


CR 2017/88 - Income tax: scrip for scrip: exchange of Kore Potash shares, options and performance rights for Kore UK CDIs, options and performance rights

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Class Ruling

Income tax: scrip for scrip: exchange of
Kore Potash shares, options and
performance rights for Kore UK CDIs,
options and performance rights

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❶ 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 relevant provisions dealt with in this Ruling are:

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 104-25 of the ITAA 1997
- section 109-10 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 are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the shareholders, option holders and employees of Kore Potash Limited (Kore Potash) who:

- participated in the Scheme of Arrangement (the Scheme) described below
- held their shares, options or performance rights on capital account
- were residents of Australia for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) at the time the Scheme was undertaken, and
- are not subject to the taxation of financial arrangement (TOFA) rules in Division 230 of the ITAA 1997.

Qualifications

4. The Commissioner makes the 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 21 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 2017 to 30 June 2018. The Ruling continues to apply after 30 June 2018 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. On 20 November 2017 (the Implementation Date), pursuant to a Scheme of Arrangement effected under the *Corporations Act 2001*, all shareholders and option holders of Kore Potash transferred all their shares and options to a newly incorporated United Kingdom company, Kore Potash Plc (Kore UK), in exchange for being issued CHESS Depository Interests (CDIs) and options in Kore UK.

Kore Potash

10. Kore Potash (previously Elemental Minerals Limited) is an Australian resident company for income tax purposes. Its shares were listed on the Australian Stock Exchange (ASX) on 21 September 2005.

11. Kore Potash, through one of its subsidiaries, holds a 97% interest in a potash exploration and development project located in the Republic of Congo.

12. As at 31 July 2017, Kore Potash had the following securities on issue:

- 768,158,142 fully paid ordinary shares
- 50,000,000 options, and
- 56,268,954 performance based securities (8,191,226 options and 48,077,728 rights) held by directors and employees.

Scheme of arrangement

13. On 31 August 2017, Kore Potash announced on the ASX, its intention to seek to re-domicile to the UK, subject to Federal Court, shareholder and regulatory approvals.

14. The re-domicile of Kore Potash to the UK was undertaken by way of a Scheme of Arrangement between Kore Potash and its shareholders under Part 5.1 of the *Corporations Act 2001*.

15. To facilitate the re-domicile Kore UK was incorporated.

16. On the Implementation date:

- each Scheme Participant (other than Ineligible Foreign Shareholders) who held Kore Potash shares on the Record date of 13 November 2017, received one Kore

UK CDI for every one share held in Kore Potash such that:

- shareholders of Kore Potash owned 100% of the Kore UK CDIs in the same percentage as their existing holdings, and
- Kore UK became the holder of all the issued shares in Kore Potash.
- each Scheme Participant received one Kore UK option or performance right for every option or performance right held in Kore Potash.

17. Kore Potash options and performance rights were issued under their respective Employee Share Scheme Plans, and were cancelled in exchange for the replacement options and performance rights in Kore UK.

18. Kore Potash delisted from the ASX and became a wholly-owned subsidiary of Kore UK.

19. Kore UK listed on the ASX to enable Scheme Participants to trade their CDIs on the ASX.

20. Kore Potash UK intends to seek admission to have its shares listed on the Alternative Investment Market on the London Stock Exchange.

Other matters

21. This Ruling is made on the following basis:

- All dealings will be at arm's length.
- Kore Potash did not have a 'significant stakeholder' or 'common stakeholder' in relation to the Scheme (within the meaning of those expressions in section 124-783).
- All Kore Potash shareholders were offered the opportunity to participate in the Scheme on the same terms.
- Kore UK will not make a choice under subsection 124-795(4).
- A CDI is a 'Chess Unit of Foreign Security' for the purposes of subsection 124-780(6).

Ruling

CGT event A1

22. CGT event A1 happened when a Kore Potash shareholder disposed of a Kore Potash share to Kore UK under the Scheme described in this Ruling (subsection 104-10(1)).

23. The time of CGT event A1 was when all the shares in Kore Potash were transferred to Kore UK on the Implementation Date (subsection 104-10(3)).
24. A shareholder made a capital gain when CGT event A1 happened if the capital proceeds for a Kore Potash share exceeded its cost base (subsection 104-10(4)).
25. A shareholder made a capital loss when CGT event A1 happened if the capital proceeds were less than the reduced cost base of that share. The capital loss is the amount of the difference (subsection 104-10(4)).
26. The capital proceeds for each Kore Potash share was the market value of the CDI on the Implementation date (paragraph 116-20(1)(b)).

Cancellation and reissue of options

27. CGT event C2 happened when a Kore Potash option holder's option was cancelled under the Scheme described in this Ruling (paragraph 104-25(1)(a)).
28. The time of CGT event C2 was when the option was cancelled on the Implementation Date (paragraph 104-25(2)(b)).
29. An option holder made a capital gain if the capital proceeds from the cancellation of the option were more than its cost base (subsection 104-25(3)).
30. An option holder made a capital loss if the capital proceeds were less than the option's reduced cost base (subsection 104-25(3)).
31. The capital proceeds for each option cancelled under the Scheme described in this Ruling was the market value of the option with which it was replaced (paragraph 116-20(1)(b)).

Availability of roll-over for shareholders and option holders

32. A Kore Potash shareholder or option holder, who made a capital gain from the disposal of their Kore Potash share or option, may choose to obtain scrip for scrip roll-over (sections 124-780 and 124-785).
33. Scrip for scrip roll-over cannot be chosen if any capital gain a Kore Potash shareholder or option holder might subsequently make from their replacement Kore UK CDIs and options would be disregarded on a subsequent CGT event, except because of a roll-over (paragraph 124-795(2)(a)).

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

34. The capital proceeds received by a Kore Potash shareholder or option holder will be Kore UK CDIs or Kore UK options. If a Kore Potash shareholder or option holder chooses scrip for scrip roll-over, the capital gain they make upon the disposal of a Kore Potash share or Kore Potash option is disregarded (subsection 124-785(1)).

Acquisition date of the Kore UK CDIs and options

35. If a Kore Potash shareholder chooses scrip for scrip roll-over, the acquisition date of the Kore UK CDIs for the purpose of making a discount capital gain is the date when they acquired the Kore Potash shares that were exchanged for the Kore UK CDIs (item 2 of the table in subsection 115-30(1)).

36. The acquisition date of the Kore UK options is the date they were issued to each Kore Potash option holder that were cancelled under the Scheme described in this Ruling (item 2 of the table in subsection 115-30(1)).

Cost base and reduced cost base of the Kore UK CDIs received

37. If a Kore Potash shareholder or option holder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of a replacement Kore UK CDI and option received (in exchange for their Kore Potash shares and options) is worked out by reasonably attributing the cost base and reduced cost base (respectively) of the Kore Potash shares and options which were exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)).

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

38. A Kore Potash shareholder or option holder who does not choose roll-over, or cannot choose roll-over, must take into account any capital gain or capital loss from a CGT event happening on the disposal of their Kore Potash shares or options in working out their net capital gain or net capital loss for the income year in which these CGT events happen (section 102-5 and 102-10).

39. A Kore Potash shareholder or option holder, who makes a capital gain where roll-over is not chosen, or cannot be chosen, can treat the capital gain as a 'discount capital gain' provided that the conditions of Subdivision 115-A are met. Kore Potash shares or options must have been acquired, or taken to have been acquired, by the shareholder or option holder at least 12 months before the Implementation Date.

Acquisition date of the Kore UK CDIs and options

40. A Kore Potash shareholder or option holder who does not choose roll-over, or cannot choose roll-over, will acquire their Kore UK CDIs or options on the Implementation Date (item 2 of the table in section 109-10).

Cost base and reduced cost base of the Kore UK CDIs received

41. If a Kore Potash shareholder or option holder does not choose roll-over, or cannot choose roll-over, the first element of the cost base and reduced cost base of the replacement Kore UK CDIs or options received is equal to the market value of the Kore Potash shares or options given in respect of acquiring the Kore UK CDIs or options (subsections 110-25(2) and 110-55(2)). The market value of the Kore Potash shares or options is worked out as at the time of the acquisition of the Kore UK CDI or option on the Implementation Date.

Employee Share Scheme (ESS) options and performance rights***CGT event on exchange of employee options and performance rights***

42. A CGT event happened to all Kore Potash options and performance rights when they were cancelled in exchange for replacement options and performance rights in Kore UK (paragraph 104-25(1)(a)).

43. A capital gain is made if the capital proceeds from the CGT event exceeded the cost base of the Kore Potash options and rights. A capital loss is made if the capital proceeds from the CGT event were less than the reduced cost base of the Kore Potash options and rights (subsections 104-25(3)).

Where no prior ESS deferred taxing point had happened to the Kore Potash options and rights

44. Where an employee had Kore Potash options and rights subject to Division 83A, and an ESS deferred taxing point had not previously happened in relation to their Kore Potash options and rights, the exchange of the Kore Potash options and rights for like rights in Kore UK will be eligible to rollover under Division 83A (section 83A-130). Under this rollover an ESS taxing point will not arise for the Kore Potash options and rights as a result of the exchange and the new rights are treated for Division 83A purposes as a continuation of the old Kore Potash options and rights.

45. This rollover is not applicable to an employee whose share ownership in the new company, Kore UK, at the time the replacement rights are issued is more than 10% inclusive of shares that could be acquired via the new replacement rights (subsection 83A-130(9)).

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46. A capital gain or capital loss made from the CGT event happening to the Kore Potash options and rights that have not had a prior ESS deferred taxing point is disregarded (section 130-80).

Commissioner of Taxation

13 December 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 capital gain is made

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

48. One 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 or option holder to disregard a capital gain from a share or option that is disposed of or cancelled if the shareholder or option holder receives a replacement share or option in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share or option.

49. Subdivision 124-M contains a number of conditions for, and exceptions to a shareholder or option holder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is subject to this Ruling are:

- an entity exchanges shares or options in a company for shares or options 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.

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

Where no prior ESS deferred taxing point had happened to Kore Potash options and rights

51. Where the employee's new replacement options and rights in Kore UK are, for the purpose of section 83A-130, treated as a continuation of the old Kore Potash options and rights, the exchange alone would not trigger an ESS deferred taxing point for the Kore Potash options and rights.

52. Section 83A-130 provides, relevantly, that where:

- as a result of a company takeover an employee stops holding ESS interests in the old company (Kore Potash) that were acquired under an ESS

- the employee acquires in connection with the takeover replacement ESS interests in a new company (Kore UK) that can reasonably be regarded as matching any of the old ESS interests
- the replacement ESS interests relate to ordinary shares
- the employee is employed by the new company, or a subsidiary of the new company
- the employee at the time they acquire the replacement ESS interests:
 - does not hold and is not taken to hold a beneficial interest in more than 10% of the shares in the new company
 - is not in a position and not taken to be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of the new company, and

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interest in the old company.

53. The Kore Potash Scheme of Arrangement constituted a 'takeover' within the meaning of section 83A-130 because Kore Potash (the 'old company') became a 100% subsidiary of another company, Kore UK (the 'new company'), as a result of the scheme (subsection 83A-130(1)).

54. The conditions are satisfied, except for any employee whose share ownership in the new company, Kore UK, at the time the replacement rights are issued is more than 10% inclusive of shares that could be acquired via the new replacement rights.

CGT treatment of Kore Potash employee options and rights

55. Subsection 130-80(1) applies to disregard any capital gain or capital loss made from the CGT event happening to the Kore Potash options and rights as:

- they are ESS interests that were acquired under an employee share scheme (paragraph 130-80(1)(a))
- the CGT event that happens is not CGT event E4, G1 or K8 (paragraph 130-80(1)(b))
- if subdivision 83A-C applies to Kore Potash options and rights, the CGT event did not happen because the ESS interest was forfeited or lost (paragraphs 130-80(2)(a) and (b)).

56. The above conditions are satisfied where an employee had Kore Potash shares subject to Division 83A, and an ESS deferred taxing point had not previously happened in relation to their Kore Potash options and rights. In that case, any capital gain or capital loss made from the CGT event happening on cancellation or disposal or the Kore Potash options and rights in exchange for the replacement rights is disregarded.

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:

- ITAA 1997 110-55(2)
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-30(1)
 - ITAA 1997 116-20
 - ITAA 1997 116-20(1)(b)
 - ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-780
 - ITAA 1997 124-780(6)
 - ITAA 1997 124-783
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 - ITAA 1997 104-25
 - ITAA 1997 104-25(1)(a)
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Income tax ~~ Capital gains tax ~~ Rollovers ~~ Scrip for Scrip – Subdivision - 124-M

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