CR 2014/64 - Income tax: Merger of Life Technologies Corporation, Thermo Fisher Scientific Inc and Polpis Merger Sub Co - Life Technologies Corporation 2009 Equity Incentive Plan

Class Ruling

Income tax: Merger of Life Technologies Corporation, Thermo Fisher Scientific Inc and Polpis Merger Sub Co – Life Technologies Corporation 2009 Equity Incentive Plan

Contents Para

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.

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 Class Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 83A-10(1) of the ITAA 1997
- subsection 83A-110(1) of the ITAA 1997
- subsection 83A-120(3) of the ITAA 1997
- section 83A-125 of the ITAA 1997
- section 104-25 of the ITAA 1997

- section 104-155 of the ITAA 1997
- section 115-5 of the ITAA 1997
- subsection 116-20(2) of the ITAA 1997
- section 116-25 of the ITAA 1997
- section 118-20 of the ITAA 1997
- former subsection 130-80(2) of the ITAA 1997
- former subsection 130-83(3) of the ITAA 1997
- subsection 130-80(1) of the ITAA 1997
- subsection 83A-5(4) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997)
- former section 139CB of the *Income Tax Assessment Act 1936* (ITAA 1936), and
- former Subdivision F of former Division 13A of Part III of the ITAA 1936 (former Division 13A).

Class of entities

3. The class of entities to which this Ruling applies is all persons who:

- are employees of Life Technologies Australia Pty Limited (Life Technologies Australia) who were issued with options or Restricted Stock Units (RSUs) under the Life Technologies Corporation 2009 Equity Incentive Plan effective 30 April 2009
- held those options or RSUs at the time of the merger between Life Technologies Corporation (Life Technologies), Thermo Fisher Scientific Inc (Thermo Fisher) and Polpis Merger Sub Co (Merger Sub) on 3 February 2014, and
- are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936 and are not temporary residents within the meaning of subsection 995-1(1) of the ITAA 1997.

Qualifications

4. The Commissioner makes this 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 29 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 2013. 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. The following documents, or relevant parts of them form part of and are to be read with the description:

- Life Technologies Corporation 2009 Equity Incentive Plan effective 30 April 2009 (the Plan)
- Life Technologies Corporation Notice of Grant of Stock Options (Outside the United States) (Option Notice of Grant)
- Life Technologies Corporation Non statutory Stock Option Agreement (Outside the United States) (Option Agreement)
- Life Technologies Corporation Notice of Grant of Restricted Stock Units (Outside the United States) (RSUs Notice of Grant)
- Life Technologies Corporation Restricted Stock Units Agreement (Outside the United States) (RSUs Agreement), and
- Agreement and Plan of Merger By and Among Life Technologies Corporation, Thermo Fisher Scientific Inc and Polpis Merger Sub Co. dated as of 14 April 2013 (the Merger Agreement).

9. Life Technologies is a US based company that was listed on the NASDAQ. It is a foreign resident for Australian taxation purposes.

10. Life Technologies Australia is a wholly owned Australian incorporated subsidiary of Life Technologies.

11. On 14 April 2013, Life Technologies, Thermo Fisher and Merger Sub entered into the Merger Agreement.

12. On 3 February 2014, pursuant to the Merger Agreement, Merger Sub merged with and into Life Technologies with Life Technologies surviving and becoming a wholly owned subsidiary of Thermo Fisher (the Merger).

13. In connection with the Merger, Life Technologies stock ceased trading on the NASDAQ.

14. Pursuant to the Merger Agreement, each share of Life Technologies common stock was converted into the right to receive $76.1311786 in cash (Merger Consideration). The aggregate consideration payable was rounded to the nearest whole cent.

Life Technologies options prior to the Merger

15. Prior to 1 July 2009, Life Technologies issued options to employees of Life Technologies Australia under the Plan. The options were issued for no consideration.

16. Immediately after the acquisition of the options, no participant held a legal or beneficial interest in more than 5% of the shares in Life Technologies, or was in a position to cast, or control the casting of, more than 5% of the maximum number of votes that may be cast at a general meeting of Life Technologies.

17. An option entitled a participant, after a defined vesting period, to acquire an ordinary share in Life Technologies upon exercise and payment of the exercise price subject to the terms of the Plan and the Option Notice of Grant and the Option Agreement.

18. The options vested 25% annually over a four year period beginning one year after the grant date provided the participant's employment had not terminated prior to the vesting date. If the participant's employment terminated, unvested options terminated and were cancelled. However, where a participant's employment terminated because of death, disability or retirement, options became fully vested and exercisable.

19. The options had a maximum exercise period of 10 years from the effective date of grant.

20. The options were non-transferrable (except for the possibility that they may become transferrable on the death of the participant).

Life Technologies options under the Merger

21. All unexercised options were cancelled at the time of the closing of the Merger. The holder of the options became entitled to receive an amount in cash payable within 5 days of the closing of the Merger.

22. The cash amount payable to the holder of the options was equal to the difference between the Merger Consideration and the option exercise price multiplied by the number of options held.

Restricted Stock Units prior to the Merger

23. Since 1 July 2009, Life Technologies has issued RSUs under the Plan to employees of Life Technologies Australia. The RSUs were issued for no consideration.

24. RSUs entitled a participant, after a defined vesting period, to acquire an ordinary share in Life Technologies for no consideration subject to the terms of the Plan, the RSUs Notice of Grant and the RSUs Agreement.

25. However, under the RSUs Agreement, Life Technologies had a discretion to settle the RSUs in the form of a cash payment in circumstances where settlement in shares: is prohibited by local laws, rules or regulations; would require approval of regulatory or government bodies; would result in adverse tax consequences; or is administratively burdensome.

26. RSUs vest 25% annually over a four year period beginning one year after the grant date provided that the participant's service has not terminated prior to the grant date. Where a participant's employment is terminated, their unvested RSUs are cancelled. However, where a participant's employment is terminated due to death, disability or retirement, unvested RSUs became fully vested and settled.

27. The RSUs are non-transferrable except on death.

Restricted Stock Units under the Merger

28. RSUs that were scheduled to vest prior to 1 January 2015 were deemed to be fully vested and non-forfeitable. The RSUs were cancelled and a participant became entitled to receive an amount in cash equal to the Merger Consideration multiplied by each RSU which was deemed to have vested. Life Technologies was required to pay the amount due within 5 days of closing of the Merger.

29. RSUs that were scheduled to vest on or after 1 January 2015 were assumed by Thermo Fisher and converted into the right to receive a cash amount equal to the product of the Merger Consideration and each RSU scheduled to vest post 1 January 2015. The assumed RSUs continue to vest and be settled by Life Technologies in accordance with the original vesting schedule and the terms of the Plan and RSUs Agreement.

Ruling

Options taxed upfront or where a cessation time occurred prior to 1 July 2009

Capital gains tax

30. CGT event C2 happened at the time that the options were cancelled under the Merger. The participant made a capital gain or capital loss when CGT event C2 happened in relation to the cancellation of the options: section 104-25 of the ITAA 1997.

31. Where a participant had made an election under former section 139E of the ITAA 1936, the first element of the cost base of the options is their market value, which, under former subdivision F of former Division 13A, is the market value at the time they were acquired: former subsection 130-80(2) of the ITAA 1997.

32. Where a cessation time had occurred prior to 1 July 2009, the first element of the cost base of the options is their market value, which, under former subdivision F of former Division 13A, is the market value at the cessation time: former subsection 130-83(3) of the ITAA 1997.

33. Any capital gain made by a participant will be a discount capital gain under section 115-5 of the ITAA 1997 as the options were acquired more than 12 months before the Merger.

Tax treatment of options where no election made under former section 139E and no cessation time prior to 1 July 2009

34. An amount is included in the assessable income of a participant under subsection 83A-110(1) of the ITAA 1997 in respect of the options in the income year in which the Employee Share Scheme (ESS) deferred taxing point occurs. The amount included is the market value of the options at the ESS deferred taxing point, reduced by the cost base of the options.

35. The ESS deferred taxing point for a participant's options is the time that the options were cancelled under the Merger (i.e. the time of disposal), unless the participant ceased employment more than 30 days prior to the cancellation, in which case the ESS deferred taxing point was the time that they ceased employment: subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997, former section 139CB of the ITAA 1936 and subsection 83A-120(3) of the ITAA 1997.

36. The market value of the options at the time of their cancellation is the Merger Consideration.

37. Where a participant ceased employment more than 30 days prior to the Merger, the options are taken to have been acquired immediately after the ESS deferred taxing point for their market value at the time the participant ceased employment: section 83A-125 of the ITAA 1997.

Capital gains tax

38. CGT event C2 happened at the time that the options were cancelled under the Merger: section 104-25 of the ITAA 1997.

39. Pursuant to subsection 130-80(1) of the ITAA 1997, where the ESS deferred taxing point for a participant's options is the time of the Merger (when the options were cancelled), a participant disregards any capital gain or loss to the extent that it results from the cancellation of the options.

40. Pursuant to subsection 104-25(3) of the ITAA 1997, where the ESS deferred taxing point happened when a participant ceased employment more than 30 days prior to the Merger:

- the participant makes a capital gain if the Merger Consideration exceeds the market value of the options at the ESS deferred taxing point
- the participant makes a capital loss if the Merger Consideration is less than the market value of the options at the ESS deferred taxing point.

41. Any capital gain made by a participant will be a discount capital gain under section 115-5 of the ITAA 1936 if the ESS deferred taxing point occurred 12 months or more prior to the Merger.

Tax treatment of RSUs

42. At the time that the RSUs were acquired they were not ESS interests within the meaning of subsection 83A-10(1) of the ITAA 1997.

RSUs that would otherwise vest prior to 1 January 2015

43. A participant's assessable income will include the amount received upon cancellation of the RSUs under section 6-5 of the ITAA 1997 in the year ended 30 June 2014.

Capital gains tax

44. CGT event C2 happened at the time that the RSUs were cancelled under the Merger: section 104-25 of the ITAA 1997

45. Pursuant to subsection 118-20 of the ITAA 1997, any capital gain made from the cancellation of the RSUs is reduced to zero because section 6-5 of the ITAA 1997 includes the amount received upon cancellation of the RSUs in a participant's assessable income.

RSUs that would otherwise vest on or after 1 January 2015

46. When the assumed RSUs vest and the participant receives the cash amount equal to the product of the Merger Consideration and the vested RSUs, the amount will be included in the participant's assessable income under section 6-5 of the ITAA 1997.

Capital gains tax

47. CGT event H2 happened when the RSUs were assumed by Thermo Fisher under the Merger. The Merger is considered an act, transaction or event which occurs in relation to the RSUs that does not result in an adjustment being made to the RSUs cost base or reduced cost base (section 104-155 of the ITAA 1997).

48. No capital gain will be made from CGT event H2 happening because there are no capital proceeds from the change that occurs to the RSUs as a result of the Merger: subsection 104-155(3) and subsection 116-20(2) of the ITAA 1997. The market value substitution rule does not apply to CGT event H2: section 116-25 of the ITAA 1997.

49. When the RSUs vest and the participant is paid the cash amount equal to the product of the Merger Consideration and the vested RSUs, any capital gain made from the cancellation of the RSUs is reduced to zero pursuant to section 118-20 of the ITAA 1997, because the amount received upon settlement of the RSUs is included in the participant's assessable income under section 6-5 of the ITAA 1997.

Commissioner of Taxation
6 August 2014

Appendix 1 – Explanation

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.

Tax treatment of options

50. Options were acquired prior to 1 July 2009 within the meaning of former Division 13A. The options were acquired under an employee share scheme within the meaning of former section 139C of former Division 13A.

51. The options were qualifying rights within the meaning of former section 139CD of former Division 13A.

Options taxed upfront or where a cessation time occurred prior to 1 July 2009

52. Where a participant made an election pursuant to former section 139E of the ITAA 1936, former Division 13A continues to apply after the commencement of Division 83A (Subsection 83A-10(2) of the IT(TP)A 1997).

53. The discount given in relation to the participant's options is included in their assessable income in the year that the option was acquired ('taxed upfront'): former subsection 139B(2) of the ITAA 1936.

54. Where the participant's options are taxed upfront, the discount is the market value of the option at the time it was acquired under former subsection 139CC(2) of the ITAA 1936.

55. Where a participant did not make an election pursuant to former section 139E of the ITAA, the discount is included in the participant's assessable income in the year in which the cessation time under former section 139CB occurs: former subsection 139B(3) of the ITAA 1936.

56. Where a participant ceased employment prior to 1 July 2009, a cessation time occurred under former section 139CB of the ITAA 1936. Former Division 13A continues to apply after the commencement of Division 83A (Subsection 83A-10(2) of the IT(TP)A 1997).

57. For a participant whose options had a cessation time prior to 1 July 2009, the discount is determined under former subsection 139CC(3) or (4) of the ITAA 1936.

58. Market value for the purposes of former Division 13A is determined under former subdivision F.

Capital gains tax

59. CGT event C2 happened at the time that the options were cancelled under the Merger. The participant made a capital gain or capital loss when CGT event C2 happened in relation to the cancellation of the options: section 104-25 of the ITAA 1997.

60. Where a participant made an election pursuant to former section 139E of the ITAA 1936, the first element of the cost base of the options is their market value which, under former Subdivision F of former Division 13A, is the market value at the time they were acquired: former subsection 130-80(2) of the ITAA 1997.

61. Where a cessation time occurred prior to 1 July 2009, the first element of the cost base of the options is their market value, which, under Subdivision F of former Division 13A, is the market value at the cessation time: former subsection 130-83(3) of the ITAA 1997.

62. Any capital gain made by a participant will be a discount capital gain under section 115-5 of the ITAA 1997 as the options were acquired more than 12 months before the Merger.

Tax treatment of options where no election made under former section 139E and no cessation time prior to 1 July 2009

63. The options are ESS interests within the meaning of subsection 83A-10(1) of the ITAA 1997.

64. Subsection 83A-5(2) of the IT(TP)A 1997 provides that Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A of the ITAA 1997 to the extent that it relates to that Subdivision) will apply to the options granted to a participant under the Plan where:

- former subsection 139B(3) applied in relation to the options (the participant did not make an election covering those options under former section 139E); and
- the cessation time mentioned in former subsection 139B(3) and former section 139CB for those options did not occur before 1 July 2009.

65. Where Subdivision 83A-C of the ITAA 1997 applies, an amount is included in the assessable income of a participant under subsection 83A-110(1) of the ITAA 1997 in respect of the options in the income year in which the ESS deferred taxing point occurs. The amount included is the market value of the options at the ESS deferred taxing point reduced by the cost base of the options.

66. The application of Subdivision 83A-C is modified by subsection 83A-5(4) of the IT(TP)A 1997. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that the ESS deferred taxing point for the options will be the cessation time mentioned in former subsection 139B(3), subject to subsection 83A-120(3) of the ITAA 1997.

67. The ESS deferred taxing point for a participant's options is the time that the options were cancelled under the Merger (the time of disposal) pursuant to section 139CB(1) of the ITAA 1936, unless the participant ceased employment more than 30 days prior to the cancellation, in which case the ESS deferred taxing point was the time that they ceased employment.

68. The market value of the options at the time of their cancellation is the Merger Consideration.

69. Where a participant ceased employment more than 30 days prior to the Merger, the options are taken to have been acquired immediately after the ESS deferred taxing point for their market value at the time they ceased employment: section 83A-125 of the ITAA 1997.

Capital gains tax

70. CGT event C2 happened at the time that the options were cancelled under the Merger: section 104-25 of the ITAA 1997.

71. Pursuant to subsection 130-80(1) of the ITAA 1997, where the ESS deferred taxing point for a participant's options is the time of the Merger (when the options were cancelled), a participant disregards any capital gain or loss to the extent that it results from the cancellation of the options because:

- the CGT event happened in relation to ESS interests acquired under an employee share scheme; and
- the CGT event is not E4, G1 or K8, and
- the CGT event happened on the ESS deferred taxing point.

72. Pursuant to subsection 104-25(3) of the ITAA 1997, where the ESS deferred taxing point happened when a participant ceased employment more than 30 days prior to the Merger:

- the participant makes a capital gain if the Merger Consideration exceeds the market value of the options at the ESS deferred taxing point:
- the participant makes a capital loss if the Merger Consideration is less than the market value of the options at the ESS deferred taxing point.

73. Any capital gain made by a participant will be a discount capital gain under section 115-5 of the ITAA 1936 if the ESS deferred taxing point occurred 12 months or more prior to the Merger.

Reporting obligations

74. Pursuant to subsection 392-5(1) of Schedule 1 of the *Taxation Administration Act 1953* (the TAA), the provider of the options must give to the Commissioner and to the individual participant a statement for the year in which the ESS deferred taxing point occurred for the options (i.e. the year ended 30 June 2014 or an earlier year in which the ESS deferred taxing point occurred because the participant ceased employment). The statement must be in the approved form (subsection 392-5(2) of the TAA) and include the information required under subsection 392-5(3) of the TAA, including the market value of the options at the ESS deferred taxing point.

75. The provider will not be liable for TFN withholding tax under subdivision 14C of Schedule 1 to the TAA if the participant has made a TFN declaration in relation to their employer and the employer has informed the provider of the participant's tax file number before the end of the income year in which the ESS deferred taxing point occurred: subsection 14-155(1) and section 14-160 of the TAA.

Tax treatment of RSUs

76. At the time that the RSUs were acquired they were not ESS interests within the meaning of subsection 83A-10(1) of the ITAA 1997. They were not rights to acquire shares in a company because the rights could be satisfied with shares or cash at the discretion of Life Technologies.

RSU that would otherwise vest prior to 1 January 2015

77. Section 83A-340 of the ITAA 1997 does not apply to the RSUs.

78. A participant's assessable income will include the amount received upon cancellation of the RSUs under section 6-5 of the ITAA 1997 in the year ended 30 June 2014. As the participant's rights granted under the RSUs were ultimately satisfied in cash, the RSUs:

- are viewed as one of a series of steps in the payment of salary or wages being the amount received upon cancellation of the RSUs; and
- are not viewed as a separate benefit to the payment of salary or wages which are excluded from the definition of fringe benefit by paragraph 136(1)(f) of the *Fringe Benefits Tax Assessment Act 1986*.

79. Accordingly, as the amount received by a participant is salary or wages, the payer must withhold an amount from the payment in accordance with section 12-35 of Schedule 1 to the TAA.

Capital gains tax

80. CGT event C2 happened at the time that the RSUs were cancelled under the Merger: section 104-25 of the ITAA 1997

81. Pursuant to section 118-20 of the ITAA 1997, any capital gain made from the cancellation of the RSUs is reduced to zero because section 6-5 of the ITAA 1997 includes the amount received upon cancellation of the RSUs in a participant's assessable income.

RSU that would otherwise vest on or after 1 January 2015

82. Section 83A-340 of the ITAA 1997 does not apply to the RSUs.

83. When the RSUs vest and the participant receives the cash amount equal to the product of the Merger Consideration and the vested RSUs, the amount will be included in the participant's assessable income under section 6-5 of the ITAA 1997. As the participant's rights granted under the RSUs will be ultimately satisfied in cash, the RSUs:

- are viewed as one of a series of steps in the payment of salary or wages being the amount received upon cancellation of the RSUs; and
- are not viewed as a separate benefit to the payment of salary or wages which are excluded from the definition of fringe benefit by paragraph 136(1)(f) of the *Fringe Benefits Tax Assessment Act 1986*.

84. Accordingly, as the amount received by the participant is salary or wages, the payer must withhold an amount from the payment in accordance with section 12-35 of Schedule 1 to the TAA.

Capital gains tax

85. CGT event H2 will happen when the RSUs are assumed by Thermo Fisher under the Merger. The assumed RSUs provide participants with rights to receive a cash amount but otherwise continue to vest and be settled on the same terms as the original RSUs in accordance with the Plan and RSUs Agreement. The Merger is considered an act, transaction or event which occurs in relation to the RSUs that does not result in an adjustment being made to the RSUs' cost base or reduced cost base (section 104-155 of the ITAA 1997).

86. No capital gain will be made from CGT event H2 happening because there are no capital proceeds from the change that occurs to the RSUs as a result of the Merger: subsection 104-155(3) and subsection 116-20(2) of the ITAA 1997. The market substitution rule does not apply to CGT event H2: section 116-25 of the ITAA 1997.

87. When the RSUs vest and the participant is paid the cash amount equal to the product of the Merger Consideration and the vested RSUs, any capital gain made from the cancellation of the RSUs is reduced to zero pursuant to section 118-20 of the ITAA 1997 because the amount received upon settlement of the RSUs is included in a participant's assessable income under section 6-5 of the ITAA 1997.

Appendix 2 – Detailed contents list

88. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital gains tax
- CGT events C1–C3 – end of a CGT asset
- CGT events H1–H2 – special capital receipts
- employee share schemes
- salary & wages income

Legislative references:

- ITAA 1936 139CB
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1997 6-5
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-125
- ITAA 1997 104-25
- ITAA 1997 104-155
- ITAA 1997 115-5
- ITAA 1997 116-20(2)
- ITAA 1997 116-25
- ITAA 1997 118-20
- ITAA 1997 130-80(1)
- ITAA 1997 130-83(3)
- IT(TP)A 1997 83A-5(4)
- TAA 1953
-

ATO references

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