



Class Ruling

Income tax: cancellation of shares in Cumnock Coal 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 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936; and
- section 45C of the ITAA 1936.

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

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of Cumnock Coal Limited (CCL) who
- are registered on the CCL share register on the Record Date and who participate in the arrangement described in this Ruling;
 - held their CCL shares on capital account at the time of cancellation of those shares; and
 - were residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936 at the time of cancellation of their CCL shares.

In this Ruling a person belonging to this class of entities is referred to as a 'CCL Ordinary Shareholder'. The class of entities does not include any shareholder holding more than 40% of the shares.

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 13 to 15 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.
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Date of effect

8. This Ruling applies from 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. 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.

10. If this Class 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)).

11. 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.

12. 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

13. The scheme that is the subject of this Ruling is described below. The description is based on, and includes, reference to the following documents:

- Application for a Class Ruling dated 27 June 2007 from PricewaterhouseCoopers on behalf of the shareholders of CCL, a publicly listed Australian company requesting a Class Ruling in relation to the proposed merger transaction between CCL and Helios Australia Pty Ltd (Helios);
- copy of the Merger Implementation Agreement dated 17 July 2007 between CCL and Helios;
- copy of the Deed Poll between CCL and Helios and shareholders of CCL dated 17 July 2007; and

- correspondence received from PricewaterhouseCoopers.

14. The scheme that is the subject of this Ruling involves Helios acquiring 100% of the shareholding in CCL, a publicly listed Australian company, in accordance with the Merger Implementation Agreement. The proposed merger will be effected by the following steps:

- cancellation by CCL of all the ordinary shares held by CCL Ordinary Shareholders;
- the **concurrent** issue by CCL of one ordinary share to Helios; and
- the payment of cash to CCL ordinary shareholders by Helios in respect of the cancelled shares.

15. Helios is required under the terms of the Deed Poll to make a payment (Merger Consideration) to each of the CCL Ordinary Shareholders for passing the resolution for the reduction and cancellation of all their existing ordinary shares in CCL.

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

Ruling

Cancellation of existing ordinary shares in CCL

16. The proposed payment of the Merger Consideration will not be a dividend as defined in subsection 6(1) of the ITAA 1936 for the purposes of subsection 44(1) of the ITAA 1936.

17. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the proposed Merger Consideration.

18. CGT event C2, in section 104-25 of the ITAA 1997, will happen upon the cancellation of the CCL ordinary shares.

19. The CCL Ordinary Shareholders will make a capital gain when CGT event C2 happens if the capital proceeds for each CCL ordinary share are more than its cost base. They will make a capital loss if the capital proceeds are less than the share's reduced cost base (subsection 104-25(3)).

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.*

Taxation consequences of the share cancellation

Subsection 44(1)

20. Under the arrangement, as described, there is no distribution by CCL, whether in money or property, nor will CCL be crediting an amount to the participants as shareholders in CCL as is required under the definition of 'dividend' in subsection 6(1) of the ITAA 1936.

21. The payment from Helios is the only amount to be received by the shareholders which is made in return for the cancellation of the CCL Ordinary Shareholders' shares as part of a wider arrangement and therefore cannot be considered a dividend under subsection 6(1) of ITAA 1936.

22. Accordingly, the scheme does not give rise to an amount being included in a CCL Ordinary Shareholder's assessable income under subsection 44(1) of the ITAA 1936.

Section 45A

23. Section 45A of the ITAA 1936 is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

24. There is no provision of a capital benefit, as defined by subsection 45A(3) of the ITAA 1936, nor are there any disadvantaged shareholders by whom it is reasonable to assume that dividends will be received. Thus, section 45A does not apply to give rise to an amount being included in a CCL Ordinary Shareholder's assessable income.

Section 45B

25. Section 45B of the ITAA 1936 applies where certain capital payments, including a return of capital, are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);

- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person entered into the scheme or carried out the scheme or any part of the scheme for the purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

26. The shareholder 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, where the amount of tax payable or any amount payable under the ITAA 1936 or the ITAA 1997 by the shareholder would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

27. On the basis of the information provided in the documents or parts of the documents that are incorporated into the description of the scheme, section 45B of the ITAA 1936 does not apply to this scheme.

28. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital.

29. As the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 or subsection 45B(3) of the ITAA 1936 in relation to the scheme as described, section 45C of the ITAA 1936 will not deem the proposed return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or ITAA 1997.

CGT event C2

30. Under paragraph 104-25(1)(a) CGT event C2 happens if a taxpayer's ownership of an intangible CGT asset ends because it is redeemed or cancelled. CGT event C2 happens upon the cancellation of the CCL shares (subsection 104-25(2)).

31. A taxpayer will make a capital gain when CGT event C2 happens if the capital proceeds received are more than the cost base of the share. A taxpayer will make a capital loss if the capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

32. The capital proceeds from the cancellation of the CCL shares will be determined under Division 116.

33. Subsection 116-20(1) provides that capital proceeds includes the total of the money and the market value of any property received, or entitled to be received, in respect of the event happening.

34. However, section 116-30 provides that in certain circumstances the capital proceeds from a CGT event are replaced with the market value of the CGT asset that is the subject of the event. For example, the market value substitution rule will apply when the capital proceeds from CGT event C2 happening are more or less than the market value of the asset that is the subject of the event (subsection 116-30(2)). In these cases the market value is worked out as if CGT event C2 had not occurred and was never proposed to occur (subsection 116-30(3A)).

35. It is not until the time of the CGT event that it can be determined whether the capital proceeds under section 116-20 should be replaced with the market value of the CGT asset that is the subject of the event, pursuant to section 116-30.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- acquisition of shares
- cancellation of shares
- capital reductions
- CGT cost base
- ordinary shares
- takeovers and mergers

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)

- ITAA 1936 45B(2)(b)
 - ITAA 1936 45B(2)(c)
 - ITAA 1936 45B(3)
 - ITAA 1936 45B(9)
 - ITAA 1936 45C
 - ITAA 1997 104-25
 - ITAA 1997 104-25(1)(a)
 - ITAA 1997 104-25(2)
 - ITAA 1997 104-25(3)
 - ITAA 1997 Div 116
 - ITAA 1997 116-20
 - ITAA 1997 116-20(1)
 - ITAA 1997 116-30
 - ITAA 1997 116-30(2)
 - ITAA 1997 116-30(3A)
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - Copyright Act 1968
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ATO references

NO: 2007/13363

ISSN: 1445-2014

Income Tax ~~ Assessable income ~~ dividend, interest
and royalty income

Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to
C3 - end of a CGT asset