



CR 2005/46 - Income tax: scrip for scrip roll-over: acquisition of Tab Limited shares by Tabcorp Investments No. 4 Pty Ltd

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Class Ruling

Income tax: scrip for scrip roll-over: acquisition of Tab Limited shares by Tabcorp Investments No. 4 Pty Ltd

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Preamble

The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are the following provisions of the *Income Tax Assessment Act 1997* (ITAA 1997):

- section 104-10;
- section 116-20; and
- Subdivision 124-M.

Class of persons

3. The class of persons to which this Ruling applies are the shareholders in Tab Limited who:

- (a) held their Tab Limited shares on capital account;
- (b) accepted the offer made by Tabcorp Investments No. 4 Pty Ltd to acquire their Tab Limited shares or whose shares were compulsorily acquired under the compulsory acquisition process set out in Parts 6A.1 and 6A.3 of the *Corporations Act 2001* (Corporations Act);
- (c) were 'residents of Australia' within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and

- (d) were not 'significant stakeholders' within the meaning of that expression in section 124-783 of the ITAA 1997.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 17.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Class Ruling applies to the year ended 30 June 2005.

Arrangement

9. The arrangement that is the subject of this Ruling is described below. The description is based on, and includes, the following documents:
- (a) Class Ruling application dated 31 January 2005 from Allens Arthur Robinson requesting the Australian Taxation Office to make a class ruling in relation to the scrip for scrip roll-over provisions as they apply to the acquisition of Tab Limited by Tabcorp Investments No. 4 Pty Ltd;

- (b) Bidder's Statement lodged with the Australian Securities and Investment Commission (ASIC) dated 2 April 2004;
- (c) Supplementary Bidder's Statement lodged with the ASIC dated 4 May 2004;
- (d) Second Supplementary Bidder's Statement lodged with the ASIC dated 3 June 2004; and
- (e) Notice of variation – Extension of offer period lodged with the ASIC dated 30 July 2004.

Details of the offer

10. On 23 February 2004, Tabcorp Holdings Ltd (Tabcorp Holdings) on behalf of its wholly-owned subsidiary Tabcorp Investments No. 4 Pty Ltd (Tabcorp Investments) announced an offer to acquire all of the fully-paid ordinary shares in Tab Limited (Tab) under an off-market takeover bid. Both Tabcorp Holdings and Tab had more than 300 members just before the announcement and are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936.

11. The Bidder's Statement dated 2 April 2004 offered \$2.00 cash and between 0.20 and 0.22 fully paid ordinary shares in Tabcorp Holdings for each Tab share. The offer could be accepted by a Tab shareholder making a valid acceptance that was received by Tabcorp Investments before the close of the offer, which, following certain extensions, occurred on 13 August 2004.

12. The offer was subject to a number of conditions. The last of the conditions to be satisfied was a condition precedent to formation of a contract of sale (being the condition set out in section 10.7(b)(ii) of the Bidder's Statement). This condition was satisfied on 5 July 2004.

13. The actual number of Tabcorp Holdings shares to be provided to each Tab shareholder was dependent upon Tabcorp Holdings' share price over a specified pricing period of 10 trading days. In this regard, Tabcorp Holdings announced on 20 July 2004 that the share component of the offer consideration would be 0.20 of a Tabcorp Holdings share for each Tab share.

14. The second supplementary Bidder's Statement dated 3 June 2004 provided that the cash component of the offer consideration would be increased to \$2.10 per Tab share if, at or before the end of the offer period, Tabcorp Holdings obtained a relevant interest (as defined in the Corporations Act) in at least 90% of the Tab shares. On 27 July 2004, Tabcorp Holdings announced that it had acquired a relevant interest in more than 90% of the Tab shares.

Foreign shareholders

15. Tab shareholders resident in countries other than Australia, New Zealand and the United States of America were not entitled to receive Tabcorp Holdings shares as consideration for the disposal of their Tab shares. The Tabcorp Holdings shares that would otherwise have been issued to them were instead issued to a nominee approved by the ASIC. The nominee sold those Tabcorp Holdings shares on the Australian Stock Exchange (ASX). The net sale proceeds were remitted to the relevant foreign shareholders.

Share sale facility

16. Tabcorp Holdings established a share sale facility pursuant to which certain Tab shareholders were able to sell up to 200 of the Tabcorp Holdings shares they have received as part of the consideration for the sale of their Tab shares to Tabcorp Investments. Participation in the share sale facility was voluntary for eligible Tab shareholders. The share sale facility is not part of the arrangement that is the subject of this Ruling.

Compulsory acquisition

17. Shares owned by Tab shareholders who did not accept the offer made by Tabcorp Investments were compulsorily acquired on 20 September 2004. Tab shareholders whose Tab shares were compulsorily acquired were entitled to receive the same consideration as those Tab shareholders who accepted the offer.

Ruling

18. CGT event A1 in section 104-10 of the ITAA 1997 happened as a result of a Tab shareholder disposing of a Tab share to Tabcorp Investments under the arrangement described in this Ruling.

19. The event happened at the time the shareholder entered into the contract to dispose of the share or when it was compulsorily acquired: subsection 104-10(3) of the ITAA 1997.

20. A shareholder will make a capital gain from CGT event A1 happening if the capital proceeds for a Tab share exceed its cost base. The shareholder will make a capital loss if those capital proceeds are less than the share's reduced cost base.

21. The capital proceeds for each share are \$2.10 plus the market value of 0.2 of a Tabcorp share at the time the shareholder entered into the contract to dispose of their Tab share: section 116-20 of the ITAA 1997.

22. A shareholder who made a capital gain from the disposal of a Tab share can choose a roll-over under Subdivision 124-M of the ITAA 1997 if any capital gain that could be made upon a future CGT event happening in relation to a replacement share in Tabcorp Holdings would not be disregarded (except because of a roll-over).

23. If a shareholder chooses roll-over, a capital gain from a Tab share is disregarded to the extent that the shareholder received a Tabcorp Holdings share. The capital gain is not disregarded to the extent that the shareholder received cash for the disposal of their Tab share: section 124-790 of the ITAA 1997.

24. If a shareholder chooses roll-over, the cost base of a replacement Tabcorp Holdings share is worked out by reasonably attributing to it the cost base of any Tab share for which it was exchanged and for which a partial roll-over was obtained. However, the cost base of a Tab share must first be reduced by so much of it that is taken into account in working out the shareholder's capital gain relating to the cash proceeds: subsections 124-785(2) and (3) of the ITAA 1997.

Explanation

CGT event A1 and capital proceeds

25. CGT event A1 in section 104-10 of the ITAA 1997 happens if there is a change in the ownership of an asset from one entity to another. The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs.

26. The time when CGT event A1 happens determines the income year in which any capital gain or loss is made.

27. Taxation Determination TD 2002/4 states:

... if an offer from a 'bidder' company for shares in a 'target' company is one which is subject to a condition precedent to the formation of a contract, the contract does not come into existence until the condition is satisfied.

28. In this case, the offer made to Tab shareholders was subject to a condition precedent to formation which was satisfied on 5 July 2004. Consequently, CGT event A1 will happen to all Tab shareholders in the 2004-05 income year.

29. Those Tab shareholders whose acceptance of the offer was received by Tabcorp Investments before 5 July 2004 are taken to have disposed of their shares when the condition was satisfied. Tab shareholders who accepted the offer after that time are taken to have disposed of their Tab shares when their acceptance was received by Tabcorp Investments.

30. Tab shareholders whose Tab shares were compulsorily acquired are considered to have disposed of their shares on 20 September 2004 when the compulsory acquisition was completed in accordance with the Corporations Act.

31. The time of CGT event A1 happening is also relevant to determining the capital proceeds received for each Tab share. Section 116-20 of the ITAA 1997 provides that capital proceeds from a CGT event are the money and the market value of any property received (worked out at the time of the event happening).

32. Tab shareholders must therefore determine the market value of a Tabcorp Holdings share at the time they disposed of their Tab shares (see paragraphs 29 and 30). To facilitate practical compliance, the Commissioner will accept the closing price of a Tabcorp Holdings share on the ASX on the date that the shareholder disposed of their Tab share as that market value provided that the closing price does not significantly vary from the trading values in such shares over the course of the day. Where the closing price does vary significantly the Commissioner will accept the average trade-weighted price for the shares over the day as representing that market value.

Availability of scrip for scrip roll-over

33. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives in exchange a replacement share.

34. The capital gain is disregarded completely if the only capital proceeds the shareholder receives is a replacement share. If the shareholder receives some other form of capital proceeds, the capital gain is disregarded in part. The roll-over also provides that the cost base and reduced cost base of the replacement shares is based on the cost base and reduced cost base of the original shares at the time of the roll-over.

35. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, the eligibility of a shareholder to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the circumstances of the arrangement that is the subject of this Ruling are outlined below.

36. Subparagraph 124-780(1)(a)(i) of the ITAA 1997 requires an entity (Tab shareholder) to exchange a share in a company for a share in another company.

37. This requirement is satisfied because part of the consideration Tab shareholders received for each Tab share was an interest in a Tabcorp Holdings share (although only a partial roll-over will be available – see paragraphs 63 to 66).

38. Paragraphs 124-780(1)(b) and 124-780(2)(a) of the ITAA 1997 require that shares in an entity (Tab – the original entity) be exchanged in consequence of a single arrangement that results in another entity (Tabcorp Investments – the acquiring entity) becoming the owner of 80% or more of the voting shares in the original entity.

39. The only issued shares in Tab were ordinary shares. These shares satisfied the definition of ‘voting shares’ in subsection 995-1(1) of the ITAA 1997.

40. In the context of the scrip for scrip roll-over provisions the offer to Tab shareholders is a ‘single arrangement’. Tabcorp Investments acquired 100% of the Tab ordinary shares in consequence of that arrangement. The Explanatory Memorandum to the *New Business Tax System (Capital Gains Tax) Bill 1999* that introduced section 124-780 of the ITAA 1997 states that this test will be satisfied if the share acquisition has a causal connection with the arrangement. It indicates that this connection will exist if, after a takeover offer expires, shares are acquired under powers of compulsory acquisition in the Corporations Act.

41. Accordingly this requirement is satisfied in respect of all Tab shares disposed of to Tabcorp Investments including those that were compulsorily acquired by it.

42. Paragraphs 124-780(1)(b) and 124-780(2)(b) of the ITAA 1997 require that the exchange of shares be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (Tab) could participate.

43. This requirement is satisfied as the takeover offer was made to all Tab shareholders.

44. Paragraphs 124-780(1)(b) and 124-780(2)(c) of the ITAA 1997 require that participation in the arrangement be on substantially the same terms for all the owners of interests of a particular type in the original entity.

45. Note 2 to subsection 124-780(2) of the ITAA 1997 states that participation will be on substantially the same terms even if, for example, matters such as those referred to in subsections 619(2) and (3) of the Corporations Act affect the capital proceeds that each participant can receive. Subsection 619(3) deals with nominee arrangements for foreign shareholders.

46. Therefore, although the Tabcorp Holdings shares to which some foreign shareholders were otherwise entitled were issued to a nominee for sale, those shareholders were still able to participate in the arrangement on substantially the same terms as the other shareholders.

47. The share sale facility (which was limited to Australian shareholders) although available at the same time as the arrangement that is the subject of this Ruling was separate from it and does not prevent the arrangement being on substantially the same terms for all shareholders.

48. Paragraphs 124-780(1)(c) and 124-780(3)(a) of the ITAA 1997 require the original interest holder (a Tab shareholder) to have acquired its original interest (a Tab share) on or after 20 September 1985.

49. This requirement is satisfied because all of the Tab shares were acquired by Tab shareholders after June 1998. Prior to that time, Tab was owned by the NSW Government.

50. Paragraphs 124-780(1)(c) and 124-780(3)(b) of the ITAA 1997 require that, apart from the roll-over, the original interest holder (a Tab shareholder) would make a capital gain from a CGT event happening in relation to the original interest (a Tab share).

51. Whether a Tab shareholder would, apart from the roll-over, make a capital gain from the disposal of any of its shares to Tabcorp Investments is a question of fact that is dependent on the specific circumstances of each shareholder – in particular, the cost base of each Tab share and the value of the capital proceeds received. Paragraph 22 limits this Ruling in this regard.

52. Paragraphs 124-780(1)(c) and 124-780(3)(c) of the ITAA 1997 require that the replacement interest is in the acquiring entity (Tabcorp Investments) or the ultimate holding company of the wholly-owned group of which it is a member (Tabcorp Holdings).

53. This requirement will be satisfied as the replacement shares received by the Tab shareholders were in Tabcorp Holdings which is the ultimate holding company of the wholly-owned group of which Tabcorp Investments is a member.

54. Paragraphs 124-780(1)(c) and 124-780(3)(d) of the ITAA 1997 require that the original interest holder (Tab shareholder) choose to obtain the roll-over relief.

55. Paragraph 22 limits this Ruling to shares in respect of which roll-over is chosen.

56. Additional requirements in subsection 124-780(5) of the ITAA 1997 must be satisfied if the original interest holder (a Tab shareholder) and an acquiring entity (Tabcorp Investments) did not deal with each other at arm's length and:

- (a) neither the original entity (Tab) nor the replacement entity (Tabcorp Holdings) had at least 300 members just before the arrangement started: paragraph 124-780(4)(a) of the ITAA 1997; or
- (b) the original interest holder (a Tab shareholder), the original entity (Tab) and the acquiring entity (Tabcorp Investments) were all members of the same linked group just before the arrangement started: paragraph 124-780(4)(b) of the ITAA 1997.

57. Paragraph 124-780(4)(a) of the ITAA 1997 will not apply because both Tab and Tabcorp Holdings had more than 300 members just before the arrangement started. Section 124-810 of the ITAA 1997 will not apply to either Tab or Tabcorp Holdings as their ownership was not concentrated in the manner contemplated by that section.

58. Paragraph 124-780(4)(b) of the ITAA 1997 will not apply because Tab and Tabcorp Investments were not members of the same linked group (within the meaning in section 170-260 of the ITAA 1997) just before the arrangement started.

Exceptions to obtaining scrip for scrip roll-over

59. Paragraph 124-795(2)(a) of the ITAA 1997 provides that the roll-over is not available if any capital gain the original interest holder (a Tab shareholder) might make from their replacement interest (a Tabcorp Holdings share) would be disregarded.

60. This exception may apply, if for example, the shareholder holds their Tabcorp Holdings shares as trading stock. Paragraph 22 limits this Ruling in this regard.

61. Paragraph 124-795(2)(b) of the ITAA 1997 provides that the roll-over is not available if the original interest holder (a Tab shareholder) and the acquiring entity (Tabcorp Investments) are members of the same wholly-owned group just before the original interest holder stops owning their original interest (a Tab share), and the acquiring entity is a foreign resident.

62. Tabcorp Investments is an Australian resident. Therefore this exception does not apply.

Partial roll-over

63. Subsection 124-790(1) of the ITAA 1997 provides that an original interest holder (a Tab shareholder) will obtain only a partial roll-over if its capital proceeds include something other than a replacement interest (a Tabcorp Holdings share).

64. Under the arrangement, Tab shareholders received \$2.10 and 0.20 of a Tabcorp Holdings share for each Tab share disposed of. Roll-over will not be available to the extent of the cash (ineligible proceeds) received.

65. In calculating the capital gain attributable to their ineligible proceeds, a Tab shareholder deducts from those proceeds a reasonable portion of the cost base of their Tab share (just before its disposal to Tabcorp Investments): subsection 124-790(2) of the ITAA 1997.

66. In making a reasonable apportionment of the cost base of a Tab share, it would be appropriate for a shareholder to make an apportionment having regard to the value of the ineligible proceeds and the Tabcorp Holdings shares on the date that CGT event A1 happened to their Tab share (see paragraphs 29 and 30).

Cost base of Tabcorp Holdings share

67. The first element of the cost base and reduced cost base of a Tabcorp Holdings share is worked out having regard to that portion of the cost base of a Tab share that was not taken into account in working out the capital gain in respect of the ineligible proceeds: subsections 124-785(2), (3) and (4) of the ITAA 1997.

Example

68. The following example provides guidance for Tab shareholders to work out the capital gains consequences if they choose roll-over in respect of the disposal of their shares to Tabcorp Investments.

69. The example shows how to work out:

- a capital gain attributable to the ineligible proceeds they received; and
- the first element of the cost base of their replacement Tabcorp Holdings shares.

70. Where a Tab shareholder works out the first element of the cost base of their Tabcorp Holdings shares in accordance with the approach adopted in the example, the Tax Office will accept that this represents a reasonable attribution of the cost base of each Tab share. However, it is recognised that this approach may not give the only reasonable attribution.

71. *Serena acquired 1,000 shares in Tab for \$3,200 in August 2002. On 15 July 2004 she accepted the offer from Tabcorp Investments. Serena received \$2,100 cash ($\$2.10 \times 1,000$) and 200 Tabcorp Holdings shares. The market value of a Tabcorp Holdings share on 15 July 2004 (the date Serena accepted the offer) was \$14.01.*

Capital gain attributable to ineligible proceeds

72. Serena chooses for roll-over to apply to the extent she is able. Serena works out the capital gain from the ineligible proceeds using the formula:

$$\text{Ineligible proceeds} = \$2,100$$

$$\begin{aligned}\text{Total proceeds} &= \$2,100 + 200 \times \$14.01 \\ &= \$4,902\end{aligned}$$

Capital gain = Ineligible capital proceeds – cost base of ineligible part

$$\begin{aligned}\text{Cost base of} &= \text{Cost base of} \times \frac{\text{Ineligible proceeds}}{\text{Total proceeds}} \\ \text{ineligible part} &\text{Tab shares} \\ &= \$3,200 \times 2,100 / \$4,902 \\ &= \$1,370.86\end{aligned}$$

$$\begin{aligned}\text{Capital gain} &= \$2,100 - \$1,370.86 \\ &= \$729.14\end{aligned}$$

Cost base of Tabcorp Holdings shares

73. The first element of the cost base of Serena's 200 Tabcorp Holdings shares is determined by reference to the cost base of her Tab shares that was not taken into account in working out the capital gain Serena made in respect of the ineligible proceeds. The cost base of Serena's shares will therefore be:

$$\text{Cost base of Tab shares} = \$3,200$$

$$\begin{aligned}\text{Cost base attributable to ineligible proceeds} &= \$1,370.86 \\ &(\text{taken into account above})\end{aligned}$$

$$\text{First element of cost base of each Tabcorp Holdings share} = \$9.14$$

$$\$1,829.14 \text{ (ie } \$3,200 - \$1,370.86) / 200$$

74. The first element of the reduced cost base of Serena's shares will be calculated in a similar manner.

Detailed contents list

75. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

15 June 2005

Previous draft:

Not previously issued as a draft

- share
- shareholder
- takeover

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16;
TD 2002/4

*Legislative references:**Subject references:*

- arrangement
- capital proceeds
- CGT event
- company
- cost base
- interests
- ordinary share
- original interest
- replacement interest
- resident
- roll-over
- roll-over relief
- scrip
- scrip for scrip

- ITAA 1936 6(1)
- ITAA 1997 104-10
- ITAA 1997 104-10(3)
- ITAA 1997 116-20
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780
- ITAA 1997 124-780(1)(a)(i)
- ITAA 1997 124-780(1)(b)
- ITAA 1997 124-780(1)(c)
- ITAA 1997 124-780(2)
- ITAA 1997 124-780(2)(a)
- ITAA 1997 124-780(2)(b)
- ITAA 1997 124-780(2)(c)
- ITAA 1997 124-780(3)(a)
- ITAA 1997 124-780(3)(b)
- ITAA 1997 124-780(3)(c)
- ITAA 1997 124-780(3)(d)

- ITAA 1997 124-780(4)(a)
- ITAA 1997 124-780(4)(b)
- ITAA 1997 124-780(5)
- ITAA 1997 124-783
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(3)
- ITAA 1997 124-785(4)
- ITAA 1997 124-790
- ITAA 1997 124-790(1)
- ITAA 1997 124-790(2)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-795(2)(b)
- ITAA 1997 124-810
- ITAA 1997 170-260

- ITAA 1997 995-1(1)
- TAA 1953 Pt IVAAA
- Copyright Act 1968
- Corporations Act 2001 619(2)
- Corporations Act 2001 619(3)
- Corporations Act 2001 Pt 6A.1
- Corporations Act 2001 Pt 6A.3

Other references:

- Explanatory Memorandum to the New Business Tax System (Capital Gains Tax) Bill 1999

ATO references

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