


***CR 2015/51 - Income tax: scrip for scrip roll-over:
exchange of unvested options in Viator Inc for
unvested options in TripAdvisor Inc***

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Class Ruling

Income tax: scrip for scrip roll-over: exchange of unvested options in Viator Inc for unvested options in TripAdvisor Inc

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📌 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 provisions

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

- Sections 102-5 the *Income Tax Assessment Act 1997* (ITAA 1997)
- Section 102-10 of the ITAA 1997
- Section 104-25 of the ITAA 1997
- Section 109-10 of the ITAA 1997
- Section 109-55 of the ITAA 1997
- Section 110-25 of the ITAA 1997
- Subdivision 115-A 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 Australian employees and directors of Viator Systems Pty Limited (referred to as the Australian Employees) who:

- participated in the Scheme described below
- were residents of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* at the time the Scheme was undertaken (the Effective Time)
- held Options issued by Viator Inc to acquire 'Common Stock' in Viator Inc (Common Shares) that had not vested as at the Effective Time (Unvested Options)
- did not hold their Unvested Options as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, they held their Unvested Options on capital account, and
- are not subject to the taxation of financial arrangement (TOFA) rules in Division 230 on their gains and losses on their Unvested Options.

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

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 7 to 26 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

6. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

7. The following description of the scheme is based on information provided by the applicant:

- application for Class Ruling from Greenwoods & Herbert Smith Freehills dated 2 June 2015
- Amended and Restated Agreement and Plan of Merger between TripAdvisor LLC, Vineyard Acquisition Corporation and Viator Inc dated 24 July 2014 (Merger Agreement), and
- Viator Inc 2010 Stock Incentive Plan last amended on 25 March 2010 (Plan Rules).

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

Viator Inc

8. Viator Inc, a Delaware corporation was incorporated in 1999. It is a global resource for travellers to research, plan and book tours, attractions, excursions and private guides. Viator Inc's headquarters is located in San Francisco, California and it operates globally via offices in Sydney; London; and Las Vegas.

9. Prior to the Effective Time Viator Inc had on issue: shares, warrants to purchase shares in Viator Inc (Warrants), and Options to purchase shares in Viator Inc. The Options were on issue to the Grantees (defined in the Plan Rules to be Employee, Director or Consultant).

TripAdvisor entities

10. TripAdvisor LLC is a Delaware limited liability company and a wholly owned subsidiary of TripAdvisor Inc.

11. TripAdvisor Inc. offers advice to travellers and a wide variety of travel choices and planning features with links to booking tools.

12. TripAdvisor Inc's common stock is traded on the NASDAQ Stock Market.

Viator Inc Options

13. Options pursuant to the Plan Rules:

- were issued by Viator Inc after 1 July 2009 for nil consideration
- had an exercise price that was greater than the market value of a Common Share when the Options were granted
- vested subject to the Grantee's 'Continuous Service' on the following basis:
 - 25% of the shares subject to the Option shall vest 12 months after the date of grant (being the Vesting Commencement Date), and
 - 1/48 of the shares subject to the Option shall vest on each monthly anniversary of the Vesting Commencement Date thereafter.

14. Shares acquired on exercise of an Option were not subject to any disposal restrictions (except in the case of an IPO of Viator Inc or to the extent the shares were not registered under the US Securities Act of 1933), but were subject to Viator Inc having a 'right of first refusal' to acquire the shares in the event that the Grantee received a bona fide third party offer to acquire the shares.

The Merger

15. Pursuant to the Merger Agreement, the Merger between Viator Inc and TripAdvisor LLC was implemented by way of a 'reverse triangular merger' under US law.

16. The Merger completed at the Effective Time (8 August 2014) and Viator Inc became a wholly-owned subsidiary of TripAdvisor LLC. Therefore, as a result of the merger Viator Inc is now (indirectly) a 100% subsidiary of TripAdvisor Inc.

17. Under the Merger Agreement, the total consideration paid by TripAdvisor LLC for the shares in Viator Inc, warrants to purchase shares in Viator Inc (Warrants), and vested options to purchase shares in Viator Inc (Vested Options) was based on an overall valuation of approximately \$200 million subject to certain adjustments including for transactions expenses (the Consideration). No cash consideration was paid in relation to the Unvested Options.

Assumption of Unvested Options

18. At the Effective Time of the Merger, each Unvested Option was 'assumed' by TripAdvisor Inc (Assumed Option). The contractual obligations represented by each Unvested Option were expressly assumed by TripAdvisor Inc with appropriate adjustments that preserved the compensation element of the Unvested Option.

19. The rights and obligations attaching to the Unvested Options were terminated, and were replaced with new rights and obligations.

20. Each Assumed Option generally continues to have the same terms and conditions as were in effect immediately prior to the Merger, including the vesting arrangements and other terms and conditions set forth in the Plan Rules and the applicable stock option or other agreement, except that:

- TripAdvisor Inc has amendment and administrative authority with respect to the Assumed Option (subject to any required consent of the affected option holder)
- the Assumed Option covers that number of whole shares of TripAdvisor Inc (TripAdvisor Shares) equal to:
 - the number of Common Stock underlying such Assumed Option immediately prior to the effective time of the Merger, multiplied by
 - the Option Exchange Ratio (0.1963)
 - rounded down to the next whole number of TripAdvisor Shares.

Example: John is an employee of Viator Inc at the time of the Merger and holds an Unvested Option to purchase 200 shares of Viator Inc's common stock. Following the Merger, John's Assumed Option will cover 39 TripAdvisor Shares (200×0.1963).

- the per share exercise price for the TripAdvisor Shares covered by the Assumed Option equals:
 - the exercise price per Common Stock at which such Assumed Option was exercisable immediately prior to the effective time of the Merger, divided by
 - the Option Exchange Ratio (0.1963)
 - rounded up to the next whole cent.

Example: John's Unvested Option has a per share exercise price of \$5 following the Merger, the per share exercise price for John's Assumed Option will be \$25.48 ($\$5 / 0.1963$).

Other Matters

21. All parties to the Scheme are dealing with each other on an arm's length basis (for the purposes of subsection 124-780(4)).
22. There are no significant stakeholders and common Stakeholders in respect of the Scheme for the purposes of Subdivision 124-M:
 - (a) TripAdvisor Inc had more than 300 members/shareholders just before the Effective Time (for the purposes of section 124-783).
 - (b) It was not the case that 20 individuals or less had a direct or indirect interest in at least 75% of the issued shares in TripAdvisor Inc (for the purposes of section 124-810).
 - (c) TripAdvisor did not hold any shares in Viator Inc just prior to the Effective Time (for the purposes of section 124-783).
 - (d) None of the shareholders in Viator Inc held shares in TripAdvisor Inc just prior to the Effective Time (for the purposes of subsection 124-783).
23. As a result of the Merger, Viator Inc shares became 'voting shares' within the meaning of section 9 of the Corporations Act 2001 (for the purposes of subsection 124-780(2)).
24. All the owners of the voting shares in Viator Inc were entitled to participate in the Merger (for the purposes of subsection 124-780(2)).
25. TripAdvisor Inc will not make a choice under subsection 124-795(4).
26. Division 83A (about employee share schemes) does not apply to the Unvested Options.

Ruling

Assumption of Unvested Options

27. CGT event C2 happened when the Unvested Options were assumed by TripAdvisor Inc under the Scheme (subsection 104-25(1)).
28. The time of the CGT event C2 is the Effective Time (8 August 2014) under the Scheme (subsection 104-25(2)).
29. An Australian Employee will make a capital gain from CGT event C2 happening if the capital proceeds (the market value of the Assumed Options) at the time the Unvested Options were assumed by TripAdvisor Inc is greater than the cost base of the Unvested Options. An Australian Employee will make a capital loss if the capital proceeds (the market value of the Assumed Options) at the time the Unvested Options were assumed by TripAdvisor Inc is less than the reduced cost base of the Unvested Options (subsection 104-25(3)).

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

30. Subject to the qualification in paragraph 124-795(2)(a) (see below), an Australian Employee who made a capital gain in relation to their Unvested Options is eligible to choose scrip for scrip roll-over (section 124-780). Scrip for scrip roll-over is not available for a capital loss (paragraph 124-780(3)(b)).

31. Scrip for scrip roll-over cannot be chosen if the capital gain made by the Australian Employee in relation to their Unvested Options would be disregarded under another provision of the ITAA 1997 for a reason other than the application of a roll-over or a capital gain being disregarded on exercise of the Assumed Options (paragraph 124-795(2)(a) and Taxation Determination TD 2006/9).

Consequences of choosing Subdivision 124-M roll-over***Capital gain is disregarded***

32. An Australian Employee who chooses to obtain Subdivision 124-M roll-over will disregard any capital gain made when CGT event C2 happened in relation to the Unvested Options (that is, when the Australian Employee received the Assumed Options in exchange for the Unvested Options (subsection 124-785(1))).

CGT cost base and CGT reduced cost base

33. The first element of the cost base and the reduced cost base of the Assumed Options will be the cost base of the Unvested Options for which the Assumed Options were exchanged, and for which the Australian Employees obtained the roll-over (subsection 124-785(2)).

34. In this case, the cost base of the Assumed Options received in exchange for the Unvested Options will be nil (as the Australian Employees paid no consideration to acquire their Unvested Options from Viator Inc).

Acquisition date of the Assumed Options

35. For the Australian Employees who choose scrip for scrip roll-over, the acquisition date of the Assumed Options for CGT discount purposes is the date they initially acquired the Unvested Options (item 8C in the table in section 109-55 in conjunction with item 2(a) of the table in subsection 115-30(1)).

Consequences if Subdivision 124-M roll-over is not chosen, or cannot be chosen

Capital gain or capital loss is not disregarded

36. An Australian Employee who does not choose Subdivision 124-M roll-over, or who cannot choose the roll-over (for example because they do not make a capital gain from CGT event C2 event happening on the Assumption of the Unvested Options) must take into account any capital gain or capital loss from the Assumption of their Unvested Options in working out their net capital gain or net capital loss for the income year ending 30 June 2015 (sections 102-5 and 102-10).

37. The Australian Employee can treat the capital gain as a discount capital gain if the conditions in Subdivision 115-A are met.

CGT cost base and CGT reduced cost base

38. For these Australian Employees, the first element of the cost base and the reduced cost base of the Assumed Options received in exchange for the Unvested Options will be the market value of the Unvested Options at the Effective Time (paragraph 110-25(2)(b)).

Acquisition date of the Assumed Options

39. For Australian Employees who do not choose scrip for scrip roll-over, the acquisition date of their Assumed Options will be the Effective Time (item 2 of the table in section 109-10).

Commissioner of Taxation

15 July 2015

Appendix 1 – Explanation

❶ *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.*

40. The tax consequences that arise concerning the Scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

41. The significant tax consequence is the availability of roll-over under Subdivision 124-M.

Subdivision 124-M

42. Subdivision 124-M enables the Australian Employee to disregard a capital gain made from the Assumption of their Unvested Options under the Merger Agreement if the Australian Employees receive replacement unvested options in exchange.

43. Subdivision 124-M contains a number of conditions for, and exceptions to, an Australian Employee Unvested Option holder 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) unvested options in a company are exchanged for unvested options in another company
- (b) the exchange occurs as part of a single arrangement
- (c) conditions for roll-over are satisfied
- (d) further conditions are not applicable or are satisfied, and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

44. Under the Scheme that is the subject of this Ruling, the conditions for roll-over under Subdivision 124-M are satisfied.

Appendix 2 – Detailed contents list

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

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References

- Previous draft:*
- ITAA 1997 102-5
 - ITAA 1997 102-10
- Not previously issued as a draft
- ITAA 1997 104-25(1)
 - ITAA 1997 104-25(2)
 - ITAA 1997 104-25(3)
- Related Rulings/Determinations:*
- TR 2006/10
- ITAA 1997 109-10
 - ITAA 1997 109-55
 - ITAA 1997 110-25(2)(b)
- Subject references:*
- Capital gains tax
 - Capital proceeds
 - CGT event C2
 - CGT roll-over relief
 - Cost base
 - Reduced cost base
- ITAA 1997 Subdiv 115A
 - ITAA 1997 115-30(1)
 - ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-785(1)
 - ITAA 1997 124-795(2)(a)
- Legislative references:*
- TAA 1953
-

ATO references

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