


CR 2017/54 - Income tax: scrip for scrip roll-over: acquisition of Heemskirk Consolidated Limited by Northern Silica Corporation

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Class Ruling

Income tax: scrip for scrip roll-over: acquisition of Heemskirk Consolidated Limited by Northern Silica Corporation

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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 provision(s)

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

- section 102-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 102-10 of the ITAA 1997
- section 104-10 of the ITAA 1997
- section 109-10 of the ITAA 1997
- section 110-25 of the ITAA 1997
- Subdivision 115-A of the ITAA 1997
- section 116-20 of the ITAA 1997
- 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 are the holders of ordinary shares in Heemskirk Consolidated Limited (HSK) who:

- held their ordinary HSK shares on the Record Date 13 March 2017
- are residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) and are not 'temporary residents' as defined in subsection 995-1(1)
- participated in the scheme that is the subject of this Ruling under which they chose to receive ordinary shares in Northern Silica Corporation (NSC) in exchange for their ordinary HSK shares
- did not hold their HSK shares 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 HSK shares broadly on capital account, and
- are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their HSK shares.

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

4. In this Ruling, a person belonging to this class of entities is referred to as a 'Participating Shareholder'.

Qualifications

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

6. 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 28 of this Ruling.

7. 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 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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 and includes the application for a Class Ruling received on 12 May 2017.

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

Relevant Entities

Heemskirk Consolidated Limited (HSK)

10. HSK is an Australian resident company that was listed on the Australian Securities Exchange (ASX) since October 2004.

11. HSK produces industrial minerals and its sole operation is the Moberly Silica Mine in British Columbia, Canada. HSK does not own any land or mining tenements in Australia.

12. As at 28 April 2017:

- HSK had 562,653,912 fully paid ordinary shares on issue, which traded on the ASX
- each ordinary share carried the same rights to vote, receive dividends and receive capital distributions
- HSK had 100,000 Class A \$0.25 ordinary shares and 1,500,000 Class B \$0.50 ordinary shares, each paid up to \$0.01 per share
- HSK had 1,461,808 fully paid reserved unvested employee shares, and
- HSK also had issued a number of options to acquire ordinary HSK shares.

Northern Silica Corporation (NSC)

13. NSC is a newly incorporated company under the *Business Corporations Act (Alberta)* and was established solely for the purpose of the acquisition of HSK. NSC is an unlisted company which is a resident of Canada.

The Scheme

14. On 22 December 2016, HSK announced NSC's proposed off-market takeover bid for HSK.

15. On 13 February 2017, NSC and HSK entered into a Takeover Implementation Agreement under which NSC would acquire all of the shares in HSK pursuant to the takeover bid (the Offer), and subject to certain conditions being satisfied.

16. NSC lodged its Bidder's Statement with the Australian Securities and Investment Commission (ASIC), the ASX and HSK on 13 March 2017. The Offer was open for acceptance from 15 March 2017. The Offer was to close by 7:00 pm (Sydney time) 18 April 2017.

17. NSC subsequently varied the date when the Offer was to close by lodging a Notice of Variation with the ASIC, the ASX and HSK, extending the Offer Closing Date to 7:00 pm (Sydney time) 16 May 2017.

18. HSK ensured that any unvested employee rights to acquire HSK shares were cancelled or exercised before the Offer was completed on 8 May 2017.

19. On 8 May 2017, NSC declared that the Offer was free of all conditions.

20. NSC announced on 15 May 2017 that it had a relevant interest in over 90% of the shares in HSK, which entitled NSC to proceed with the compulsory acquisition of the remaining HSK shares pursuant to section 661A of the *Corporations Act 2001*.

21. On 16 May 2017, NSC commenced Compulsory Acquisition of the remaining HSK shares.

22. On 29 June 2017, NSC completed the takeover of HSK. As a result, HSK became a wholly-owned subsidiary of NSC.

Scheme Consideration

23. Shareholders who held ordinary HSK shares on the Record Date of 13 March 2017 could choose under the Offer to receive in exchange for each ordinary HSK share (subject to Nominee Sale Agent / Ineligible Foreign Shareholder) either:

- (a) \$0.075 cash (the Cash Consideration), or
- (b) one NSC share (the Share Consideration).

24. Class A and Class B shareholders were entitled to the Cash Consideration or the Share Consideration to the extent that their Class A or Class B shares were paid up.

25. Where HSK shareholders chose the Cash Consideration or Share Consideration on or before the extended Offer Closing Date of 16 May 2017, the shareholders received cash or NSC shares as chosen on 3 June 2017. Other HSK shareholders were provided an additional opportunity to choose the Cash Consideration or Share Consideration by 20 June 2017. The HSK shareholders who made a choice pursuant to the additional opportunity received cash or NSC shares as chosen on 29 June 2017. Any HSK shareholders that failed to make a choice by 20 June 2017 were deemed to receive the Cash Consideration.

Ineligible Foreign Shareholders

26. ASIC granted NSC relief from the application of certain requirements of subsection 619(3) of the *Corporations Act 2001*. All 'Ineligible Foreign Shareholders' were deemed to choose the Cash Consideration option.

27. An 'Ineligible Foreign Shareholder' of HSK was a HSK shareholder whose address as shown on the Register is in a jurisdiction other than Australia, its external territories or New Zealand, unless NSC otherwise determined after being satisfied that it was not lawful, unduly onerous or unduly impracticable to comply with the local securities law in the relevant jurisdiction in relation to the provision of shares.

Other matters

28. This Ruling is made on the following basis:

- all HSK shareholders and NSC dealt with each other at arm's length (for the purposes of subsection 124-780(4))
- any Participating Shareholder that is a 'significant stakeholder' jointly chose the roll-over with NSC (paragraph 124-780(3)(d))
- there were no 'common stakeholders' in relation to the scheme (within the meaning of the expression in section 124-783)
- all HSK shareholders were offered the opportunity to participate in the scheme on the same terms
- NSC (being the replacement entity as defined in subparagraph 124-780(3)(c)(ii)) will not make a choice under subsection 124-795(4), and

- no member of the wholly-owned group of which NSC is the ultimate holding company issued equity (other than the new NSC shares), or owes new debt, under the arrangement that is the subject of this Ruling, to an entity that is not a member of the wholly-owned group, in relation to the issuing of the new NSC shares (for the purposes of paragraph 124-780(3)(f)).

Ruling

CGT event A1

29. CGT event A1 happened to a Participating Shareholder that disposed of their HSK shares to NSC pursuant to the scheme (section 104-10). The time of CGT event A1 is the Offer Completion Dates of 16 May 2017 (for NSC shares obtained on 3 June 2017) and 20 June 2017 (for NSC shares obtained on 29 June 2017) (paragraph 104-10(3)(b)).

30. A Participating Shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a HSK share exceed its cost base. The capital gain is the amount of the excess (subsection 104-10(4)).

31. A Participating Shareholder made a capital loss from CGT event A1 happening if the capital proceeds from the disposal of a HSK share were less than the reduced cost base of that share. The capital loss is the amount of the difference (subsection 104-10(4)).

32. The capital proceeds from CGT event A1 happening to a HSK share is the market value (in Australian Dollars) of any property (ordinary NSC shares) received, or entitled to be received, in respect of the disposal of an ordinary HSK share. The market value of the ordinary NSC shares is worked out as at the time of CGT event A1, which is on the Offer Completion Dates of 16 May 2017 or 20 June 2017 (see paragraph 29 above) (subsection 116-20(1)).

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

33. Subject to the qualification in the following paragraph, a Participating Shareholder who made a capital gain from the disposal of their HSK shares to NSC in exchange for ordinary NSC shares may choose to obtain scrip for scrip roll-over (section 124-780).

34. Scrip for scrip roll-over cannot be obtained if any capital gain a Participating Shareholder might make from the replacement NSC interest would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

Consequences if scrip for scrip roll-over is chosen***Capital gain is disregarded***

35. If a Participating Shareholder chooses scrip for scrip roll-over, any capital gain that the shareholder made on the disposal of a HSK share to NSC is disregarded (subsection 124-785(1)).

Acquisition date of the new NSC shares

36. For the purpose of determining whether a capital gain made from any later disposal of a NSC share is a discount capital gain, Participating Shareholders who choose scrip for scrip roll-over are taken to have acquired the replacement NSC shares when they acquired the corresponding HSK shares involved in the roll-over (item 2 of the table in subsection 115-30(1)).

Cost base and reduced cost base of new NSC shares received

37. Where a Participating Shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of each replacement NSC share received is worked out by reasonably attributing to it the cost base and reduced cost base of the HSK share for which it was exchanged (subsections 124-785(2) and 124-785(4)).

38. A Participating Shareholder can calculate the first element of the cost base and reduced cost base of each replacement NSC share by dividing the aggregate cost bases or reduced cost bases of their respective ordinary HSK shares by the number of replacement ordinary NSC shares received.

Consequences if scrip for scrip roll-over is not chosen, or cannot be chosen***Capital gain is not disregarded***

39. A Participating Shareholder who does not choose roll-over, or cannot choose roll-over, must take into account any capital gain or capital loss made when CGT event A1 happened on the disposal of their HSK shares in working out their net capital gain or net capital loss for the income year in which CGT event A1 happened (sections 102-5 and 102-10).

40. A Participating Shareholder who made a capital gain where roll-over is not chosen, or cannot be chosen, is entitled to treat the capital gain as a 'discount capital gain' provided that the conditions of Subdivision 115-A are met. In particular, the HSK shares must have been acquired, or must be taken to have been acquired, by the shareholder at least 12 months before the Offer Completion Dates of 16 May 2017 or 20 June 2017 (see paragraph 29 above).

Acquisition date of the new NSC shares

41. A Participating Shareholder who does not choose roll-over, or cannot choose roll-over, acquired their replacement NSC shares on the Offer Completion Dates of 16 May 2017 or 20 June 2017 (see paragraph 29 above) (item 2 of the table in section 109-10).

Cost base and reduced cost base of new NSC shares received

42. Where a Participating Shareholder does not choose roll-over, or cannot choose roll-over, the first element of the cost base and reduced cost base of each replacement NSC share received is equal to the market value of the number of NSC shares received in respect of each HSK share. The market value of the NSC shares is worked out at the time of their acquisition on the Offer Completion Dates of 16 May 2017 or 20 June 2017 (see paragraph 29 above) (subsections 110-25(2) and 110-55(2)).

Commissioner of Taxation

16 August 2017

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.*

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

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

44. The main tax consequence that is the subject of this Ruling is the availability of scrip for scrip roll-over under Subdivision 124-M. The roll-over enables a shareholder to disregard a capital gain from a share that is disposed of 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.

45. 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:

- an entity exchanges shares in a company for shares in another company
- the exchange is in consequence of a single arrangement
- conditions for the roll-over are satisfied
- further conditions, if applicable, are satisfied, and
- exceptions to obtaining scrip for scrip roll-over are not applicable.

46. The scheme that is the subject of this Ruling satisfies the requirements for a roll-over under Subdivision 124-M.

47. This Ruling has taken into account the amendments made to Subdivision 124-M by the *Tax and Superannuation Laws Amendment (2015 Measures No. 4) Act 2015* (Amendment Act) which received Royal Assent on 13 October 2015. Schedule 1 to the Amendment Act applies to CGT events happening after 7:30pm (by legal time in the Australian Capital Territory) on 8 May 2012.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

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- ITAA 1997
- ITAA 1997 102-5
- ITAA 1997 102-10
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- ITAA 1997 104-10(3)(b)
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- ITAA 1997 109-10
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- ITAA 1997 110-25(2)
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- Taxation and Superannuation Laws Amendment (2015 Measures No. 4) Act 2015
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ATO references

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 Income tax ~~ Capital gains tax ~~ Rollovers ~~ Scrip for scrip – Subdivision 124-M

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