


CR 2007/100 - Income tax: scrip for scrip: acquisition of HPAL Limited by Salmat Limited

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Class Ruling

Income tax: scrip for scrip: acquisition of HPAL Limited by Salmat Limited

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ⓘ 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997; and
- Subdivision 124-M of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of HPAL Limited (HPAL) who:
- (a) are residents of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* at the time the scheme was undertaken;
 - (b) participate in the scheme under the proposed scheme of arrangement;
 - (c) hold their HPAL shares on capital account;
 - (d) disposed of their HPAL shares to Salmat Limited (Salmat) in exchange for Salmat ordinary shares and/or cash; and
 - (e) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M.

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 12 to 21 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 1 January 2007 to 31 December 2007. However, the Ruling continues to apply after 31 December 2007 to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

8. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. 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:

- Class Ruling application dated 3 August 2007 from PricewaterhouseCoopers (PWC) on behalf of HPAL;
- Copy of the Scheme Implementation Agreement dated 18 July 2007; and
- Copy of the Draft Scheme Booklet dated 22 August 2007.

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

13. Both HPAL and Salmat are Australian resident public companies listed on the Australian Securities Exchange (ASX).

14. HPAL has only one class of shares currently on issue, the ordinary shares.

15. On 18 July 2007, HPAL announced it had entered into a Scheme Implementation Agreement with Salmat in relation to an offer to acquire all the shares in HPAL.

16. On 18 July 2007, HPAL also announced a fully franked interim dividend of 4.75 cents per share and a fully franked special dividend of 13.25 cents per share. The record date for both dividends was 17 August 2007.

17. The proposed purchaser of HPAL is Document Management Solutions Pty Limited (DMS), a wholly owned subsidiary of Salmat.

18. The proposed acquisition is to be effected by a Scheme of Arrangement (Scheme). Under the Scheme, HPAL shareholders have the option to elect to receive either:

- (a) *Cash Consideration* - \$2.545 (being \$2.725 cash less the aggregate amount of the Interim Dividend of 4.75 cents and Special Dividend of 13.25 cents) for each HPAL share; or
- (b) *Share Consideration* – Subject to scaleback, between 0.5040 and 0.5784 Salmat shares for each HPAL share (the precise exchange ratio of Salmat shares for HPAL shares within these limits will be calculated by dividing the Cash Consideration by the Volume Weighted Average Price (VWAP) of Salmat shares for the ten trading days prior to the Scheme Meeting).

19. HPAL shareholders will be asked to vote on the Scheme at a shareholder's meeting expected to be held in October 2007.

20. Both the interim and special dividends were paid by HPAL on 28 September 2007 and were not conditional on whether the Scheme becomes effective and is implemented.

21. In the event that the Share Consideration elections by HPAL shareholders exceed the Salmat Share Consideration Cap, there will be a pro rata scaleback of Salmat shares and HPAL shareholders will receive the balance of the Scheme Consideration in cash.

Ruling

Disposal of HPAL shares

22. CGT event A1 will happen when a HPAL shareholder disposes of a HPAL share on the Scheme Implementation Date (section 104-10).

23. A HPAL shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a HPAL share exceeds its cost base. A HPAL shareholder will make a capital loss if those capital proceeds are less than the HPAL share's reduced cost base (subsection 104-10(4)).

24. The capital proceeds for each HPAL share will be the cash received and the market value on the Scheme Implementation Date of the Salmat shares received (subsection 116-20(1)).

25. A HPAL shareholder who makes a capital gain will be eligible to treat the gain as a discounted capital gain provided they held the HPAL share for at least 12 months before the disposal and the other requirements of Subdivision 115-A are satisfied (section 115-25).

Availability of scrip for scrip roll-over

26. A HPAL shareholder is eligible to choose scrip for scrip roll-over under section 124-780 if:

- apart from the roll-over under Subdivision 124-M, they will make a capital gain when CGT event A1 happens to their HPAL share (paragraph 124-780(3)(b));
- they cannot disregard (except because of a roll-over) any capital gain they might make from a replacement Salmat share (paragraph 124-795(2)(a)); and
- all other relevant requirements are satisfied. The requirements for the roll-over are explained in paragraphs 41 to 76 of this Ruling.

27. If a HPAL shareholder chooses roll-over, a capital gain from a HPAL share is disregarded to the extent that the shareholder received Salmat shares. The capital gain is not disregarded to the extent that ineligible proceeds (cash consideration) are received for the disposal of the HPAL share (section 124-790).

Cost base of Salmat shares

28. If a HPAL shareholder chooses roll-over and the only capital proceeds received are Salmat shares, the first element of the cost base of a replacement Salmat share is worked out by reasonably attributing to it the cost base of any HPAL share for which it was exchanged and for which roll-over was chosen (subsection 124-785(2)).

29. If a HPAL shareholder chooses roll-over but also receives cash consideration (ineligible proceeds) the first element of a replacement Salmat share is reduced by so much of that cost base as is attributable to an ineligible part (subsection 124-785(3)).

Acquisition date of Salmat shares

30. The acquisition date of Salmat shares is the date that they were issued to each HPAL shareholder (that is the Scheme Implementation Date) (section 109-10).

31. For HPAL shareholders who choose scrip for scrip roll-over, the acquisition date of their Salmat shares for CGT discount purposes is the date they acquired the corresponding HPAL shares that were disposed of for the relevant Salmat shares (item 2 in the table in subsection 115-30(1)).

Commissioner of Taxation

31 October 2007

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.*

Disposal of HPAL shares to Salmat

32. CGT event A1 happens if there is a change in the ownership of a CGT asset from one entity to another. On the disposal of the HPAL shares to Salmat, a change of ownership of HPAL shares will occur and therefore CGT event A1 will happen.

33. A HPAL shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a HPAL share exceeds its cost base. A HPAL shareholder will make a capital loss if those capital proceeds are less than the HPAL share's reduced cost base.

34. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain. Under subsection 104-10(3), CGT event A1 happens when a contract to dispose of the asset is entered into, or if there is no contract, when the change of ownership occurs.

35. A takeover or merger effected by a scheme of arrangement does not involve a disposal of shares under a contract (see paragraph 9 of the addendum to Taxation Determination TD 2002/4). Therefore, CGT event A1 will happen on the Scheme Implementation Date, which will be the date when the HPAL shareholder disposes of their HPAL shares to Salmat.

Capital proceeds

36. Section 116-20 provides that capital proceeds from a CGT event are the total of the money and the market value of any property received or entitled to be received (worked out at the time of the event happening).

37. The capital proceeds for HPAL shareholders will be the sum of the cash consideration and the share consideration received in respect of the transfer of the HPAL shares. The Dividends, the declaration and payment of which are not a term of the offer and are not contingent upon the Scheme going ahead, will not form part of the capital proceeds.

38. The capital proceeds that HPAL shareholders receive for the disposal of a HPAL share will be the market value of the Salmat shares on the Scheme Implementation Date plus any cash.

39. The Commissioner accepts that the market value of a Salmat share may be determined by reference to the ASX VWAP of Salmat shares on the Implementation Date. Salmat can provide this information to HPAL shareholders to assist in determining this.

Discount capital gains

40. A HPAL shareholder who makes a capital gain from the disposal of the HPAL shares, may be entitled to treat the gain as a discount capital gain in respect of those HPAL shares that are held for at least 12 months provided the other requirements of Subdivision 115-A are satisfied (section 115-25).

Availability of scrip for scrip roll-over

41. Scrip for scrip roll-over enables a shareholder to disregard a capital gain they make from a share that is disposed of as part of a corporate restructure, including a merger, if the shareholder receives a replacement share in exchange.

42. The capital gain is disregarded completely if the only capital proceeds the shareholder receives are replacement shares. A capital gain will be only partially disregarded if, in addition to shares, there is cash consideration as part of the capital proceeds.

Requirements for scrip for scrip roll-over – Subdivision 124-M

43. Subdivision 124-M 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 Scheme that is the subject of this Ruling 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; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

Shares are exchanged for shares in another company

44. Paragraph 124-780(1)(a) requires an entity (the original interest holder) to exchange a share for a share in another company.

45. This requirement is satisfied by a HPAL shareholder who will receive Salmat shares as part of the capital proceeds for the disposal of their HPAL shares under the Scheme.

The exchange occurs as part of a single arrangement

46. Paragraph 124-780(1)(b) requires that shares in an entity be exchanged in consequence of a single arrangement.

47. In the context of scrip for scrip roll-over, the takeover of HPAL by Salmat under the Scheme is considered to be a single arrangement. The single arrangement must also satisfy the following conditions.

(a) 80% ownership

48. Paragraph 124-780(2)(a) requires that shares in an entity be exchanged in a single arrangement that results in another entity becoming the owner of 80% or more of the voting shares in the original entity.

49. This requirement will be satisfied as Salmat, through its subsidiary DMS (the acquiring entity), will become the owner of all the ordinary shares in HPAL (the original entity) following the Scheme. Each of the ordinary shares satisfies the definition of a 'voting share' in subsection 995-1(1).

(b) All voting share owners participate

50. Paragraph 124-780(2)(b) requires 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 (apart from the acquiring entity or members of the acquiring entity's wholly-owned group) could participate.

51. This requirement will be satisfied because all HPAL shareholders will be entitled to participate in the Scheme (other than Salmat), if approved by the HPAL shareholders.

(c) Participation is on substantially the same terms

52. Paragraph 124-780(2)(c) requires that the exchange 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.

53. This requirement will be satisfied because the Scheme provides that all the HPAL shareholders will be entitled to participate in the Scheme on the same terms.

54. Ineligible foreign HPAL shareholders will receive cash consideration through a nominee arrangement. Under this arrangement the Salmat shares to which the foreign HPAL shareholder would otherwise have become entitled will be delivered to and disposed of by a nominee and the proceeds will be paid to the foreign shareholders. This nominee arrangement does not prevent the Scheme from being on substantially the same terms for all owners of HPAL shares.

Conditions for roll-over are satisfied

55. Paragraph 124-780(1)(c) requires that the conditions for roll-over outlined in subsection 124-780(3) are met. These conditions must be met in relation to each HPAL share for which scrip for scrip roll-over will be chosen.

56. The conditions in subsection 124-780(3) are as follows.

(a) The HPAL shares are post-CGT shares

57. Paragraph 124-780(3)(a) requires that the original interest holder acquired their original interests on or after 20 September 1985.

58. This requirement will be satisfied as all of the HPAL shares were issued after 20 September 1985.

(b) A HPAL shareholder would otherwise make a capital gain

59. Paragraph 124-780(3)(b) requires that, apart from the roll-over, the original interest holder would make a capital gain from a CGT event happening in relation to its original interest.

60. As explained in paragraph 23 of this Ruling, a capital gain will be made from the disposal of a HPAL share if the capital proceeds for the share are more than its cost base. Therefore, whether this condition is met will depend on the individual circumstances of the HPAL shareholder.

(c) HPAL shareholders receive replacement interests in the acquiring entity or the ultimate holding company

61. Paragraph 124-780(3)(c) requires that the replacement interest is in the acquiring entity or the ultimate holding company of the wholly owned group which includes the acquiring entity.

62. This requirement will be satisfied as HPAL shareholders will receive ordinary shares in Salmat.

(d) A HPAL shareholder must choose to obtain scrip for scrip roll-over

63. Paragraph 124-780(3)(d) requires that the original interest holder chooses the roll-over, or if section 124-782 applies, the original interest holder and the replacement entity jointly choose to obtain the roll-over.

64. Section 124-782 has no application to the Scheme since there are no significant stakeholders or common stakeholders who will participate in the arrangement.

65. Subject to their eligibility (see paragraph 26 of this Ruling), whether a HPAL shareholder chooses to obtain roll-over in relation to the disposal of a HPAL share is a question of fact to be determined for each shareholder.

Further conditions are not applicable

66. Subsection 124-780(4) provides that the additional requirements in subsection 124-780(5) must be satisfied if the original interest holder and the acquiring entity did not deal with each other at arm's length and:

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

67. Paragraph 124-780(4)(a) will not apply because both HPAL and Salmat will have at least 300 members just before the arrangement started. Paragraph 124-780(4)(b) will not apply as HPAL shareholders, HPAL and Salmat will not be members of the same linked group just before the arrangement commences.

Exceptions to obtaining scrip for scrip roll-over are not applicable

68. Section 124-795 contains a number of exceptions where scrip for scrip roll-over cannot be chosen. The exceptions in section 124-795 are as follows.

(a) HPAL shareholders are residents of Australia

69. Subsection 124-795(1) provides that roll-over is not available if, just before the disposal, the original interest holder is a foreign resident unless, just after the acquisition of the replacement interest, the replacement interest is taxable Australian property.

70. The class of entities to whom this Ruling applies is limited to HPAL shareholders who are residents of Australia at the time of the scheme. As a consequence, the exception in subsection 124-795(1) will not apply to limit this Ruling in that regard.

(b) A capital gain cannot (apart from the roll-over) be otherwise disregarded

71. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain the original interest holder might make from their replacement interest would be disregarded (except because of a roll-over).

72. Whether a capital gain arising from the subsequent disposal of a Salmat share will be disregarded under another provision of the ITAA 1997 (for example, the shareholder holds the Salmat shares as trading stock) is a question of fact for each shareholder.

(c) Acquiring entity is not a foreign resident

73. Paragraph 124-795(2)(b) provides that the roll-over is not available if the original interest holder and the acquiring entity are members of the same wholly owned group just before the original interest holder stops owning their original interest and the acquiring entity is a foreign resident.

74. This exception will not apply as HPAL shareholders and Salmat will not be members of the same wholly-owned group just before the proposed Scheme is implemented. In addition, Salmat is not a foreign resident company.

(d) No roll-over is available under Division 122 or Subdivision 124-G

75. Subsection 124-795(3) provides that the roll-over is not available if a roll-over can be chosen under Division 122 or Subdivision 124-G.

76. This exception will not apply as the circumstances of the Scheme are such that a roll-over pursuant to Division 122 or Subdivision 124-G is not available.

Consequences of choosing roll-over where only Salmat shares are received as capital proceeds

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

78. If the only capital proceeds a HPAL shareholder receives are replacement shares in Salmat and they are eligible for and choose the roll-over, the capital gain is disregarded (subsection 124-785(1)).

79. Subsections 124-785(2) and 124-785(4) require that where scrip for scrip roll-over is chosen, the first element of the cost base and the reduced cost base of each share received as a result of an exchange is determined by reasonably attributing to it the cost base of the original interest for which it was exchanged.

80. Therefore, where scrip for scrip roll-over is chosen, the first element of the cost base or reduced cost base of each replacement Salmat share is determined by attributing a reasonable proportion of the cost base of the HPAL shares which were exchanged for each Salmat share (subsection 124-785(2)).

Consequences of roll-over where Salmat shares and cash are received as capital proceeds

81. If the capital proceeds received by HPAL shareholders in respect of their HPAL shares consist of cash consideration (ineligible proceeds) as well as Salmat shares, a shareholder will be able to choose only partial roll-over. Roll-over will not be available to the extent that any capital gain is attributable to the cash consideration (ineligible proceeds) received for each HPAL share (subsection 124-790(1)).

82. In determining the first element of the cost base or reduced cost base of each Salmat share, the cost base of the HPAL shares will be reduced by that part of that cost base which is reasonably attributable to the cash consideration (ineligible proceeds) (subsections 124-785(2) and 124-785(3)).

83. In calculating the capital gain attributable to their cash consideration (ineligible proceeds), a HPAL shareholder must work out the proportion of the cash consideration received for their HPAL shares in relation to the total capital proceeds. That proportion would be applied to the cost base of each HPAL share to determine the part of that cost base (ineligible part) which is reasonably attributable to the cash consideration (ineligible proceeds) (subsection 124-790(2)).

84. In working out that amount of the cost base of the HPAL share that is reasonably attributable to the cash consideration, the Commissioner accepts the following method:

$$\text{Cost Base of HPAL shares} \quad \times \quad \frac{\text{Value of Cash Consideration}}{\text{Value of Share Consideration}}$$

plus Cash Consideration

where:

- (a) Cash Consideration means the cash received by a HPAL shareholder for each HPAL share held as a result of Salmat share scaleback (as provided in subparagraph 18(a) of this Ruling).

- (b) Share Consideration means the number of Salmat shares received by a HPAL shareholder for each HPAL share held (as provided in subparagraph 18(b) of this Ruling).

85. When that proportion is worked out, the remaining proportion is used to determine the first element of the cost base (and reduced cost base) for replacement Salmat shares issued as share consideration to a HPAL shareholder (subsections 124-785(2), 124-785(3) and 124-785(4)).

Consequences where only cash is received as capital proceeds

86. HPAL shareholders who elect to receive only cash in exchange for their HPAL shares or receive cash by default, cannot choose roll-over under the Scheme. Accordingly, no part of any capital gain realised by such shareholders is disregarded.

87. Subsection 110-25(2) provides that the first element of the cost base of an asset is the total of:

- the money you paid or are required to pay in respect of acquiring it; and
- the market value of any other property given or required to be given in respect of acquiring it.

The market value of the property is worked out at the time of acquisition.

88. For HPAL shareholders who do not, or cannot, choose roll-over (including those HPAL shareholders, if any, who receive ineligible proceeds), the first element of the cost base and reduced cost base of their Salmat shares is determined by the market value of the HPAL shares they disposed of under the scheme.

Acquisition date of Salmat shares

89. The acquisition date of Salmat shares is the date that they are issued to each HPAL shareholder. This happens on the Scheme Implementation Date (section 109-10).

90. For HPAL shareholders who choose scrip for scrip roll-over, the acquisition date of their Salmat shares for CGT discount purposes is the date they acquired their HPAL shares which were disposed of in exchange for the relevant Salmat shares (item 2 in the table in subsection 115-30(1)).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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Subject references:

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- ordinary share
- original interest
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- resident
- roll-over
- scrip for scrip roll-over
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Legislative references:

- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-10(3)
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- ITAA 1997 109-10
- ITAA 1997 110-25(2)
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ATO references

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