CR 2013/47 - Income tax: scrip for scrip: exchange of shares in Xstrata plc for shares in Glencore International plc

Class Ruling

Income tax: scrip for scrip: exchange of shares in Xstrata plc for shares in Glencore International plc

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 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 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-30 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;

- section 130-80 of the ITAA 1997; and
- section 134-1 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the shareholders in Xstrata plc (Xstrata) who:

- acquired their ordinary shares in Xstrata (Xstrata shares) on or after 20 September 1985;
- participated in the arrangement as described in paragraph 33 of this Ruling;
- held their Xstrata shares on capital account at the time of their participation in the arrangement;
- were residents of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) at all relevant times and were not considered temporary residents for tax purposes;
- were not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions as used in Subdivision 124-M at the time of the arrangement; and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Xstrata shares.

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

4. In this Ruling, a person belonging to this class of entities is referred to as an Xstrata shareholder.

5. This Ruling includes participants who held options under the Xstrata share schemes described at paragraph 29 who, by exercising their vested options, became shareholders in Xstrata belonging to the class of entities to which this Ruling applies.

Qualifications

6. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

7. This Ruling does not consider how Division 83A may apply to the class of entities to which this Ruling applies.

8. This Ruling also does not consider the income tax consequences of the Glencore Option Proposal that is referred to below in subparagraph 31(a) of this Ruling. CR 2012/38 *Merger of Xstrata plc and Glencore International plc – Xstrata plc Long Term Incentive Plan* deals with the income tax consequences of those circumstances.

9. 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 13 to 33 of this Ruling.

10. 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.

11. You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).

Date of effect

12. This Ruling applies from 1 July 2012 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

13. 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:

- Class Ruling application dated 10 December 2012 with supporting documents including the New Scheme Circular dated 25 October 2012;
- Xstrata Articles of Association;
- Voting Deed between Xstrata plc and the Law Debenture Trust Corporation PLC dated 19 March 2002; and

- Supplementary information received via email dated 14 March 2013, 3 April 2013, 19 April 2013 and 24 April 2013.

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

Xstrata plc

14. 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. Its registered office is in London, UK.

15. Shares in Xstrata are listed on the London and Switzerland stock exchanges.

Merger

16. 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.

17. The Merger was to be effected by way of a Court sanctioned Scheme of Arrangement of Xstrata under Part 26 of the *Companies Act 2006 (United Kingdom).* The Original Scheme Circular and Scheme of Arrangement issued to shareholders on 31 May 2012. Following shareholder consultation, Xstrata's board announced revised Merger terms. The New Scheme Circular and New Scheme of Arrangement issued to shareholders on 25 October 2012.

18. Just before the time of the arrangement, Xstrata had the following types of shares on issue:

- Deferred shares;
- Special Voting Share; and
- Ordinary shares.

Deferred shares

19. The Deferred shares were issued in 2002 to satisfy a former requirement under the *UK Companies Act* that a UK public company have at least £50,000 of share capital denominated in Sterling. Two senior Xstrata executives each held 25,000 of these shares.

20. Holders of the Deferred shares had no rights to attend, speak or vote at any AGM, and were not entitled to receive dividends. The Deferred shares were not 'voting shares' as defined in section 9 of the *Corporations Act 2001.*

21. Xstrata, Glencore and the holders of the Deferred shares agreed that these shares would not be subject to the New Scheme of Arrangement but would still be acquired by Glencore in connection with the Merger.

Special Voting Share

22. A Special Voting Share was issued in 2002 when Xstrata merged with Xstrata AG, and was held by the Law Debenture Trust Corporation plc (Law Debenture) on trust for the former shareholders of Xstrata AG. The Special Voting Share preserved specific rights (Entrenched Rights) enjoyed by the former Xstrata AG shareholders prior to the 2002 merger, and entitled Law Debenture to vote to defeat any action to amend or remove the Entrenched Rights defined in the Xstrata Articles of Association. Xstrata and Law Debenture executed a Voting Deed under which Law Debenture was obliged to vote to defeat any action to remove the Entrenched Rights unless certain procedures set out in the Voting Deed were followed.

23. The Special Voting Share did not carry a right to receive dividends, nor did it carry rights to vote on a majority of matters. However, it was a 'voting share' as defined in section 9 of the *Corporations Act 2001*.

Shares issued under the equity capital management program

24. Just before the time of the arrangement, Batiss Investments Limited (Batiss) held 28,428,786 ordinary shares in Xstrata (just under 1% of all ordinary shares on issue). Batiss is a Guernsey registered entity owned by a charitable trust. It is independent from Xstrata plc.

25. The shares held by Batiss were issued in 2003 as part of an equity capital management program (ECMP) at a time when UK companies were not able to hold their own shares. As part of the ECMP, Batiss entered into an option agreement in 2003 with Xstrata Finance (Dubai) Limited (Xstrata Dubai), a wholly owned subsidiary of the Xstrata Group. Under the option agreement, Xstrata Dubai could direct Batiss to transfer any Xstrata shares it purchased to a third party nominated by Xstrata Dubai, other than a subsidiary of Xstrata. Also, the option agreement between Xstrata Dubai and Batiss required that Batiss waive its rights to receive dividends and to vote in certain situations.

26. The Board of Xstrata Dubai decided to direct Batiss, in accordance with the terms of the 2003 option agreement, to transfer the Xstrata shares it held to the Xstrata Employee Benefits Trust (the EBT).

27. The direction to transfer was not conditional upon the Merger occurring and the transfer was also to occur regardless of whether the Merger was going to occur.

28. The Xstrata shares held by Batiss were transferred to the EBT on 25 April 2013. The shares transferred to the EBT were subject to the New Scheme of Arrangement.

Xstrata share schemes

29. Xstrata operated three share schemes, namely the Long Term Incentive Plan, the Annual Bonus Plan and the Added Value Plan. Conditional share awards and options (issued on or after 1 July 2009) held by participants under the Xstrata share schemes vested, or vested and became exercisable (as the case may be), upon Court sanction of the New Scheme of Arrangement.

30. Xstrata shares that were issued when the conditional share awards vested upon Court sanction of the Scheme were subject to the New Scheme of Arrangement on the same terms as Xstrata shares held by other Xstrata shareholders at that time.

31. Participants holding options under one of the Xstrata share schemes which vested and became exercisable upon Court sanction of the New Scheme of Arrangement could either:

a) accept the 'Glencore Option Proposal', whereby they could exchange their vested Xstrata options for replacement vested options over shares in Glencore;

b) exercise their vested Xstrata options before the Reorganisation Record Time, and consequently receive Xstrata shares which were subject to the New Scheme of Arrangement, or

c) exercise their vested Xstrata options after the Reorganisation Record Time and within either a 30 day or a 6 month period (depending on the share scheme) following the sanctioning of the New Scheme of Arrangement (after which time any unexercised vested Xstrata options would lapse).

32. The New Scheme of Arrangement provided for the amendment of the Xstrata Articles of Association to ensure that any participants that exercised their vested Xstrata options after the Reorganisation Record Time would have the Xstrata shares with which they were issued immediately transferred to Glencore in consideration for the issue of Glencore shares, on the same terms as other Xstrata shareholders that participated in the arrangement.

Arrangement

33. The Original Scheme Circular, the New Scheme Circular and the New Scheme of Arrangement outlined the steps necessary under the arrangement to effect the Merger. These included:

- The Merger being approved by at least 75% of the Xstrata ordinary shareholders present (or voting by proxy) at the Xstrata General Meeting held 20 November 2012;
- The Court sanctioning the New Scheme of Arrangement at a Scheme Court Hearing (29 April 2013);
- Each of the ordinary shares in the capital of Xstrata being reclassified on the following basis on the Reorganisation Record Time:
  - (1) all of the Excluded shares reclassified into A ordinary shares of nominal value US$0.50 each ('A shares'); and
  - (2) all other Xstrata Shares reclassified into B ordinary shares of nominal value US$0.50 each ('B shares') (30 April 2013).

  [Where Excluded shares included Xstrata shares beneficially owned by the Glencore Group]
- The share capital in Xstrata being reduced by cancelling and extinguishing all of the B shares; (2 May 2013)
- Immediately upon the reduction of capital becoming effective, each of the Deferred shares being gifted to Glencore for an aggregate consideration of £1.
- At an Xstrata general meeting of its remaining shareholders, a resolution to terminate the Voting Deed and amend the Xstrata Articles of Association being approved, allowing the Voting Deed to be terminated, the Entrenched Rights removed from the Xstrata Articles of Association and the Special Voting Share to be redeemed by Xstrata; (2 May 2013)
- The reserve arising in Xstrata's books of account being capitalised and applied in paying up in full New Xstrata Shares equal to the number of B shares cancelled, and being issued as credited to Glencore;
- The A shares reverting to and being reclassified as ordinary shares of US $0.50 each in the capital of Xstrata; (3 May 2013)
- The Xstrata Articles being further amended by the deletion of the new Article 7A; (3 May 2013)

- In consideration for the cancellation of the B shares and the allotment and issue of the New Xstrata shares to Glencore, Glencore issuing to the holders of B shares 3.05 Glencore shares for every Xstrata share that had been reclassified as a B share (3 May 2013);
- For any Xstrata share scheme participant that exercises their vested Xstrata options after the Reorganisation Record Time and up to six months after the Scheme Sanction date on 29 April 2013, the Xstrata shares issued to them being transferred to Glencore in exchange for 3.05 Glencore shares for every Xstrata share transferred.

Ruling

CGT event C2 under paragraph 104-25(1)(a)

34. CGT event C2 happened when each Xstrata share held by an Xstrata shareholder was cancelled under the arrangement described in the Ruling (paragraph 104-25(1)(a)).

35. The time of the event was the date when the Xstrata shares were cancelled as part of the arrangement, being 2 May 2013 (subsection 104-25(2)).

CGT event C2 under paragraph 104-25(1)(e)

36. CGT event C2 happened when Xstrata option holders exercised their vested Xstrata options as part of the arrangement described in the Ruling (paragraph 104-25(1)(e)).

37. The time of the event was the date when the Xstrata options were exercised (subsection 104-25(2)).

CGT event A1

38. CGT event A1 happened when each Xstrata share held by an Xstrata shareholder as a consequence of exercising vested Xstrata options after the Reorganisation Record Time was transferred to Glencore under the arrangement described in the Ruling (subsection 104-10(1)).

39. The time of the event was the date when the Xstrata share was transferred as part of the arrangement (subsection 104-10(3)).

Capital gain or capital loss on Xstrata shares

40. An Xstrata shareholder made a capital gain from CGT event C2 or CGT event A1 happening if the capital proceeds received from the cancellation or transfer of an Xstrata share was more than the cost base of that share. The capital gain is the amount of the excess (subsection 104-25(3) or subsection 104-10(4) as the case may be).

41. An Xstrata shareholder made a capital loss if the capital proceeds received from the cancellation or transfer of an Xstrata share was less the reduced cost base of that share. The capital loss is the amount of the difference (subsection 104-25(3) or subsection 104-10(4) as the case may be).

42. The capital proceeds received from the cancellation or transfer of an Xstrata share was the market value of the Glencore shares received in respect of CGT event C2 or CGT event A1 happening, worked out at the time of the CGT event (paragraph 116-20(1)(b)).

43. Any capital gain or capital loss made from CGT event C2 or CGT event A1 happening to Xstrata shares being cancelled or transferred within 30 days of the Scheme Sanction date will be disregarded under section 130-80(1).

Capital gain or capital loss on exercise of Xstrata options

44. Any capital gain or capital loss made from CGT event C2 under paragraph 104-25(1)(e) happening to the vested Xstrata options being exercised, and the resultant Xstrata shares disposed of, within 30 days of the Scheme Sanction date will be disregarded under subsection 130-80(1).

45. Any capital gain or capital loss made from CGT event C2 under paragraph 104-25(1)(e**)** happening to the vested Xstrata options being exercised more than 30 days after the Scheme Sanction date will be disregarded under subsection 134-1(4).

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

46. An Xstrata shareholder who made a capital gain from an Xstrata share being cancelled or transferred is eligible to choose scrip for scrip roll-over under Subdivision 124-M. Scrip for scrip roll-over is not available for a capital loss.

47. However, scrip for scrip roll-over cannot be obtained if any capital gain an Xstrata shareholder might make from the cancellation or transfer of an Xstrata share is disregarded (except because of a roll-over) (paragraph 124-795(2)(a)).

If scrip for scrip roll-over is chosen

48. If scrip for scrip roll-over is chosen, the capital gain an Xstrata shareholder made on their Xstrata share being cancelled or transferred is disregarded (subsection 124-785(1)).

Cost base of Glencore share if scrip for scrip is chosen

49. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each Glencore share is equal to the part of the cost base of the relevant Xstrata share that is reasonably attributable to the acquisition of the Glencore share (subsections 124-785(2) and 124-785(4)).

Cost base of Glencore share if scrip for scrip is not chosen

50. Where scrip for scrip roll-over is not chosen, or cannot be chosen, the first element of the cost base and reduced cost base of each Glencore share is equal to part of the market value of the Xstrata share that is reasonably attributable to the acquisition of the Glencore share, worked out at the time of their acquisition (subsections 110-25(2) and 110-55(2), and section 112-30).

Acquisition date of Glencore share

51. An Xstrata shareholder whose Xstrata shares were cancelled as part of the New Scheme of Arrangement acquired their Glencore shares on 3 May 2013 being the date shares were issued to the Xstrata shareholders (item 2 of the table in section 109-10).

52. An Xstrata option holder who exercises their vested Xstrata options after the Reorganisation Record Time such that they are issued Xstrata shares which are then transferred to Glencore in exchange for Glencore shares will acquire their Glencore shares on the date the Glencore shares were issued to them (item 2 of the table in section 109-10).

53. However, for the purposes of determining whether a capital gain made from any later disposal of their Glencore shares is eligible to be treated as a discount capital gain, an Xstrata shareholder who chooses scrip for scrip roll-over is taken to have acquired their Glencore shares when they acquired the corresponding Xstrata shares (item 2 of the table in subsection 115-30(1)).

Commissioner of Taxation
19 June 2013

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.

54. The Ruling section details the tax consequences and the relevant legislative provisions that relate to this scheme.

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

56. 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 conditions that are relevant to this scheme are:

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

57. Under the scheme, the conditions for an Xstrata shareholder to be eligible to choose scrip for scrip roll-over under Subdivision 124-M are satisfied.

58. Relevantly, although the Deferred shares were excluded by agreement from being subject to the New Scheme of Arrangement, their acquisition by Glencore was considered to be part of the 'arrangement' relevant for the purposes of subsection 124-780(2) but those shares were not 'voting shares' for the purposes of paragraph 124-780(2)(b) and were also shares of a different type to Xstrata ordinary shares for the purposes of paragraph 124-780(2)(c).

59. In addition, the redemption of the Special Voting Share was considered to be part of the 'arrangement' relevant for the purposes of subsection 124-780(2). The Special Voting Share was considered to be a 'voting share' for the purposes of paragraph 124-780(2)(b) and to be a share of a different type to Xstrata ordinary shares for the purposes of paragraph 124-780(2)(c).

60. Finally, having had regard to all of the relevant facts and circumstances of the Scheme as defined in paragraphs 11-31 of this Ruling, the unconditional and irrevocable transfer of the Xstrata shares held by Batiss to the EBT prior to the Merger being implemented, but under the terms of the option agreement entered into in 2003, was not considered to be part of the 'arrangement' relevant for the purposes of subsection 124-780(2).

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:

- CGT capital proceeds
- CGT cost base
- Ordinary shares
- CGT discount
- CGT events
- CGT roll-over relief
- Disposal of shares
- Market Value cost base
- Schemes of arrangement
- Scrip for scrip roll-over

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 Div 83A
- 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(1)(e)
- ITAA 1997 104-25(2)
- ITAA 1997 104-25(3)
- ITAA 1997 109-10
- ITAA 1997 110-55
- ITAA 1997 112-30
- ITAA 1997 115-30(1)
- ITAA 1997 116-20(1)(b)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780
- ITAA 1997 124-785(1)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 130-80(1)
- ITAA 1997 134-1(4)
- ITAA 1997 Div 230
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001

ATO references

NO: 1-4GEHZZI
ISSN: 1445-2014
ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip