


CR 2017/10 - Income tax: Thinksmart Limited - delisting from ASX and shares converted into Depositary Interests

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Class Ruling

Income tax: Thinksmart Limited – delisting from ASX and shares converted into Depositary Interests

Contents	Para
LEGALLY BINDING SECTION:	
Summary – what this ruling is about	1
Date of effect	7
Scheme	8
Ruling	21
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	35
Appendix 2:	
Detailed contents list	64

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.

Summary – 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 provisions considered in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 97 of the ITAA 1936
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 6-10 of the ITAA 1997
- section 8-1 of the ITAA 1997
- section 104-10 of the ITAA 1997
- section 104-25 of the ITAA 1997
- section 104-55 of the ITAA 1997

- section 104-60 of the ITAA 1997
- section 104-75 of the ITAA 1997
- section 104-155 of the ITAA 1997
- section 106-50 of the ITAA 1997
- Subdivision 115-A of the ITAA 1997, and
- section 116-20 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is shareholders of Thinksmart Limited (Thinksmart) who:

- are residents of Australia as defined in subsection 6(1) of the ITAA 1936 at all relevant times
- hold their Thinksmart shares on capital account, that is, neither as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997), and
- are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their beneficially held shares in Thinksmart.

(Note: Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

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 8 to 20 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

7. This Ruling applies from 1 July 2016 to 30 June 2020. The Ruling continues to apply after 30 June 2020 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.

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

9. Thinksmart is a financial technology company incorporated in Australia. The share capital of Thinksmart is comprised solely of fully paid ordinary shares.

10. Thinksmart's principal activity is the delivery of business-to-business finance products through the retail industry.

11. On 25 July 2016, Thinksmart announced that, subject to obtaining necessary approvals, it intended to conduct an off-market tender buy-back of up to 10 million shares, delist from the Australian Securities Exchange (ASX) in Australia and apply to be admitted to the Alternative Investment Market (AIM) of the London Stock Exchange plc in the United Kingdom (UK).

12. On 29 September 2016, at an Extraordinary General Meeting the shareholders of Thinksmart approved a resolution to delist from the ASX.

13. On 2 December 2016, Thinksmart was admitted to the AIM with shares in Thinksmart being able to be settled through CREST (the electronic settlement system in the UK).

14. On 6 December 2016, Thinksmart was delisted from the ASX resulting in shares in Thinksmart no longer being able to be traded on the ASX.

15. On 13 December 2016, shares in Thinksmart were converted into certificated form on the Australian share register and shareholders were issued with a physical share certificate.

Conversion of Thinksmart shares to Depositary Interests

16. On 16 November 2016 Thinksmart and Computershare Investor Service Plc (as Depositary) entered into the *Deed in respect of Thinksmart Ltd Depositary Interests* (Depositary Deed) which established a mechanism allowing shareholders in Thinksmart to convert their shares into Depositary Interests.

17. Under the Depositary Deed, the Depositary will issue, on a one to one basis, a Depositary Interest to a CREST member (the Holder) for each share in Thinksmart transferred to the Depositary by a shareholder of Thinksmart.

18. The Depositary will hold each share in Thinksmart transferred to it on trust as bare trustee on behalf of the relevant Holder.

19. The Holder will hold each Depositary Interest as bare trustee on behalf of the shareholder in Thinksmart who transferred legal ownership of the relevant share in Thinksmart to the Depositary to hold under the Depositary Deed.

20. Each shareholder in Thinksmart who transfers legal ownership of a share in Thinksmart to the Depositary to hold under the Depositary Deed and who has a Depositary Interest held by a Holder will at all times:

- beneficially own and be absolutely entitled to the share in Thinksmart for the purposes of section 106-50 of the ITAA 1997
- be entitled to any dividends paid in relation to the share in Thinksmart
- be able to call for the share in Thinksmart to be transferred back to them or transferred at their direction
- not be entitled to receive any cash consideration in respect of any acts, transactions or events described above that occur in relation to the share in Thinksmart

Ruling

Conversion of shares into certificated form

21. CGT events A1 (section 104-10 of the ITAA 1997), C2 (section 104-25 of the ITAA 1997) and H2 (section 104-155 of the ITAA 1997) will not happen at the time a share in Thinksmart was converted into certificated form on the Australian share register.

Conversion of share into a Depositary Interest

22. CGT events A1 (section 104-10 of the ITAA 1997), C2 (section 104-25 of the ITAA 1997), E1 (section 104-55 of the ITAA 1997), E2 (section 104-60 of the ITAA 1997) and E5 (section 104-75 of the ITAA 1997) will not happen at the time a share in Thinksmart is converted into a Depositary Interest.

23. As a result, the acquisition date and the cost base and reduced cost base of each share in Thinksmart will not change as a result of a share in Thinksmart being converted into a Depositary Interest.

24. No capital gain under CGT event H2 (section 104-155 of the ITAA 1997) will be made by a shareholder as they will not receive and will not be entitled to receive any capital proceeds in respect of the conversion of each share in Thinksmart into a Depositary Interest.

25. The conversion of each share in Thinksmart into a Depositary Interest will not result in any assessable income being derived by a shareholder under section 6-5 or 6-10 of the ITAA 1997.

26. The conversion of each share in Thinksmart into a Depositary Interest will not give rise to any allowable deduction under section 8-1 of the ITAA 1997.

Disposal of a Depositary Interest treated as a disposal of a share

27. A disposal of a Depositary Interest will be treated as a disposal of the underlying share in Thinksmart (section 106-50 of the ITAA 1997).

Availability of CGT discount on disposal of a Depositary Interest

28. A capital gain on disposal of a Depositary Interest may be treated as a discount capital gain provided that the conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

Dividends received on a Depositary Interest

29. Any dividend received in respect of each share in Thinksmart which is converted into a Depositary Interest and held by a Holder will be a dividend as defined under subsection 6(1) of the ITAA 1936 and included as assessable income under section 97 of the ITAA 1936.

Cancellation of Depositary Interest and return of share

30. CGT events A1 (section 104-10 of the ITAA 1997) and C2 (section 104-25 of the ITAA 1997) will not happen at the time a Depositary Interest is cancelled and legal ownership of the share in Thinksmart is transferred by the Depositary to the shareholder who originally transferred the share in Thinksmart to the Depositary.

31. As a result, the acquisition date and the cost base and reduced cost base of each shareholder's share in Thinksmart will not change as a result of the share in Thinksmart being transferred by the Depositary to the shareholder.

32. No capital gain under CGT event H2 (section 104-155 of the ITAA 1997) will be made by a shareholder as they will not receive or be entitled to receive any capital proceeds in respect of a Depositary Interest which is cancelled.

33. The cancellation of a Depositary Interest and legal ownership of the share in Thinksmart being transferred by the Depositary to the shareholder who originally transferred the share to the Depositary will not result in any assessable income being derived by the shareholder under section 6-5 or 6-10 of the ITAA 1997.

34. The cancellation of a Depositary Interest and legal ownership of the share in Thinksmart being transferred by the Depositary to the shareholder who originally transferred the share to the Depositary will not give rise to any allowable deduction under section 8-1 of the ITAA 1997.

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.*

Conversion of shares into certificated form

35. CGT event A1 happens if a taxpayer disposes of a CGT asset (subsection 104-10(1) of the ITAA 1997), and the disposal involves a change of ownership from the taxpayer to another entity. However, a change of ownership does not occur if the taxpayer stops being the legal owner of the asset but continues to be its beneficial owner (subsection 104-10(2) of the ITAA 1997).

36. CGT event A1 will not happen as beneficial ownership of each share in Thinksmart will remain with the relevant shareholder at the time it is converted into certificated form on the Australian share register.

37. CGT event C2 happens if a taxpayer's ownership of an intangible CGT asset ends by the asset being redeemed, cancelled, released, discharged, satisfied, expiring, abandoned, surrendered or forfeited (subsection 104-25(1) of the ITAA 1997).

38. CGT event C2 will not happen as beneficial ownership of each share in Thinksmart will not end when each share in Thinksmart is converted into certificated form on the Australian share register.

39. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost case (section 104-155 of the ITAA 1997).

40. CGT event H2 will not happen at the time each share in Thinksmart is converted into certificated form on the Australian share register as there will be no act, transaction or event that will occur in relation to the shares in Thinksmart.

Conversion of share into a Depositary Interest

41. CGT event A1 happens if a taxpayer disposes of a CGT asset (subsection 104-10(1) of the ITAA 1997), and the disposal involves a change of ownership from the taxpayer to another entity. However, a change of ownership does not occur if the taxpayer stops being the legal owner of the asset but continues to be its beneficial owner (subsection 104-10(2) of the ITAA 1997).

42. CGT event A1 will not happen as beneficial ownership of each share in Thinksmart will remain with the relevant shareholder at the time each share is converted into a Depositary Interest.

43. CGT event C2 happens if a taxpayer's ownership of an intangible CGT assets ends by the asset being redeemed, cancelled, released, discharged, satisfied, expiring, abandoned, surrendered or forfeited (subsection 104-25(1) of the ITAA 1997).

44. CGT event C2 will not happen as beneficial ownership of each share in Thinksmart will remain with the shareholder at all relevant times and will not end.

45. CGT event E1 happens when a taxpayer creates a trust over a CGT asset by declaration or settlement (subsection 104-55(1) of the ITAA 1997). CGT event E2 happens when a taxpayer transfers a CGT asset to an existing trust (subsection 104-60(1) of the ITAA 1997). However, subsection 104-55(5) and subsection 104-60(5) respectively provide that CGT events E1 and E2 do not happen if the taxpayer is the sole beneficiary of the trust and is absolutely entitled to the asset as against the trustee (disregarding any legal disability) and the trust is not a unit trust.

46. CGT event E5 happens if a beneficiary becomes absolutely entitled to a CGT asset of a trust (except a unit trust or a trust to which Division 128 applies) as against the trustee (disregarding any legal disability the beneficiary is under) (section 104-75 of the ITAA 1997).

47. CGT events E1, E2 and E5 will not happen as each shareholder of Thinksmart will at all times be absolutely entitled to the relevant share in Thinksmart.

48. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base (section 104-155 of the ITAA 1997). A capital gain is made if the 'capital proceeds' from the event are more than the incidental costs incurred in relation to it; a capital loss is made if the capital proceeds are less than the incidental costs (section 104-155 of the ITAA 1997).

49. CGT event H2 will happen when each share in Thinksmart is converted into a Depositary Interest.

50. Capital proceeds are the money or other consideration received, or entitled to be received, because of the act, transaction or event (section 116-20(2) of the ITAA 1997). Paragraph 29 of Taxation Ruling TR 95/3 *Income tax and capital gains: application of subsections 160M(6) and 160M(7) to restrictive covenants and trade ties* provides that 'consideration' for these purposes can include the benefit of mutual promises flowing to parties even if those promises are not in themselves property.

51. Each shareholder in Thinksmart did not receive and was not entitled to receive any capital proceeds in respect of a share in Thinksmart being converted into a Depositary Interest. As such, no shareholder of Thinksmart will have a capital gain from CGT event H2

(section 104-155 of the ITAA 1997) when each share in Thinksmart is converted into a Depositary Interest.

Disposal of a Depositary Interest treated as a disposal of a share

52. A CGT asset of a trust to which a beneficiary is absolutely entitled as against the trustee (disregarding any legal disability) is treated for CGT purposes as being the beneficiary's asset (rather than an asset of the trust). Furthermore, any act done in relation to the asset by the trustee is taken to be done by the absolutely entitled beneficiary (rather than the trustee) (section 106-50 of the ITAA 1997).

53. The Commissioner's views in respect of the meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the ITAA 1997 is contained in draft Taxation Ruling TR 2004/D25 *Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997*.

54. Under the arrangement a shareholder in Thinksmart who transfers legal ownership of a share in Thinksmart to the Depositary remains absolutely entitled, at all times, to the share in Thinksmart. A disposal of the Depositary Interest will be treated, if there is a change in beneficial ownership, as a disposal of the underlying share in Thinksmart.

Availability of CGT discount on disposal of a Depositary Interest

55. A capital gain on disposal of a Depositary Interest may be treated as a discount capital gain provided that the conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

Dividends received on a Depositary Interest

56. A dividend received in respect of each share in Thinksmart which is converted into a Depositary Interest and held by a Holder will be a dividend as defined under subsection 6(1) of the ITAA 1936 and included as assessable income under section 97 of the ITAA 1936.

Cancellation of Depositary Interest and return of share

57. CGT event A1 happens if a taxpayer disposes of a CGT asset (subsection 104-10(1) of the ITAA 1997), and the disposal involves a change of ownership from the taxpayer to another entity. However, a change of ownership does not occur if the taxpayer stops being the legal owner of the asset but continues to be its beneficial owner (subsection 104-10(2) of the ITAA 1997).

58. CGT event A1 will not happen as beneficial ownership of each share in Thinksmart will remain with the shareholder at the time each Depositary Interest is cancelled.

59. CGT event C2 happens if a taxpayer's ownership of an intangible CGT assets ends by the asset being redeemed, cancelled, released, discharged, satisfied, expiring, abandoned, surrendered or forfeited (subsection 104-25(1) of the ITAA 1997).

60. CGT event C2 will not happen as beneficial ownership of each share in Thinksmart will remain with the shareholder at all relevant times and will not end.

61. No capital gain under CGT event H2 (section 104-155 of the ITAA 1997) will be made by a shareholder as they will not receive or be entitled to receive any capital proceeds in respect of a Depositary Interest which is cancelled.

62. The cancellation of a Depositary Interest and legal ownership of the share in Thinksmart being transferred by the Depositary to the shareholder who originally transferred the share to the Depositary will not result in any assessable income being derived by the shareholder under section 6-5 or 6-10 of the ITAA 1997.

63. The cancellation of a Depositary Interest and legal ownership of the share in Thinksmart being transferred by the Depositary to the shareholder who originally transferred the share to the Depositary will not give rise to any allowable deduction under section 8-1 of the ITAA 1997.

Appendix 2 – Detailed contents list

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

	Paragraph
Summary – what this ruling is about	1
Relevant provisions	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Conversion of Thinksmart shares to Depositary Interests	16
Ruling	21
Conversion of shares into certificated form	21
Conversion of share into a Depositary Interest	22
Disposal of a Depositary Interest treated as a disposal of a share	27
Availability of CGT discount on disposal of a Depositary Interest	28
Dividends received on a Depositary Interest	29
Cancellation of Depositary Interest and return of share	30
Appendix 1 – Explanation	35
Conversion of shares into certificated form	35
Conversion of share into a Depositary Interest	41
Disposal of a Depositary Interest treated as a disposal of a share	52
Availability of CGT discount on disposal of a Depositary Interest	55
Dividends received on a Depositary Interest	56
Cancellation of Depositary Interest and return of share	57
Appendix 2 – Detailed contents list	64

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 95/3; TR 2004/D25;
TR 2006/10

Legislative references:

- ITAA 1997 104-25(1)
- ITAA 1997 104-55
- ITAA 1997 104-55(1)
- ITAA 1997 104-55(5)
- ITAA 1997 104-60
- ITAA 1997 104-60(1)
- ITAA 1997 104-60(5)
- ITAA 1997 104-75
- ITAA 1997 104-155
- ITAA 1997 106-50
- ITAA 1997 Subdiv 115-A
- ITAA 1997 116-20
- ITAA 1997 116-20(2)
- ITAA 1997 Div 128
- ITAA 1997 Div 230
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 97
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
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ATO references

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Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 – end of a CGT asset
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events E1 to E9 – trusts
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events H1 and H2 – special capital receipts

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