


CR 2009/39 - Income tax: scrip for scrip: acquisition of Ingena Group Limited by UXC Professional Solutions Pty Limited

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Class Ruling

Income tax: scrip for scrip: acquisition of Ingena Group Limited by UXC Professional Solutions Pty Limited

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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.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 98 of the ITAA 1936;
- section 99A of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;

- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 115-10 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 115-220 of the ITAA 1997;
- section 115-222 of the ITAA 1997;
- section 115-225 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-40 of the ITAA 1997;
- section 124-780 of the ITAA 1997;
- section 124-785 of the ITAA 1997;
- section 124-795 of the ITAA 1997;
- section 130-20 of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997; and
- Division 974 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies consists of entities who were ordinary shareholders of Ingena Group Limited (IGL) at the time of the scheme, and who:

- (a) held their IGL shares on capital account at the time of this scheme;
- (b) accepted the offer made by UXC Professional Solutions Pty Limited (UXC Professional Solutions) to acquire their IGL shares or had their shares compulsorily acquired pursuant to Part 6A.1 of the *Corporations Act 2001*; and
- (c) were 'residents of Australia' within the meaning of that expression in subsection 6(1) of the ITAA 1936.

Qualifications

4. 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 30 of this Ruling.
5. 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.
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Date of effect

7. This Ruling applies from 29 October 2008 to 30 June 2011. The Ruling continues to apply after 30 June 2011 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, including:
- Class Ruling application dated 28 November 2008;
 - UXC Professional Solutions' bidder's statement dated 12 November 2008; and
 - correspondence with the applicant between 3 December 2008 and 5 May 2009.

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

Overview

9. The scheme that is the subject of this Ruling is the acquisition by UXC Professional Solutions of 100% of the issued shares in IGL.

Relevant entities

IGL

10. IGL was, at the time of the scheme, an Australian resident company listed on the Australian Securities Exchange (ASX). IGL provides a broad range of management and ICT consulting services to large Australian enterprises and governments.

11. IGL had, at the time of the scheme, approximately 58.9 million ordinary shares on issue. There were no other types of shares on issue in IGL at the time of this scheme.

UXC

12. UXC Limited (UXC) is an Australian resident company listed on the ASX.

13. UXC has three divisions:

- (i) Business Solutions Group: providing ICT solutions in consulting, business applications and infrastructure;
- (ii) Field Solutions Group: providing outsourced infrastructure and environmental solutions to utilities and governments; and
- (iii) Intellectual Property Ventures Group: engaged in the identification, development and commercialisation of intellectual property.

UXC Professional Solutions

14. UXC Professional Solutions is a wholly owned subsidiary of UXC and is the holding company for two of UXC's existing businesses.

The takeover

15. On 29 October 2008 UXC announced (on behalf of its wholly-owned subsidiary, UXC Professional Solutions), its intention to make an offer to acquire all of the shares in IGL by way of an off-market takeover bid.

16. UXC Professional Solutions posted its Bidder's Statement to the IGL shareholders on 12 November 2008 offering to provide one UXC-Ingena Performance Share (UXC-IPS) in exchange for two IGL shares (the Offer).

17. The Offer was subject to a number of conditions including, a 'Minimum Acceptance condition'. This condition required that before the end of the offer period, UXC Professional Solutions must have a relevant interest in more than 90% of the number of IGL shares then on issue. The Offer stipulated that these conditions were 'conditions subsequent' such that the non-satisfaction of any such condition would not prevent the formation of a contract for the disposal of IGL shares.

18. Under section 661A of the Corporations Act, UXC Professional Solutions was entitled to compulsorily acquire any IGL shares for which it had not received acceptances on the same terms as the Offer if during, or at the end of, the Offer period UXC Professional Solutions (together with its associates) had a relevant interest in at least 90% by number of the IGL shares.

19. On 11 December 2008, UXC lodged a formal notice of variation with the Australian Securities and Investments Commission extending the Offer period until 29 December 2008.

20. On 30 December 2008, UXC announced acceptances in relation to the Offer totalling 94.45% of the outstanding shares of IGL. UXC further announced that UXC Professional Solutions would compulsorily acquire the 5.55% of shares for which acceptances had not been received.

21. On 4 February 2009 UXC announced that UXC Professional Solutions had completed the compulsory acquisition of the remaining 5.55% of shares in IGL under Part 6A.1 of the Corporations Act.

22. Therefore, in accordance with the terms of the Offer, participating IGL shareholders received one UXC-IPS in exchange for every two IGL shares. Fractional entitlements to UXC-IPs were rounded down to the nearest whole number.

Terms of the UXC-IPS

23. Each UXC-IPS is a share in the capital of UXC. The terms of the UXC-IPs are set out in UXC's Constitution and the Terms of Issue in Schedule 1 of the Bidder's Statement. Subject to the Terms of Issue, each UXC-IPS confers rights that are the same as those conferred by a UXC ordinary share (UXC share) with respect to:

- attendance and voting at general meetings;
- dividends;
- surplus assets and profits on a winding up; and
- repayment of capital.

24. Further, each UXC-IPS confers on its holder a contingent entitlement to further allotments of UXC shares on the following terms:

- (a) if the net profit after tax (NPAT) for IGL on a stand-alone basis is greater than \$2.99 million for the period from 1 January 2009 to 30 June 2009, an allotment of 0.25 UXC shares for each UXC-IPS held (2009 Performance Issue); and
- (b) if the NPAT for IGL on a stand-alone basis is greater than \$6.85 million for the period from 1 July 2009 to 30 June 2010, an allotment of 0.15 UXC shares for each UXC-IPS held (2010 Performance Issue).

25. On 30 September 2010, each UXC-IPS will automatically be reclassified into one ordinary share in UXC. However, holders may seek earlier reclassification of all or some of their UXC-IPSs by notifying UXC. If a UXC-IPS is reclassified into a UXC share prior to the relevant record date for the 2009 Performance Issue or the 2010 Performance Issue, the holder will not be entitled to receive any UXC shares under the relevant Performance Issue set out in paragraph 24 of this Ruling.

26. The holder of a UXC-IPS may transfer such shares by a proper transfer effected in accordance with the ASX Settlement and Transfer Corporation Pty Limited Settlement Rules. However, the UXC-IPS will not be listed for trading on the ASX.

Foreign shareholders

27. Under the Offer, the UXC-IPSs to which foreign IGL shareholders would otherwise have been entitled were issued to a nominee for sale in accordance with subsection 619(3) of the Corporations Act. The proceeds were distributed to those foreign IGL shareholders, net of expenses.

Other matters

28. There were no 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of those expressions in section 124-783.

29. For the purposes of subsections 124-780(4) and 124-780(5), no original interest holder in IGL was, just before the relevant arrangement started, a member of a linked group which included IGL and UXC.

30. All of the ordinary shares in IGL were acquired on or after 20 September 1985.

Ruling

Acquisition of UXC-IPs by IGL Shareholders

CGT event A1 happened on the disposal of IGL shares

31. CGT event A1 happened as a result of the disposal by an IGL shareholder of each IGL share to UXC Professional Solutions (subsections 104-10(1) and 104-10(2)).

32. Where an IGL shareholder accepted the Offer, CGT event A1 happened on the day the IGL shareholder entered into the contract to dispose of their IGL shares to UXC Professional Solutions (paragraph 104-10(3)(a)).

33. Where an IGL shareholder did not accept the Offer, and had their shares compulsorily acquired by UXC Professional Solutions, CGT event A1 happened when UXC Professional Solutions became the owner of the relevant IGL shares (subsection 104-10(6)).

Capital gain or capital loss

34. An IGL shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their IGL share exceeded its cost base. The capital gain is the amount of the excess (subsection 104-10(4)). An IGL shareholder made a capital loss if the capital proceeds were less than the reduced cost base of the IGL share. The capital loss is the amount of the difference (subsection 104-10(4)).

Capital proceeds

35. The capital proceeds for the disposal of each IGL share is the sum of that part of the total market value of UXC-IPs received (worked out as at the time that CGT event A1 happened to the IGL shareholder) as is reasonably attributable to the disposal of the IGL share (subsections 116-20(1) and 116-40(1)).

36. In working out the market value of the part of a UXC-IP that is reasonably attributable to the disposal of each IGL share the Commissioner accepts the following formula:

$$\text{Market Value of UXC-IPs} \quad \times \quad \frac{\text{Total number of UXC-IPs received}}{\text{Total number of IGL shares exchanged}}$$

37. The Commissioner will accept that the market value of a UXC-IP received equals 1.312 times:

- (a) the closing price on the ASX of a UXC share on the date that CGT event A1 happened to the IGL shareholder, provided that the closing price does not vary by more than 5% from either the minimum or maximum traded price over the course of the day; or

- (b) if the closing price does vary by more than 5%, the volume-weighted average price (VWAP) for the UXC shares over that day.

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

38. Subject to the qualification in paragraph 39 of this Ruling, an IGL shareholder who made a capital gain from the disposal of their IGL shares to UXC Professional Solutions is eligible to choose scrip for scrip roll-over (section 124-780 and subsection 124-785(1)).

39. Scrip for scrip roll-over cannot be chosen if any capital gain an IGL shareholder might make from the replacement UXC-IPS would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

40. The only capital proceeds received by an IGL shareholder for their IGL shares were the UXC-IPSs. Therefore, if an IGL shareholder chooses scrip for scrip roll-over, the capital gain they will make upon the disposal of an IGL share to UXC Professional Solutions is disregarded completely (subsection 124-785(1)).

Discount capital gain

41. IGL shareholders who received UXC-IPSs and made capital gains that are not disregarded (that is, capital gains for which scrip for scrip roll-over is not chosen) are eligible to treat any resulting capital gain as a 'discount capital gain' provided that:

- the IGL shareholder is an individual, complying superannuation entity or, subject to paragraph 42 of this Ruling, a trust (section 115-10);
- the capital gain has been calculated using a cost base that has been calculated without reference to indexation at any time; and
- the IGL shares had been held for at least 12 months before the CGT event.

42. Where the IGL shareholder is a trust, sections 115-220, 115-222 and 115-225 of the ITAA 1997 apply where the trustee is assessed under paragraph 98(3)(b) of the ITAA 1936, subsection 98(4) of the ITAA 1936 or section 99A of the ITAA 1936.

Cost base of UXC-IPS

Scrip for scrip roll-over is not chosen

43. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each UXC-IPS is equal to the market value of the IGL shares (and parts thereof) given in exchange for the UXC-IPS (subsections 110-25(2) and 110-55(2)).

Scrip for scrip roll-over is chosen

44. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each new UXC-IPS is equal to the sum of the cost bases of the IGL shares (and parts thereof) exchanged for the relevant UXC-IPS (subsections 124-785(2) and 124-785(4)).

Acquisition date of UXC-IPS

45. IGL shareholders acquired their UXC-IPS:

- if they accepted the Offer to dispose of their IGL shares, on the date when they entered into the contract; or
- if their IGL shares were acquired by UXC Professional Solutions by way of compulsory acquisition, when they became the owner of the UXC-IPS (item 2 in the table in section 109-10).

46. However, for the purposes of applying the CGT discount to any later disposal of their UXC-IPS, IGL shareholders who choose scrip for scrip roll-over under the Offer are taken to have acquired their UXC-IPS when they acquired the corresponding IGL shares (item 2 in the table in subsection 115-30(1)).

UXC-IPS dividends

47. The UXC-IPSs will be equity interests for the purposes of Division 974 of the ITAA 1997. Any distribution paid in respect of the UXC-IPSs will be a dividend within the meaning of subsection 6(1) of the ITAA 1936. The distribution will be a frankable distribution pursuant to section 202-40 of the ITAA 1997, to the extent that the dividends are sourced from current and retained earnings. The UXC-IPS dividends will be capable of being franked in accordance with section 202-5 of the ITAA 1997.

Allotment of UXC shares under the 2009 and 2010 Performance Issues***Section 6-5***

48. The value of any UXC shares issued pursuant to either the 2009 or 2010 Performance Issue will not be assessable as ordinary income under subsection 6-5(1).

Subsection 6(1)

49. The value of any UXC shares issued pursuant to either the 2009 or 2010 Performance Issue will not be a dividend as defined in subsection 6(1) of the ITAA 1936, and will not be included in a shareholder's assessable income under subsection 44(1) of the ITAA 1936.

Section 45B

50. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the provision of any UXC shares issued pursuant to either the 2009 or 2010 Performance Issue, and no part of the capital benefit provided will be taken to be a dividend for income tax purposes.

Capital gains tax

51. No CGT event will happen as a result of the allotment of ordinary shares in UXC pursuant to either the 2009 or 2010 Performance Issue. Any UXC shares allotted in respect of the UXC-IPs will be taken to have been acquired on the date when the UXC-IPs were allotted. The first element of the cost base (and reduced cost base) of the UXC-IP is to be apportioned in a reasonable way over both the UXC-IPs and the UXC shares (item 1 in the table in subsection 130-20(3)).

Reclassification of UXC-IPs into UXC shares

52. No CGT event will happen as a result of the reclassification of each UXC-IP into a UXC share. It follows that the cost base (and reduced cost base) of each UXC share is equal to the cost base of the corresponding UXC-IP (and reduced cost base) prior to the reclassification. Further, each UXC share will be taken to have been acquired when the corresponding UXC-IP was acquired.

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.*

Acquisition of UXC-IPs by IGL Shareholders

Scrip for scrip roll-over

53. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

54. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It 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 a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

55. Subdivision 124-M contains a number of conditions that go to whether scrip for scrip roll-over may be available under an arrangement. The main conditions and exceptions that are relevant to the circumstances of the takeover of IGL are:

- (a) shares are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

56. Under the Offer all of the conditions for roll-over under Subdivision 124-M are satisfied. No further explanation of the application of those tax laws beyond that contained in the Ruling part of this document is necessary.

Allotment of UXC shares under the 2009 and 2010 Performance Issues

Section 6-5

57. An issue of additional shares to a UXC-IPS shareholder would be a bonus issue within the meaning of paragraph 254A(1)(a) of the Corporations Act, that is, an issue of shares for which no consideration is payable. The issue of additional shares would result in a re-expression of a UXC-IPS shareholder's interest in the share capital of UXC. Accordingly, the value of any additional shares issued would not be assessable as ordinary income under subsection 6-5(1) of the ITAA 1997 (*Federal Commissioner of Taxation v. McNeil* 229 CLR 656; 2007 ATC 4223; 64 ATR 431).

Subsection 6(1)

58. Subsection 6(1) of the ITAA 1936 defines a dividend to include any distribution made by a company to any of its shareholders, whether in money or other property and any amount credited by a company to any of its shareholders as shareholders.

59. Although any additional shares issued will constitute 'property' in the hands of a UXC-IPS shareholder, the issue will not be a disposition of property in the ordinary meaning of that expression (*Ord Forrest Pty Ltd v. Commissioner of Taxation* (1974) 130 CLR 124). As there is no disposition, there cannot be a distribution of property by UXC.

60. Further, an issue of additional shares will not involve an amount being credited to a UXC-IPS shareholder, or an amount being paid out of profits.

61. Accordingly, the issue of additional shares will not constitute a dividend within the meaning of subsection 6(1) of the ITAA 1936 and the value of any additional shares will not be included in the assessable income of any UXC-IPS shareholder under section 44(1) of the ITAA 1936.

Section 45B

62. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. Broadly this provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

63. Having regard to the relevant circumstances of the scheme (the issue of additional shares to UXC-IPS shareholders) as set out in subsection 45B(8) of the ITAA 1936, it cannot be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose, other than a merely incidental purpose of enabling a taxpayer to obtain a tax benefit.

64. Consequently, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the provision of additional shares to UXC-IPS shareholders.

Capital gains tax

65. No CGT event will happen to a UXC-IPS shareholder if UXC shares are issued to them in accordance with the 2009 or 2010 Performance Issue.
66. Subdivision 130-A applies where a company issues other shares (bonus shares) in relation to existing shares in the company. Subdivision 130-A provides special rules about the time of acquisition and the cost base of bonus shares for capital gains tax purposes.
67. Subdivision 130-A will apply to the issue of UXC shares to UXC-IPS shareholders as a result of the 2009 or 2010 Performance Issue.
68. As the UXC shares are not a dividend nor taken to be a dividend, the first element of the cost base (and reduced cost base) of the UXC-IPs is to be reasonably apportioned over both the UXC-IPs and the UXC shares (item 1 in the table in subsection 130-20(3)).
69. Any UXC shares issued to UXC-IPS shareholders in accordance with the 2009 or 2010 Performance Issue will be taken to have been acquired when their UXC-IPs were acquired (item 1 in the table in subsection 130-20(3)).
70. For the purposes of determining if a capital gain made on any later disposal of their UXC shares is a discount capital gain, IGL shareholders who choose scrip for scrip roll-over under the Offer will therefore be taken to have acquired any UXC shares issued to them as a result of the 2009 or 2010 Performance Issue when they acquired their applicable IGL shares, as this is when they were taken to have acquired their UXC-IPs.

Reclassification of UXC-IPS into UXC shares

71. UXC-IPs are a class of ordinary shares in the share capital of UXC. The reclassification of a UXC-IP into a UXC share involves a variation of the rights that make up a UXC-IP. The UXC-IPs are not cancelled or redeemed on reclassification.
72. The reclassification does not involve the ownership of the UXC-IP ending for the purposes of section 104-25 nor is it a disposal of the UXC-IPs for the purposes of section 104-10. Taxation Ruling TR 94/30, at paragraphs 8 and 9, provides that a variation of rights attaching to shares does not result in a full or part disposal of the share.
73. Accordingly, the reclassification of UXC-IPs into UXC shares will not give rise to a CGT event for the UXC-IP shareholder.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/30; TR 2006/10

Subject references:

- arrangement
- CGT capital proceeds
- CGT event A1 - disposal of a CGT asset
- CGT events
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- CGT roll-over relief
- disposal of shares
- market value cost base
- ordinary share
- schemes of arrangement
- scrip for scrip roll-over
- shareholders

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
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- ITAA 1936 98
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- ITAA 1997 124-785(1)
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- ITAA 1997 Subdiv 130-A
- ITAA 1997 130-20
- ITAA 1997 130-20(3)
- ITAA 1997 202-5
- ITAA 1997 202-40
- ITAA 1997 Div 974
- Corporations Act 2001 254A(1)(a)
- Corporations Act 2001 Pt 6A.1
- Corporations Act 2001 619(3)
- Corporations Act 2001 661A
- TAA 1953
- Copyright Act 1968

Case references:

- Federal Commissioner of Taxation v. McNeil [2007] HCA 5; (2007) 229 CLR 656; 2007 ATC 4223; (2007) 64 ATR 431
- Ord Forrest Pty Ltd v. Federal Commissioner of Taxation (1974) 130 CLR 124

ATO references

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