


# ***CR 2022/77 - DGO Gold Limited - scrip for scrip roll-over***

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Status: **legally binding**

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## Class Ruling

# DGO Gold Limited – scrip for scrip roll-over

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### **📌 Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences for holders of ordinary shares in DGO Gold Limited (DGO) in relation to the acquisition of those shares by Gold Road Resources Limited (Gold Road).
2. Details of this scheme are set out in paragraphs 27 to 51 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you:
  - were a holder of DGO ordinary shares (DGO Shareholder) and received replacement Gold Road shares as a participant in the Scheme that is the subject of this Ruling
  - were an Australian resident as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) or a non-resident (who did not hold their DGO shares in relation to carrying on a business at or through a permanent establishment<sup>1</sup> in Australia)

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<sup>1</sup> The term 'permanent establishment' is as defined in the relevant international tax treaty (if there is one) or, if not, as defined in subsection 6(1) of ITAA 1936.

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- held your DGO shares on capital account for tax purposes; that is, your DGO shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
  - acquired your DGO shares on or after 20 September 1985.
5. This Ruling does not apply to you if you:
- acquired your DGO shares under a DGO employee share or option plan, or
  - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 27 to 51 of this Ruling.

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

### **When this Ruling applies**

6. This Ruling applies from 1 July 2021 to 30 June 2023.

## **Ruling**

### **CGT event A1 happened on the disposal of your DGO Gold Limited shares**

7. CGT event A1 happened when you disposed of each of your DGO shares to Gold Road (section 104-10).
8. If you accepted Gold Road's offer to acquire all of your DGO shares (Offer) before the Offer became unconditional, CGT event A1 happened when the Offer became unconditional on 15 June 2022 (paragraph 104-10(3)(a)).
9. If you accepted the Offer on or after the date when the Offer became unconditional, CGT event A1 happened when you accepted the Offer (paragraph 104-10(3)(a)).
10. If your DGO shares were compulsorily acquired, CGT event A1 happened when those shares were compulsorily acquired by Gold Road (subsection 104-10(6)).
11. The capital proceeds from CGT event A1 happening to each DGO share is the market value of the shares in Gold Road you received in respect of your disposal of your DGO share (subsection 116-20(1)). The market value of the Gold Road shares is worked out as at the time of CGT event A1 happening.

### **Resident shareholders – effect of CGT event A1**

12. You will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of your DGO share exceeded the cost base of that share (subsection 104-10(4)).
13. You will make a capital loss from CGT event A1 happening if the capital proceeds from the disposal of your DGO share were less than the reduced cost base of that share (subsection 104-10(4)).

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***Non-resident shareholders – effect of CGT event A1***

14. If you are a non-resident DGO shareholder, you disregard a capital gain or capital loss you make from CGT event A1 happening when you disposed of your DGO shares to Gold Road (section 855-10).

15. However, you cannot disregard a capital gain or capital loss you make from CGT event A1 happening if your DGO shares are covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident (table item 5 of section 855-15)).

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

16. If you make a capital gain from the disposal of your DGO shares, you may choose to obtain scrip for scrip roll-over (paragraph 124-780(3)(b)).

17. However, you cannot obtain the roll-over if any capital gain you might make from your DGO shares would be disregarded other than because of a roll-over (for example, if the shares were your trading stock) (paragraph 124-795(2)(a)).

***Non-residents – limited entitlement to roll-over***

18. If you were a non-resident just before you stopped owning your DGO shares, you cannot choose scrip for scrip roll-over unless your replacement Gold Road shares were taxable Australian property (as defined in section 855-15) just after you acquired them (subsection 124-795(1)).

***Consequences if you choose scrip for scrip roll-over for your DGO Gold Limited shares******Capital gain is disregarded***

19. If you choose scrip for scrip roll-over, your capital gain from CGT event A1 happening in respect of the disposal of your DGO shares to Gold Road is disregarded (subsection 124-785(1)).

***Cost base and reduced cost base of Gold Road Resources Limited shares***

20. If you choose scrip for scrip roll-over, the first element of the cost base and reduced cost base of the replacement Gold Road share you received is worked out by reasonably attributing to it the cost base and reduced cost base (respectively) of your original DGO share for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and (4)).

21. You can calculate the first element of the cost base and reduced cost base of each replacement Gold Road share by dividing the total cost bases of your DGO shares by the number of replacement Gold Road shares you received.

***Acquisition date of Gold Road Resources Limited shares***

22. For the purposes of determining eligibility to make a discount capital gain, the Gold Road shares acquired in exchange for DGO shares are taken to have been acquired on the date you acquired, for capital gains tax (CGT) purposes, the corresponding DGO shares (table item 2(a) of subsection 115-30(1)).

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**Consequences if you do not choose, or cannot choose, scrip for scrip roll-over for your DGO Gold Limited shares**

***Capital gain is not disregarded***

23. If you do not choose, or cannot choose, scrip for scrip roll-over, you must take into account any capital gain or capital loss from CGT event A1 happening in respect of the disposal of your DGO shares in working out your net capital gain or net capital loss for the income year in which CGT event A1 happened (sections 102-5 and 102-10).

24. If you make a capital gain you can treat the capital gain as a discount capital gain provided that the conditions of Subdivision 115-A are met (section 115-25).

***Cost base and reduced cost base of Gold Road Resources Limited shares***

25. If you do not choose, or cannot choose, scrip for scrip roll-over, the first element of the cost base and reduced cost base of a replacement Gold Road share that you received is equal to the market value of the DGO share you gave in respect of acquiring the Gold Road share (subsections 110-25(2) and 110-55(2)).

26. The market value of the DGO share you gave is to be worked out as at the time you acquired the Gold Road share.

***Acquisition date of Gold Road Resources Limited shares***

27. Under table item 2 of section 109-10, if you acquired your shares in Gold Road:

- by accepting the Offer, the date on which you acquired your shares in Gold Road is the date on which you entered into the contract with Gold Road (which is also the time at which CGT event A1 happens), or
- as a result of the compulsory acquisition of your DGO shares, the date on which you acquired your shares in Gold Road is when the Gold Road shares were issued or allotted to you by Gold Road.

**Scheme**

28. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

**DGO Gold Limited**

29. DGO is an Australian public company that was incorporated on 4 April 2007 and listed on the Australian Securities Exchange (ASX) on 21 December 2007.

30. DGO is a gold exploration and investment company that invests in ASX-listed brownfield explorers and greenfield gold discovery opportunities.

31. DGO had approximately 83,477,112 ordinary shares on issue at the commencement of the Offer Period.

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Status: **legally binding**

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### **Gold Road Resources Limited**

32. Gold Road is an Australian public company that was incorporated on 28 May 2004 and listed on the ASX on 4 July 2006.

33. Gold Road is an Australian gold producer with a 50% interest in a Western Australian gold mine and exploration projects in Western Australia's north-eastern goldfields.

### **The Scheme**

34. On 4 April 2022, DGO and Gold Road announced that they entered into a Bid Implementation Agreement for Gold Road's proposed off-market takeover bid.

35. The takeover offer required that DGO ordinary shares be exchanged for ordinary shares in Gold Road in accordance with the takeover bid.

36. Under the Offer, Australian-resident and non-resident DGO Shareholders with a registered address in New Zealand, Singapore, the United Kingdom or the United States of America would receive 2.16 ordinary Gold Road shares per ordinary share held in DGO and nothing else.

37. DGO Shareholders with an address on the DGO register of members outside of Australia, New Zealand, Singapore, the United Kingdom and the United States of America who accepted the Offer did not receive replacement shares in Gold Road, but instead received the net proceeds of the sale of those Gold Road shares they would otherwise have been entitled to by a designated sale nominee.

38. DGO Shareholders who wanted to accept the Offer could only do so by accepting the Offer in respect of all of the DGO shares they owned.

39. It was a condition of the Offer that Gold Road obtained a Relevant Interest, within the meaning of sections 608 and 609 of the *Corporations Act 2001* (Corporations Act), in at least 80% of all DGO shares on issue (80% Minimum Acceptance Condition).

40. Gold Road could declare the Offer to be free of the 80% Minimum Acceptance Condition if there was a Superior Proposal, as defined in the Bidder's Statement, or if the Bid Implementation Agreement was terminated for any reason.

41. Gold Road could compulsorily acquire all DGO shares under the same terms as the Offer pursuant to Part 6A.1 of the Corporations Act if, at the end of the Offer Period, Gold Road:

- received valid acceptances of at least 75% (by number) of the DGO shares not held by Gold Road (and its associates), and
- acquired a Relevant Interest, within the meaning of sections 608 and 609 of the Corporations Act, in at least 90% (by number) of the DGO shares then on issue.

42. On 7 April 2022, Gold Road lodged its Bidder's Statement with the ASX and the Australian Securities and Investment Commission, and served it on DGO.

43. The Offer was open for acceptance from 8 April 2022 to 9 May 2022 (Offer Period).

44. On 21 April 2022, DGO lodged its Target's Statement with the ASX and Australian Securities and Investments Commission and served it on Gold Road.

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45. On 29 April 2022, Gold Road varied the date when the Offer was to close by lodging a Supplementary Bidder's Statement, extending the Offer Period to 9 June 2022.
46. On 30 May 2022, Gold Road varied the Offer by lodging a Supplementary Bidder's Statement, increasing the Offer to 2.25 Gold Road ordinary shares for every DGO ordinary share and extending the Offer Period to 30 June 2022.
47. On 15 June 2022, Gold Road met the 80% Minimum Acceptance condition and declared the Offer to be free of all remaining defeating conditions.
48. DGO Shareholders who accepted the Offer by 15 June 2022 received 2.25 Gold Road ordinary shares for every DGO ordinary share by 24 June 2022. DGO Shareholders who accepted the Offer from 15 June 2022 to 30 June 2022 received 2.25 Gold Road ordinary shares for every DGO ordinary share within 7 business days of Gold Road receiving their acceptance.
49. On 24 June 2022, Gold Road commenced the compulsory acquisition of the remaining DGO shares. The compulsory acquisition was on the same terms as the Offer, such that under the compulsory acquisition, DGO Shareholders would receive 2.25 Gold Road ordinary shares per ordinary share held in DGO and nothing else.
50. DGO shares were suspended from trading on the ASX from the close of trading on 1 July 2022. DGO was removed from the official list of the ASX on 6 July 2022.
51. On 4 August 2022, Gold Road completed the takeover of DGO and compulsorily acquired all remaining DGO shares. As a result, DGO became a wholly-owned subsidiary of Gold Road.
52. On 4 August 2022, in accordance with the Offer, Gold Road issued Gold Road shares to DGO Shareholders whose DGO shares were compulsorily acquired.

#### **Other matters**

53. This Ruling is made on the following basis:
- the Offer was not carried out in contravention of paragraphs 612(a) to (g) of the Corporations Act, for the purposes of subsection 124-780(2A)
  - there was no 'significant stakeholder' or 'common stakeholder' in DGO within the meaning of those terms in section 124-783
  - paragraph 124-780(3)(f) is satisfied in respect of the sale of DGO shares to Gold Road
  - all parties that participated in the scheme dealt at arm's length for the purposes of subsection 124-780(4)
  - DGO had more than 300 shareholders prior to and until the scheme, for the purposes of subsection 124-783(8)

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- Gold Road did not make a choice under subsection 124-795(4) that DGO shareholders could not obtain the roll-over in Subdivision 124-M for CGT event A1 happening in relation to the exchange of DGO shares, and
- no non-resident DGO Shareholder, on an associate-inclusive basis, held greater than 10% of the shares in DGO throughout a 12-month period that began no earlier than 24 months before they accepted the Offer or had their shares compulsorily acquired by Gold Road, for the purposes of section 855-25.

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**Commissioner of Taxation**

24 August 2022

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 Status: **not legally binding**


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## Appendix – Explanation

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**ⓘ** *This Explanation 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.*

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### **Availability of scrip for scrip roll-over under Subdivision 124-M if a capital gain is made**

54. Scrip for scrip roll-over under Subdivision 124-M 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 of the replacement share.

55. 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 (paragraph 124-780(1)(a))
- the exchange is in consequence of a single arrangement that satisfies subsections 124-780(2) or (2A)
- conditions for the roll-over in subsection 124-780(3) are satisfied
- further conditions, if applicable, are satisfied, and
- exceptions to obtaining scrip for scrip roll-over are not applicable.

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

### **Taxable Australian property**

57. A shareholder may disregard a capital gain or capital loss from a CGT event if they are a non-resident, or the trustee of a non-resident trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

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58. The term 'taxable Australian property' is defined in the table in section 855-15. The following table sets out the 5 categories of CGT assets:

**Table 1: Categories of CGT assets**

Item 1	Taxable Australian real property
Item 2	An indirect Australian real property interest (see section 855-25) not covered by table item 5
Item 3	A CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by table items 1, 2 or 5
Item 4	An option or right to acquire a CGT asset covered by table items 1, 2 or 5
Item 5	A CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

59. Subsection 855-25(1) provides that a membership interest held by an entity in another entity at a time, is an indirect Australian real property interest at that time if the interest satisfies both the:

- non-portfolio interest test in section 960-195 at either time specified in subparagraphs 855-25(1)(a)(i) or (ii), and
- principal asset test in section 855-30 at that time.

60. The non-portfolio interest test requires that a foreign-resident shareholder and their associates together hold 10% or more of the issued shares in an entity at the time the shares are disposed or for at least 12 months during the 24 months prior to disposal of the shares.

61. The principal asset test requires that the sum of the market values of the entity's assets that are taxable Australian real property exceeds the sum of the market values of the entity's assets that are not taxable Australian real property.

62. No non-resident shareholder, on an associate-inclusive basis, held greater than 10% of the shares in DGO throughout a 12-month period that began no earlier than 24 months before they accepted the Offer or had their shares compulsorily acquired by Gold Road, for the purposes of section 855-25.

63. Accordingly, the non-portfolio interest test will not be satisfied and the membership interest is not an indirect Australian real property interest. Non-resident shareholders are able to disregard any capital gain they make on the disposal of their DGO shares, unless their DGO shares are covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident (table item 5 of section 855-15)).

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## References

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### *Legislative references:*

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- ITAA 1997 102-5
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- ITAA 1997 109-10
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- ITAA 1997 104-165(3)
- ITAA 1997 110-25(2)
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- ITAA 1997 116-20(1)
- ITAA 1997 115-30(1)
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- Corporations Act 2001 612(g)

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NO: 1-TM5MSBM  
 ISSN: 2205-5517  
 BSL: PGI  
 ATOLaw topic: Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 - disposal of a CGT asset  
 Income tax ~~ Capital gains tax ~~ Rollovers ~~ Scrip for scrip - Subdivision 124-M

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