


CR 2009/23 - Income tax: scrip for scrip: exchange of HeartWare Limited shares, options or performance rights for equivalent HeartWare International Inc securities

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Class Ruling

Income tax: scrip for scrip: exchange of HeartWare Limited shares, options or performance rights for equivalent HeartWare International Inc securities

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❶ 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 Ruling are:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997; and

- Subdivision 124-M of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are the holders of shares, options and performance rights (HeartWare securities) in respect of HeartWare Limited (HeartWare) who:

- (a) participated in the Scheme as described in paragraphs 8 to 25 of this Ruling;
- (b) were residents of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) at the time the scheme was undertaken;
- (c) held their HeartWare securities on capital account;
- (d) were not employees of the HeartWare group or were employees of the HeartWare group who did not receive an option or right in HeartWare International Inc (or HeartWare US) that will be treated as a continuing right for the purposes of Division 13A of Part III of the ITAA 1936; and
- (e) were 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 8 to 25 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 31 October 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 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 PriceWaterhouseCoopers (the applicant for this Ruling). The following documents, or relevant parts of them form part of and are to be read with the description:

- application for Class Ruling dated 18 August 2008;
- Information Memorandum dated 12 September 2008;
- Restructure Implementation Agreement;
- Independent Expert's Report August 2008;
- Annual Report 2007;
- deed polls and other scheme documentation;
- Federal Court of Australia Court Order dated 30 October 2008;
- publicly available information including Company Announcements and Australian Securities Exchange (ASX) Announcements; and
- correspondence and e-mails in relation to the application.

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

9. HeartWare is an Australian resident public company incorporated in Australia on 26 November 2004.

10. HeartWare had ordinary shares listed on the ASX as well as unlisted options (consisting of options issued under an Employee Share Option Plan and Standalone Options) and Performance Rights.

11. There were in excess of 1,300 holders of fully paid ordinary shares in HeartWare but only two had a direct interest of greater than 10% at 15 July 2008. There were also holders of Employee Share Option Plan options (ESOP options), standalone options and performance rights (security holders).

12. As at 12 September 2008, there were 310,356,839 shares in HeartWare, 22,746,464 ESOP options, 1,850,000 standalone options, and 5,000,000 performance rights on issue.

Key events

13. On 16 May 2008, HeartWare announced that it proposed to redomicile to the United States.

14. On 22 October 2008, all the resolutions at the Court Ordered Scheme Meeting of Shareholders, Option holders and Performance Rights holders were passed.

15. On 31 October 2008, the Federal Court of Australia made relevant orders under section 411(4)(a) of the *Corporations Act 2001* to give effect to the proposed schemes (HeartWare Schemes).

16. On 31 October 2008, the Federal Court of Australia orders approving the HeartWare Schemes were lodged with the Australian Securities and Investment Commission and HeartWare ceased trading at close of trading on the ASX. The closing ASX price was \$0.52.

17. On 3 November 2008, HeartWare International, Inc (HeartWare US) was admitted to the official list of the ASX. CHESS Depository Interests (share-CDIs) in respect of the shares in HeartWare US commenced trading on the ASX on a deferred settlement basis on 3 November 2008.

18. The 'Record Date' for working out the consideration entitlements under the HeartWare Schemes was 7 November 2008.

19. On 11 November 2008, the 'Implementation Date':

- all shares in HeartWare were transferred to HeartWare US pursuant to the order made by the Federal Court of Australia;
- shareholders were issued one share-CDI for each share held in HeartWare (representing a one-thirty fifth interest in one share of common stock in HeartWare US). Fractional entitlements were rounded down to a multiple of 35 share-CDIs; or
- alternatively, if a shareholder elected, one share of common stock in HeartWare US was issued to each HeartWare shareholder for every 35 shares in HeartWare which they held as at the Record Date. Fractional entitlements were rounded down to the nearest whole number of common stock in HeartWare US;

- holders of ESOP options and standalone options in respect of HeartWare shares became entitled to one option in respect of HeartWare US shares, for every 35 HeartWare options held at the Record Date. Fractional entitlements were rounded down to the nearest whole number of HeartWare US options; and
- holders of performance rights in respect of HeartWare shares became entitled to one restricted stock unit (RSU) to acquire one share of common stock in HeartWare US, for every 35 HeartWare performance rights held at the Record Date. Fractional entitlements were rounded down to the nearest whole number of RSU.

20. The last day of deferred settlement trading was Friday 14 November 2008.

21. Normal settlement trading in HeartWare US share-CDIs commenced on 17 November 2008.

Foreign shareholders

22. Subject to the exception in paragraph 23 of this Ruling, HeartWare shareholders whose addresses were recorded in the respective registers as outside Australia, New Zealand or the USA, (foreign shareholders) did not directly receive common stock or share-CDIs in HeartWare US.

23. Foreign shareholders may have received common stock or share-CDIs in HeartWare US if HeartWare US was satisfied before the Record Date that the relevant foreign shareholders could be lawfully issued such common stock or share-CDIs under the laws of their respective jurisdictions.

24. Where a foreign HeartWare shareholder could not directly receive HeartWare US common stock or share-CDIs, the common stock or share-CDIs that they would have been entitled to receive were instead issued to a nominee company.

25. The nominee company sold the HeartWare US common stock and share-CDIs and distributed the relevant proceeds in respect of their entitlements to the foreign shareholders.

Ruling

Disposal of HeartWare shares

26. CGT event A1 happened when a shareholder disposed of a HeartWare share to HeartWare US under the scheme described in this Ruling (subsection 104-10(1)).

27. The CGT event happened when all the shares in HeartWare were transferred to HeartWare US on the Implementation Date (subsection 104-10(3)).

28. A shareholder made a capital gain when CGT event A1 happened if the capital proceeds for a HeartWare share exceeded its cost base (subsection 104-10(4)).

29. A shareholder made a capital loss if the capital proceeds were less than the share's reduced cost base (subsection 104-10(4)).

30. Where a HeartWare share was exchanged for a HeartWare US share-CDI, the capital proceeds for each HeartWare share was the market value of the share-CDI (paragraph 116-20(1)(b)).

31. The 5-day volume weighted average price for a HeartWare US share-CDI for the period 14 November 2008 to 20 November 2008 was \$0.48. The Commissioner accepts \$0.48 as being the market value of the share-CDI on the Implementation Date.

32. Where a HeartWare share was exchanged for an interest in a share of common stock in HeartWare US, the capital proceeds for each HeartWare share was the market value of the part of the HeartWare US common stock that was received in exchange for the HeartWare share (paragraph 116-20(1)(b)).

33. No publicly traded market existed for HeartWare US common stock on or around the Implementation Date. However, under the exchange ratio, 35 HeartWare shares could be exchanged for one share of common stock in HeartWare US. The Commissioner accepts \$16.80 as being the market value of one share of common stock in HeartWare US on the Implementation Date. Accordingly, the capital proceeds for each HeartWare share disposed of for a share of common stock in HeartWare US was generally \$0.48 (one-thirty fifth of \$16.80).

34. The capital proceeds for each HeartWare share is the market value of the HeartWare share at the time of the CGT event where the fractional entitlements to HeartWare US common stock or a share-CDI were rounded down (subsection 116-30(1)).

Cancellation of HeartWare options and performance rights

35. CGT event C2 happened when a security holder's option or performance right was cancelled under the scheme described in this Ruling (subsection 104-25(1)).

36. The time when CGT event C2 happened was when the ownership of the options or performance rights ended on the Implementation Date (subsection 104-25(2)).

37. The capital proceeds for each HeartWare option and performance right was the market value of the part of the HeartWare US option or RSU that was received in respect of the ending of the option or performance right (paragraph 116-20(1)(b)).

38. The capital proceeds for each HeartWare option or performance right is the market value of the respective HeartWare option or performance right at the time of the CGT event where the fractional entitlements to a HeartWare US option or RSU were rounded down (subsection 116-30(1)).

Scrip for scrip roll-over

39. A HeartWare shareholder, option holder or performance right holder may choose scrip for scrip roll-over under Subdivision 124-M provided:

- (a) they made a capital gain from the disposal of their HeartWare share, or from the cancellation of their HeartWare option or performance right;
- (b) the capital gain is referable to the receipt of HeartWare US common stock, share-CDI, option or RSU; and
- (c) any capital gain that they might make from the HeartWare US common stock, share-CDI, option or RSU cannot be disregarded (except because of a roll-over).

Cost base and reduced cost base of replacement assets

40. Where a shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of each HeartWare US common stock is the sum of the cost bases of the HeartWare shares reasonably attributable to the acquisition of the HeartWare US common stock (subsections 124-785(2) and 124-785(4)).

41. Where a shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of each HeartWare US share-CDI is the corresponding cost base of the HeartWare share that was exchanged for the share-CDI (subsections 124-785(2) and 124-785(4)).

42. Where an option holder or performance right holder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of each HeartWare US option and RSU is the sum of the cost bases of the HeartWare options and performance rights reasonably attributable to the acquisition of the HeartWare US option or RSU (subsections 124-785(2) and 124-785(4)).

Acquisition date of replacement assets

43. The acquisition date of the HeartWare US common stock, share-CDIs, options and RSUs acquired in exchange for the HeartWare shares, options and performance rights is the date they were issued to each HeartWare shareholder, option holder and performance right holder (the Implementation Date) (sections 109-5 and 109-10).

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44. However, for the purpose of determining eligibility to a discount capital gain, HeartWare shareholders, option holders and performance right holders who choose scrip for scrip roll-over are taken to have acquired their HeartWare US common stock, options and RSUs when they acquired the corresponding HeartWare shares, options or performance rights (item 2 in the table in subsection 115-30(1)).

Commissioner of Taxation

13 May 2009

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.

45. 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.

46. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a share, option or right or similar interest holder to disregard a capital gain from a share, option, right or similar interest that is disposed of as part of a corporate takeover or merger if the holder receives a replacement asset in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement asset.

47. Subdivision 124-M contains a number of conditions that determine whether scrip for scrip roll-over is available under an arrangement. The main conditions and exceptions that are relevant to the circumstances of the restructure of HeartWare are:

- (a) shares, options, rights or similar interests are exchanged for shares, options, rights or similar interests 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.

48. Under the Heartware Scheme the conditions for roll-over under Subdivision 124-M are satisfied. Further, it is considered that no novel issues of tax law interpretation arise in relation to the availability of scrip for scrip roll-over.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- arrangement
- CGT capital proceeds
- CGT cost base
- CGT events
- CGT roll-over relief
- discount capital gain
- disposal of options
- disposal of shares
- market value cost base
- ordinary share
- schemes of arrangement
- scrip for scrip roll-over
- securityholders
- shareholders
- ITAA 1936 Pt III Div 13A
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(2)
- ITAA 1997 109-5
- ITAA 1997 109-10
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)(b)
- ITAA 1997 116-30
- ITAA 1997 116-30(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- Corporations Act 2001 411(4)(a)
- TAA 1953
- Copyright Act 1968

Legislative references:

- ITAA 1936 6(1)
-

ATO references

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ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ CGT event A1 – disposal of a CGT asset
Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 – end of a CGT asset
Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip