrata Options, the Glencore Options are not transferable;

- the Plan Rules apply *mutatis mutandis* to the Glencore Options subject only to any changes the Remuneration Committee may deem necessary to reflect the fact that they are options over Glencore shares;
- the Glencore Options will be vested when acquired by participants to reflect that the Xstrata Options they replaced were also vested and will not be subject to any performance conditions; and
- the Glencore Options have the same expiry date as the Xstrata Options they replaced, that is, on the tenth anniversary of the date the Xstrata Options were acquired by participants.

22. Accordingly, under the second choice, participants will be granted a Glencore Option over 2.8 ordinary Glencore shares for each Xstrata Option they release and the exercise price of the Glencore Options will be adjusted so that the total exercise price payable on the Glencore Options will be the same as that payable on the replaced Xstrata Options.

23. As a result of the exchange of Xstrata Options for Glencore Options, no participant will hold a legal or beneficial interest in more than 5% of Glencore shares or be in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a Glencore general meeting.

24. This ruling only applies to those participants who make the latter choice, that is, participants who choose to release their Xstrata Options in exchange for Glencore Options.

Ruling

Glencore Options as continuation of Xstrata Options

25. An Xstrata Option held by a participant prior to the Merger is an ESS interest for the purposes of Division 83A.

26. Where a participant's Xstrata Options are replaced with Glencore Options under the Merger, the replacement Glencore Options will be treated as a continuation of the ESS interests (Xstrata Options) they replaced for the purposes of section 83A-130.

Options acquired before 1 July 2009

27. As the replacement Glencore Options will be treated as a continuation of the ESS interests they replace, the disposal of Xstrata Options acquired before 1 July 2009 in exchange for Glencore Options will not be an ESS deferred taxing point.

28. Participants will include an amount in their assessable income under subsection 83A-110(1) in respect of Glencore Options they receive in exchange for Xstrata Options granted before 1 July 2009 in the year of income in which they exercise their Glencore Options (subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997).

29. However, if participants dispose of the Glencore shares they receive on exercising Glencore Options within 30 days of exercising the options, they will include an amount in their assessable income under subsection 83A-110(1) in the year of income in which they dispose of the Glencore shares (paragraph 83A-120(3)(b)).

Options acquired on or after 1 July 2009

30. As the replacement Glencore Options will be treated as a continuation of the ESS interests they replace, neither the vesting of nor subsequent disposal of Xstrata Options that occurs by a participant releasing Xstrata Options acquired after 1 July 2009 in exchange for Glencore Options will be an ESS deferred taxing point.

31. Participants will include an amount in their assessable income under subsection 83A-110(1) in respect of Glencore Options they receive in exchange for Xstrata Options they were granted on or after 1 July 2009 in the year of income in which they acquired Glencore Options (subsection 83A-120(7)).

32. However, if participants dispose of Glencore shares they receive on exercising Glencore Options within 30 days of acquiring the options, they will be required to include an amount in their assessable income in the year of income in which they dispose of the Glencore shares (paragraph 83A-120(3)(b)).

Capital gains and losses

33. Any capital gains or capital losses that arise as a result of the exchange of Xstrata Options for Glencore Options under the Merger will be disregarded in accordance with section 130-80.

Commissioner of Taxation
13 June 2012

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.

Application of Division 83A

34. Xstrata Options granted to participants both before and after 1 July 2009 under the LTIP, and Glencore Options received in exchange for them, are ESS interests as defined under paragraph 83A-10(1)(b).

35. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

36. By virtue of paragraph 83A-5(2)(a) of the IT(TP)A 1997, Division 83A applies to certain shares, rights and stapled securities acquired before 1 July 2009.

Xstrata Options acquired before 1 July 2009

37. Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) applies to Xstrata Options acquired by participants before 1 July 2009 because:

- they are qualifying rights within the meaning of former section 139CD of the ITAA 1936;
- the participants who form the Class of Entities to which this Ruling applies have not made elections under section 139E of the ITAA 1936 in relation to their rights;
- the rights were acquired before 1 July 2009; and
- the cessation time specified in former sections 139B and 139CB of the ITAA 1936 in relation to the rights did not occur before 1 July 2009.

ESS Deferred Taxing Point – Xstrata Options

38. Where Subdivision 83A-C applies to an ESS interest, the assessable income of holders of ESS interests will include an amount in respect of their interests under subsection 83A-110(1) in the income year in which the ESS deferred taxing point occurs.

39. The ESS deferred taxing point for rights is worked out under section 83A-120. However, because Subdivision 83A-C applies to rights acquired before 1 July 2009 by virtue of subparagraph 83A-5(2)(a) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

40. By virtue of the applications of subparagraphs 83A-5(4)(b)(i) and 83A-5(2)(a)(iii) of the IT(TP)A 1997 and former subsection 139B(3) of the ITAA 1936, the ESS deferred taxing point for a right acquired before 1 July 2009, subject to subsection 83A-120(3), will be the cessation time specified in former section 139CB of the ITAA 1936.

41. Former paragraph 139CB(1)(a) of the ITAA 1936 states that a cessation time occurs when a taxpayer disposes of a right other than by exercising it. The release of Xstrata Options by participants is such a disposal and therefore is the cessation time for the Xstrata Options.

Section 83A-130

42. However, section 83A-130 operates to ensure that employees who have received ESS interests under an employee share scheme are not adversely affected by the takeover or restructure of the company in which they hold their ESS interests. If the conditions in section 83A-130 are satisfied by the circumstances of the Merger, Glencore Options will be treated as a continuation of Xstrata Options and therefore, the release (disposal) of Xstrata Options will not constitute a cessation time.

43. The Merger satisfies the conditions of section 83A-130 because:

- the Merger is a takeover because it has resulted in Xstrata becoming a 100% subsidiary of Glencore (subparagraph 83A-130(1)(a)(i));
- just before the takeover, participants held ESS interests, Xstrata Options, (the old interests) in Xstrata that they acquired under an employee share scheme (paragraph 83A-130(1)(b));
- as a result of the takeover, the participants stop holding the old interests by releasing Xstrata Options (paragraph 83A-130(2)(a);
- the participants have acquired ESS interests, Glencore Options, (the new interests) in a company (the new company) in connection with the takeover (subsection 83A-130(2));
- the new interests have been acquired on economically equivalent terms and can reasonably be regarded as matching any of the old interests (paragraph 83A-130(2)(b);
- the new interests relate to ordinary shares (subsection 83A-130(4));

- the Participants were employed by the Xstrata Group at the time they acquired Xstrata Options and did not cease that employment as a result of the Merger when the Xstrata Group became a 100% subsidiary of Glencore (subsection 83A-130(6) and paragraph 83A-130(9)(a); and
- as a result of acquiring Glencore Options, no participant held a legal or beneficial interest in more than 5% of Glencore shares or was in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a Glencore general meeting (paragraph 83A-130(9)(b)).

44. Accordingly, Glencore Options acquired by participants are, for the purposes of Division 83A, treated as a continuation of Xstrata Options acquired before 1 July 2009.

45. Therefore, the disposal of Xstrata Options by participants releasing them in exchange for Glencore Options will not be an ESS deferred taxing point.

ESS deferred taxing point – Glencore Options

46. By virtue of subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997, the ESS deferred taxing point for the Xstrata Options acquired before 1 July 2009 is determined under former subsection 139B(3) (and hence former section 139CB) of the ITAA 1936. As Glencore Options received in exchange for Xstrata Options acquired before 1 July 2009 are treated as a continuation of the options under section 83A-130, the ESS deferred taxing point for the Glencore Options will be a cessation time determined under former section 139CB of the ITAA 1936.

47. Former section 139CB of the ITAA 1936 specifies the times at which a cessation time may occur. The time that is relevant to the Glencore Options received in exchange for Xstrata Options acquired before 1 July 2009 is that specified under former paragraph 139CB(1)(d) of the ITAA 1936, which provides a cessation time will occur where a right is exercised and there are no restrictions upon the disposal of the share acquired on exercise nor any condition that could result in the forfeiture of the share.

48. Glencore Options were vested when received by participants and there were no restrictions preventing the disposal of the Glencore shares received on the exercise of the options or conditions that could result in their forfeiture.

49. Accordingly, the ESS deferred tax point for Glencore Options acquired in exchange for Xstrata Options granted before 1 July 2009 will be when they are exercised. However, if a participant disposes of the beneficial interest in a Glencore share within 30 days of exercising the option, then the ESS deferred taxing point is the time of the disposal of the share in accordance with paragraph 83A-120(3)(b).

Assessable amount

50. Subsection 83A-110(1) requires participants to include an amount in their assessable income equal to the market value of the Glencore Option at the ESS deferred taxing point reduced by the cost base of the option.

Xstrata Options acquired on or after 1 July 2009

51. Xstrata Options acquired on or after 1 July 2009 are subject to Subdivision 83A-C.

ESS deferred taxing point – Xstrata Options

52. An ESS deferred taxing point will occur *prima facie* pursuant to subsection 83A-120(4) on the date Xstrata Options granted after 1 July 2009 vest, as this is the date the forfeiture conditions will be lifted. However, pursuant to subsection 83A-120(3)(a), as Xstrata Options will be disposed of to acquire Glencore Options within 30 days of the vesting of the Xstrata Options, the ESS deferred taxing point determined under subsection 83A-120(4) will be disregarded and the disposal date (the date Xstrata Options are exchanged for Glencore Options) will be taken to be the ESS deferred taxing point.

53. However, as the conditions in section 83A-130 are satisfied by the circumstances of the Merger for the reasons set out in paragraph 43, Glencore Options will be treated as a continuation of Xstrata Options acquired on or after 1 July 2009. Therefore, the disposal by the participants by releasing them in exchange for Glencore Options will not be an ESS deferred taxing point.

ESS Deferred Taxing Point – Glencore Options

54. As the Glencore Options are treated as a continuation of Xstrata Options acquired after 1 July 2009, their ESS deferred taxing point will be determined under section 83A-120.

55. An ESS deferred taxing point occurs under subsection 83A-120(7) where:

- there is no real risk that the ESS interest will be forfeited or lost (other than by disposing of or exercising it or letting it lapse);

- there is no restriction on exercising the right;
- there is no real risk that the share acquired on exercise of the right can be forfeited or lost (other than by disposing of it); and
- there is no restriction on disposing of the beneficial interest in the share acquired on exercising the right.

56. As Glencore Options were vested when acquired in exchange for Xstrata Options, all of the above conditions apply and therefore, the ESS deferred taxing point for Glencore Options acquired in exchange for the Xstrata Options granted on or after 1 July 2009 will be the time the Glencore Options were acquired by participants under the Merger.

57. However, if a Participant disposes of the beneficial interest in a Glencore share within 30 days of acquiring the Glencore Option, then the ESS deferred taxing point is the time of the disposal of the share in accordance with paragraph 83A-120(3)(b).

Assessable amount

58. Subsection 83A-110(1) requires participants to include an amount in their assessable incomes equal to the market value of the Glencore Option at the ESS deferred taxing point reduced by the cost base of the option.

Capital gains and losses

59. When the Xstrata Options are released in exchange for the Glencore Options, CGT event C2 will occur.

60. Subsection 130-80(1) operates to disregard any capital gain or capital loss to the extent that it resulted from that CGT event because:

- the CGT event happened in relation to an ESS interest (the Xstrata Option) acquired under an employee share scheme (the LTIP) (paragraph130-80(1)(a));
- the CGT event was not CGT event E4, G1 or K8 (paragraph 130-80(1)(b);
- the CGT event occurred on or before the ESS deferred taxing point for the ESS interest (subparagraph 130-80(1)(d)(ii); and
- subsection 130-80(2) does not apply.

Appendix 2 – Detailed contents list

61. 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:

- assessable income
- capital gains tax
- CGT event
- cessation time
- company takeover
- continuation of ESS interests
- ESS deferred taxing point
- employee share options
- pre 1 July 2009 options
- post 1 July 2009 options

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 139B
- ITAA 1936 139B(3)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)(a)
- ITAA 1936 139CB(1)(d)
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1997 Div 83A
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-10(1)(b)
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(3)(a)
- ITAA 1997 83A-120(3)(b)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-130
- ITAA 1997 83A-130(1)(a)(i)
- ITAA 1997 83A-130(1)(b)
- ITAA 1997 83A-130(2)(a)
- ITAA 1997 83A-130(2)
- ITAA 1997 83A-130(2)(b)
- ITAA 1997 83A-130(4)
- ITAA 1997 83A-130(6)
- ITAA 1997 83A-130(9)(a)
- ITAA 1997 83A-130(9)(b)
- ITAA 1997 130-80
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(1)(a)
- ITAA 1997 130-80(1)(b)
- ITAA 1997 130-80(1)(d)(ii)
- ITAA 1997 130-80(2)
- ITAA 1997 995-1(1)
- IT(TP)A 1997 83A-5(2)(a)
- IT(TP)A 1997 83A-5(2)(a)(iii)
- IT(TP)A 1997 83A-5(4)
- IT(TP)A 1997 83A-5(4)(b)(i)
- TAA 1953
- Copyright Act 1968

ATO references

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