

CR 2013/58 - Income tax: scrip for scrip: exchange of options in Bathurst Resources Limited for options in NZ NewCo

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Class Ruling

Income tax: scrip for scrip: exchange of options in Bathurst Resources Limited for options in NZ NewCo

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	21
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	31
Appendix 2:	
<i>Detailed contents list</i>	35

1 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 109-5 of the ITAA 1997;
- section 109-55 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997
- section 115-25 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 124-780 of the ITAA 1997;

- section 124-785 of the ITAA 1997; and
- section 124-795 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 are the option holders of Bathurst Resources Limited (BRL) that:

- (a) participate in the exchange described at paragraph 17 of this Ruling;
- (b) are 'residents of Australia' for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) at the time of disposal of their BRL options;
- (c) are not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their BRL options.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

4. In this Ruling, the entities belonging to this class are referred to as 'BRL option holders'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 9 to 20 of this Ruling.

7. 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

8. This Ruling applies from 1 July 2012 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

9. The following description of the scheme is based on information provided to the Commissioner. The following documents or relevant parts of them form part of and are to be read with the description:

- Class Ruling application dated 22 April 2013 from PricewaterhouseCoopers (PwC);
- Offer to purchase options from PwC;
- Proposed group restructure from PwC; and
- Correspondence from PwC sent on 31 May 2013.

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

Bathurst Resources Limited (BRL)

10. BRL and its 100% owned New Zealand resident subsidiaries carry on the business of coal mining in New Zealand.

11. BRL is a public company limited by shares that was incorporated on 30 May 2007 and is a resident of Australia for income tax purposes.

12. All of the shares in BRL are ordinary shares and are listed on both the Australian Securities Exchange (ASX) and the NZX Main Board (NZSX).

13. BRL currently has options on issue to directors, employees and other third parties. These options entitle the holders to acquire BRL shares on a one for one basis. At the date of the application, 45,200,000 options are on issue to BRL's Option Share Trust (OST) pursuant to BRL's Employee Share Option Plan (ESOP) rules. Another 15,510,776 options are on issue to third parties (the External option holders). The OST and the External option holders are collectively referred to as the 'BRL option holders'.

14. The OST is an Australian resident unit trust that was established on 10 September 2010. The options that are registered in OST's name are held on behalf of the respective unit holders and are not issued at a discount.

15. Almost all of the External option holders were issued options as a result of a rights issue and were not interests provided in relation to employment.

The proposed restructure

16. On 2 April 2013, BRL announced to both the ASX and NZSX, the intention to proceed with a reorganisation of BRL's corporate structure, subject to Federal Court, shareholder and regulatory approvals.

17. The reorganisation will broadly involve the following steps:

- (a) the incorporation of a new holding company in New Zealand (NZ NewCo);
- (b) the exchange, by BRL's existing shareholders, of their shares in BRL (the BRL Shares) for equivalent shares in NZ NewCo (the NZ NewCo Shares);
- (c) the exchange, by the BRL option holders of their options in BRL (BRL options) for replacement options over shares in NZ NewCo (the NZ NewCo options);
- (d) the exchange, by way of a binding agreement between BRL and each Performance Rights Holder, by the Performance Rights Holders of their performance rights in BRL (BRL Performance Rights) for replacement performance rights over shares in NZ NewCo (the NZ NewCo Performance Rights);
- (e) the listing of NZ NewCo on both the ASX and NZSX;
- (f) the sale, by BRL, of the shares in its New Zealand subsidiaries (all of whom only hold New Zealand assets) to NZ NewCo; and
- (g) the in-specie distribution of any assets held by BRL to NZ NewCo.

18. Under the Proposed Restructure, each BRL option holder will enter into a binding agreement with BRL to exchange their BRL options for the same number of NZ NewCo options. The terms of the NZ NewCo options will be substantially similar to the terms of the BRL options.

19. The reorganisation is subject to both shareholder and court approval, and will be undertaken by way of a court-approved scheme of arrangement (the scheme of arrangement) under section 411 of the *Corporations Act 2001 (Cth)*.

20. The scheme of arrangement requires both shareholder and court approval. For the shareholders, approval was obtained by the requisite majority of ordinary shareholders, and by at least 75% in value of the votes cast, at the scheme meeting held on 13 June 2013.

Ruling

Disposal of BRL options

21. CGT event A1 will happen when a BRL option holder disposes of their BRL options on the date they entered into the binding agreement for the disposal (section 104-10).

22. A BRL option holder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their BRL options exceeds its cost base. A BRL option holder will make a capital loss if those capital proceeds are less than the BRL options reduced cost base (subsection 104-10(4)).

23. As no money is received (or entitled to be received) for the disposal of the BRL options, the capital proceeds for each BRL option will be the market value of the replacement NZ NewCo options received which is determined on the date the binding agreement was entered into between the BRL option holders and NZ NewCo (subsection 116-20(1)).

24. A BRL option holder who makes a capital gain from CGT event A1 happening on the disposal will be eligible to treat the gain as a discounted capital gain provided they held the option 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 if a capital gain is made

25. Subject to the qualification in paragraph 26 of this Ruling, a BRL option holder who made a capital gain from the disposal of their BRL options is eligible to choose scrip for scrip roll-over (section 124-780). Scrip for scrip roll-over is not available for a capital loss.

26. Scrip for scrip roll-over cannot be chosen if the capital gain made by a BRL option holder from the disposal of their BRL options would be disregarded for a reason other than the application of a roll-over (paragraph 124-795(2)(a)).

27. If a BRL option holder chooses scrip for scrip roll-over, a capital gain made from the disposal of their BRL options is disregarded to the extent that the BRL option holder received NZ NewCo options (subsection 124-785(1)).

Cost base of NZ NewCo options

28. If a BRL option holder chooses scrip for scrip roll-over and the only capital proceeds received are NZ NewCo options, the first element of the cost base of a NZ NewCo option is worked out by reasonably attributing to it the cost base of the BRL option for which it was exchanged and for which roll-over was chosen (subsection 124-785(2)).

Acquisition date of NZ NewCo options

29. As the BRL option holders will acquire their NZ NewCo options as a result of CGT event A1 happening, the specific rules in the table in subsection 109-5(2) apply to deem the BRL option holders to have acquired the NZ NewCo options when the binding agreement is entered into. Accordingly, the date of acquisition of the NZ NewCo options will depend on when these agreements are entered into, and may vary for each BRL option holder.

30. For BRL option holders who choose scrip for scrip roll-over, the acquisition date of their NZ NewCo options for CGT discount purposes is the date they acquired the BRL options that were disposed of for the relevant NZ NewCo options (item 8C in the table in section 109-55 in conjunction with item 2(a) in the table in subsection 115-30(1)).

Commissioner of Taxation

31 July 2013

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.*

31. The Ruling section details the tax consequences and the relevant legislative provisions that relate to this Scheme.

32. The significant tax consequence that is the subject of this Ruling is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a BRL option holder to disregard a capital gain made from an option that is disposed of as part of a corporate takeover or merger if the BRL option holder receives a replacement option in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement option.

33. Subdivision 124-M contains a number of conditions for, and exceptions to, a BRL option holder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- (a) options in a company are exchanged for options 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.

34. Under the scheme that is the subject of this Ruling, the conditions for roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision in this regard. Therefore, no further explanation is warranted.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	5
Date of effect	8
Scheme	9
Bathurst Resources Limited (BRL)	10
The proposed restructure	16
Ruling	21
Disposal of BRL options	21
Availability of scrip for scrip roll-over if a capital gain is made	25
Cost base of NZ NewCo options	28
Acquisition date of NZ NewCo options	29
Appendix 1 – Explanation	31
Appendix 2 – Detailed contents list	35

References

- Previous draft:*
- ITAA 1997 104-10
 - ITAA 1997 104-10(4)
- Not previously issued as a draft
- ITAA 1997 109-5(2)
- Related Rulings/Determinations:*
- TR 2006/10
- ITAA 1997 109-55
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-25
 - ITAA 1997 115-30(1)
 - ITAA 1997 116-20(1)
- Subject references:*
- arrangement
 - CGT capital proceeds
 - CGT cost base
 - CGT discount
 - CGT event A1 – disposal of CGT Asset
 - CGT roll-over relief
 - disposal of shares
 - scrip for scrip roll-over
- ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-780
 - ITAA 1997 124-785(1)
 - ITAA 1997 124-785(2)
 - ITAA 1997 124-795(2)(a)
 - ITAA 1997 Div 230
 - Corporations Act 2001 411
 - TAA 1953
 - Copyright Act 1968
- Legislative references:*
- ITAA 1936 6(1)
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ATO references

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