



CR 2001/17 - Income Tax: capital gains: scrip for scrip roll-over: proposed takeover of Cable & Wireless Optus Limited by SingTel Australia Investments Ltd

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Class Ruling

Income Tax: capital gains: scrip for scrip roll-over: proposed takeover of Cable & Wireless Optus Limited by SingTel Australia Investment Ltd

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Arrangement	9
Ruling	15
Explanations	16
Detailed contents list	50

Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **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 identified below applies to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is Subdivision 124-M of the *Income Tax Assessment Act 1997*.

Class of persons

3. The class of persons to whom this Ruling applies is the shareholders of Cable & Wireless Optus Limited ('Optus') who:

- (a) are residents of Australia within the meaning of section 6 of the *Income Tax Assessment Act 1936*;
- (b) are not 'significant stakeholders' or 'common stakeholders' within the meaning of Subdivision 124-M;
- (c) accept the takeover offer from SingTel Australia Investment Ltd ('SingTel Australia'), an indirectly wholly owned subsidiary of Singapore

Telecommunications Limited ('SingTel'), to exchange their shares in Optus wholly or partly for shares in SingTel by choosing Offer Consideration (i) ['the Share Alternative'] or Offer Consideration (ii) ['the Share and Cash Alternative'] of the Transfer Alternative in the Implementation Agreement of 25 March 2001 (as amended on 18 May 2001) entered into between SingTel and Optus;

- (d) apart from the roll-over for which Subdivision 124-M provides, would make a capital gain from a CGT event happening in relation to the Optus shares; and
- (e) might make a capital gain from a replacement SingTel share which would not be disregarded (except because of a roll-over).

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 described below at paragraphs 9 to 14 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) 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
- (b) this Ruling may be withdrawn or modified.

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The Manager
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Date of effect

8. This Class Ruling applies to years of income commencing both before and after its date of issue.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. The documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- (a) Letter dated 12 April 2001 from PricewaterhouseCoopers requesting the ATO to make a Class Ruling in relation to the capital gains scrip for scrip roll-over provisions as they apply to the proposed takeover of Optus by SingTel;
- (b) 'Implementation Agreement' of 25 March 2001 between SingTel and Optus which describes among other things the structure and manner in which SingTel proposes to make its formal takeover offer to Optus shareholders;
- (c) 'Pre-Bid Agreement' of 25 March 2001 between SingTel, Cable & Wireless plc ('PLC') and Cable & Wireless Australia & Pacific Holdings BV ('CWAP');
- (d) Letter dated 2 May 2001 from PricewaterhouseCoopers;
- (e) Letter dated 11 May 2001 from PricewaterhouseCoopers;
- (f) 'Amending Agreement to Implementation Agreement' of 18 May 2001 between SingTel and Optus;
- (g) Letter dated 21 May 2001 from PricewaterhouseCoopers.

10. Under a takeover proposal announced on 26 March 2001 by SingTel, to be carried out under the terms and conditions set out in the Implementation Agreement, SingTel Australia will invite all Optus shareholders to dispose of their Optus shares in exchange for certain consideration.

11. The takeover proposal allows the Optus shareholders (among other options) to dispose of their Optus shares by way of transfer to SingTel Australia ('the Transfer Alternative').

12. Under the Transfer Alternative, the Optus shareholders have the choice of disposing of their Optus shares to SingTel Australia in exchange for one of the following Offer Consideration options:

- (i) a certain number of shares in SingTel [the Share Alternative]; or
- (ii) a certain combination of cash and shares in SingTel [the Share and Cash Alternative]; or
- (iii) a certain combination of cash, bonds and unsecured notes [the Share, Cash and Bond Alternative].

13. Under the arrangement to which this Ruling applies SingTel Australia must become owner of 80% or more of the voting shares in Optus as a result of the arrangement.

14. Under the arrangement to which this Ruling applies:

- Optus is an Australian resident company;
- All Optus shares on issue are ordinary shares (listed on the Australian Stock Exchange);
- SingTel is not an Australian resident company;
- All SingTel shares to be issued as consideration under the proposal will be ordinary shares (SingTel shares are currently listed on the Singapore Stock Exchange);
- At the time of the announcement of the proposal, neither SingTel nor any SingTel group company had any shares in Optus;
- SingTel Australia is not an Australian resident company.

Ruling

15. Subject to the qualifications in paragraphs 4 to 6 of this Ruling,

- (a) Australian resident shareholders of Optus who are within the class of persons to whom this Ruling applies and who accept the takeover offer and select the Share Alternative of the Transfer Alternative will be eligible to choose full scrip for scrip roll-over under paragraph 124-780(3)(d) for the disposal of their Optus shares in exchange wholly for SingTel shares; and

- (b) Australian resident shareholders of Optus who are within the class of persons to whom this Ruling applies and who accept the takeover offer and select the Share and Cash Alternative of the Transfer Alternative will be eligible to choose a scrip for scrip roll-over under paragraph 124-780(3)(d) for the disposal of their Optus shares in exchange for SingTel shares. There is no roll-over to the extent that the Optus shareholders receive ineligible proceeds (that is the cash) : section 124-790.

Explanations

Availability of scrip for scrip roll-over

16. Subdivision 124-M contains a number of conditions for, and exceptions to, the eligibility of an entity to choose the roll-over. Some of these conditions and exceptions are not relevant to this arrangement. Below is an outline of the main conditions and exceptions that are relevant to the circumstances of the arrangement that is the subject of this Ruling.

17. Subparagraph 124-780(1)(a)(i) requires an entity to exchange a share in a company (the ‘original entity’) for a share in another company.

18. This requirement will be satisfied by Optus shareholders to the extent they receive SingTel shares as consideration for the transfer of their Optus shares to SingTel Australia by selecting the Share Alternative or the Share and Cash Alternative of the Transfer Alternative. These options provide consideration that consist wholly or partly of SingTel shares. The description of the class of persons to whom this Ruling applies at paragraph 3(c) is qualified in this regard.

19. Optus shareholders that select an alternative option available under the proposed arrangement other than the options described in paragraph 15 above will not qualify for scrip for scrip roll-over as the consideration under the alternatives does not include a share in a company.

20. Paragraphs 124-780(1)(b) and 124-780(2)(a) require that the exchange of shares is in consequence of a single arrangement that results in the acquiring entity (SingTel Australia) becoming the owner of 80% or more of the voting shares in the original entity (Optus).

21. In the context of the scrip for scrip roll-over provisions, the takeover proposal in the Implementation Agreement is considered to be a 'single arrangement'.

22. Whether or not the arrangement results in SingTel Australia becoming the owner of 80% or more of the voting shares in Optus is a question of fact that can only be satisfied if SingTel Australia becomes the owner of 80% or more of the voting shares in Optus as a result of the proposed arrangement. The description of the arrangement to which this Ruling applies at paragraph 13 is qualified in this regard.

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

24. This requirement will be met as Optus' issued shares consist wholly of ordinary shares and the proposed takeover offer will be offered to all Optus shareholders.

25. Paragraphs 124-780(1)(b) and 124-780(2)(c) require that the exchange of shares is in consequence of a single arrangement in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity (Optus).

26. This requirement will be satisfied as the takeover proposal will give each Optus shareholder a choice as to the manner in which to dispose of their Optus shares and as to the consideration receivable in exchange for the disposal.

27. Some of the choices that foreign Optus shareholders may have in relation to the options available under the arrangement will be restricted, for example, any non cash consideration provided to New Zealand shareholders will be paid to a nominee for sale.

28. Paragraph 124-780(2)(c) will be met to the extent that the parties rely on:

- (a) subsection 619(3) of the Corporations Law in relation to foreign shareholders; or
- (b) an exemption granted by the Australian Securities and Investments Commission in relation to the takeover proposal.

29. The Pre-Bid Agreement between PLC, CWAP and SingTel provides for CWAP to choose the Share, Cash and Bond Alternative. The ATO is satisfied that in the making of the Pre-Bid Agreement,

CWAP was free to choose any of the options available under the arrangement.

30. Paragraphs 124-780(1)(c) and 124-780(3)(a) require the original interest holder (Optus shareholder) to have acquired its original interest (its Optus shares) on or after 20 September 1985.

31. As Optus was established in 1991, this requirement will be met for all Optus shareholders.

32. Paragraphs 124-780(1)(c) and 124-780(3)(b) require that, apart from the roll-over, the original interest holder (Optus shareholder) would make a capital gain from a CGT event happening in relation to its original interest (its Optus shares).

33. Whether an Optus shareholder would make a capital gain, apart from the roll-over, in relation to the disposal of its Optus shares under the arrangement is dependent on the specific circumstances of each shareholder - in particular the shareholder's cost base of each Optus share and the value of the consideration received. The description of the class of persons to whom this Ruling applies at paragraph 3(d) is qualified in this regard.

34. Paragraphs 124-780(1)(c) and 124-780(3)(c) require that the replacement interest is in the acquiring entity (SingTel Australia), or the ultimate holding company of the wholly owned group which includes the acquiring entity (SingTel Australia).

35. This requirement will be satisfied as the proposed takeover offer will be made by SingTel Australia and, to the extent that the Offer Consideration provides shares, the shares will be in SingTel (the ultimate holding company of the SingTel group).

36. Paragraphs 124-780(1)(c) and 124-780(3)(d) provide that roll-over is available for an original interest holder (an Optus shareholder) that is a significant stakeholder or a common stakeholder only if the replacement entity (SingTel) jointly elects the roll-over.

37. Additional rules associated with the cost base of interests apply for the purposes of scrip for scrip roll-over if an Optus shareholder, that is otherwise eligible for the roll-over, is a significant stakeholder or a common stakeholder for the arrangement. There are a number of matters to consider in determining whether a shareholder is a significant stakeholder or a common stakeholder in an entity, including:

- (a) the association (if any) between different shareholders in an entity;
- (b) the extent of the interests held by a shareholder (on an associate inclusive basis) in both the original entity (Optus) and the replacement entity (SingTel); and
- (c) whether either or both the original entity (Optus) or the replacement entity (SingTel) has a 'concentrated ownership' on the basis that twenty or fewer individuals between them own directly or indirectly and for their own benefit 75% or more of the relevant interests in the entity.

38. The general profile of the shareholdings in Optus suggests there would not be any Australian resident significant stakeholder or common stakeholder for the arrangement. However, as it is beyond the scope of this Ruling to determine with certainty whether there is any Australian resident significant stakeholder or common stakeholder, the class of persons to whom this Ruling applies has necessarily been qualified at paragraph 3(b).

39. Subsection 124-780(4) provides for additional requirements if the original interest holder (an Optus shareholder) and an acquiring entity (SingTel Australia) did not deal with each other at arm's length and:

- (a) neither the original entity (Optus) nor the replacement entity (SingTel) had at least 300 members just before the arrangement started; or**
- (b) the original interest holder (an Optus shareholder), the original entity (Optus) and an acquiring entity (SingTel Australia) were all members of the same linked group just before the arrangement started.**

40. Additional rules about the value of an Optus shareholder's proceeds for the exchange and about the kind of rights and obligations attaching to their interests apply where the Optus shareholder is otherwise eligible for the roll-over but does not deal with SingTel Australia at arm's length.

41. Under the arrangement, all the Australian resident shareholders of Optus will be invited by SingTel Australia to dispose of their Optus shares only in the manner and under the terms proposed in the Implementation Agreement. On this basis, the Australian resident shareholders that accept the offer and receive their Offer Consideration will be regarded as having dealt with SingTel Australia at arm's length and the additional rules will not be required to be met.

42. Subsection 124-795(1) provides that the roll-over is not available if just before you (the Optus shareholder) stop owning your original interest (the Optus shares), you are not an Australian resident unless, just after you acquire your replacement interest (SingTel shares), the replacement entity (SingTel) is an Australian resident for CGT purposes.

43. As SingTel is not an Australian resident, an Optus shareholder who is also not an Australian resident will not be eligible for the roll-over. The description of the class of persons to whom this Ruling applies at paragraph 3(a) is qualified in this regard.

44. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain you (the Optus shareholder) might make from your replacement interest (the SingTel shares) would be disregarded.

45. This exception may apply if for example the SingTel shares are trading stock. The description of the class of persons to whom this Ruling applies at paragraph 3(e) is qualified in this regard.

46. Paragraph 124-795(2)(b) provides that the roll-over is not available if you (the Optus shareholder) and the acquiring entity (SingTel Australia) are members of the same wholly owned group just before you stop owning your original interest (the Optus shares).

47. This exception will not apply and this Ruling is made on the basis that neither SingTel nor any SingTel group company held any shares in Optus before the arrangement.

48. Subsection 124-790(1) provides that the original interest holder (the Optus shareholder) will obtain only a partial roll-over if its capital proceeds (the Offer Consideration) includes something other than its replacement interest (the SingTel shares).

49. Optus shareholders that choose the Share and Cash Alternative of the Transfer Alternative and receive a combination of cash and SingTel shares will not be eligible for roll-over in respect of that part of each Optus share for which it receives the cash component. The Ruling at paragraph 15(b) is qualified in this regard.

Detailed contents list

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

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Arrangement	9
Ruling	15
Explanations	16
Availability of scrip for scrip roll-over	16
Detailed contents list	50

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Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16

Subject references:

- arrangement
- CGT event
- common stakeholder
- company
- interests
- ordinary share
- original interest
- replacement interest
- resident
- roll-over
- scrip
- scrip for scrip
- significant stake
- significant stakeholder
- share
- shareholder
- takeover

Legislative references:

- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780(1)(a)(i)
- ITAA 1997 124-780(1)(b)
- ITAA 1997 124-780(1)(c)
- ITAA 1997 124-780(2)(a)
- ITAA 1997 124-780(2)(b)
- ITAA 1997 124-780(2)(c)
- ITAA 1997 124-780(3)
- 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)
- ITAA 1997 124-790
- ITAA 1997 124-790(1)
- ITAA 1997 124-795(1)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-795(2)(b)
- ITAA 1936 6
- Corporations Law 619(3)

ATO References

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