



Class Ruling

Income tax: proposed return of capital: OZ Minerals Limited

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- section 104-135 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are the holders of ordinary shares in OZ Minerals Limited (OZ Minerals) who:

- are registered on the OZ Minerals share register on the Record Date, being the date for determining entitlements under the proposed return of capital as described in paragraphs 8 to 21 of this Ruling;
- hold their OZ Minerals shares on capital account;
- are residents of Australia for the purposes of the Australian income tax legislation, including by virtue of the operation of any double tax agreement between Australia and any other country;
- are not 'temporary residents' of Australia within the meaning of section 995-1 of the ITAA 1997; and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their OZ Minerals shares.

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

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 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 2011 to 31 December 2011. The Ruling continues to apply after 31 December 2011 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 the applicant. These documents or relevant parts of them, as the case may be, form part of and are to read with this description. These documents include:

- Application for Class Ruling from PricewaterhouseCoopers dated 10 December 2010;
- OZ Minerals Limited Annual Report for the year ended 30 December 2008;
- OZ Minerals Limited Annual Report for the year ended 30 December 2009; and
- OZ Minerals Limited Annual Report for the year ended 30 December 2010.

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. The proposed return of capital of \$388.6 million, which equates to 12 cents per OZ Minerals share, will be paid to all shareholders.

10. The proposed return of capital will be paid entirely from OZ Minerals' share capital account and not from any other account. OZ Minerals has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

Background

11. OZ Minerals was formed on 1 July 2008 as a result of the merger of Oxiana Limited and Zinifex Limited. OZ Minerals is a public company listed on the Australian Stock Exchange.

12. During the year ended 31 December 2009 OZ Minerals sold the majority of its operating, development and exploration assets to third parties. Following these sales it retained only the Prominent Hill mining operation in South Australia, exploration assets around Prominent Hill, exploration projects in Cambodia and Thailand and some equity interests in certain exploration companies. The assets sold had been acquired by Oxiana and Zinifex substantially using equity funds injected into those companies.

13. The proceeds from the asset sales allowed OZ Minerals to repay all of its bank loans, leaving it largely debt free and with a cash balance in excess of \$1 billion which OZ Minerals believed to be largely attributable to previous capital raisings.

14. Following the disposals, the Board of Directors of OZ Minerals made a strategic announcement in November 2009 setting an initial 12 month timeframe to investigate potential acquisitions. The capital proceeds from the disposals were retained to fund the acquisition of any new opportunities that would be identified.

15. OZ Minerals has investigated opportunities to acquire and develop new assets and business, however to date, none have been completed. The cash balance of OZ Minerals has grown from \$1.00 billion as at 30 June 2009 to \$1.334 billion as at 31 December 2010. The increase in the cash balance is from production at the Prominent Hill mine.

16. The proposed return of capital by OZ Minerals is intended to reduce cash representing surplus long term capital of the company while still maintaining sufficient long term capital.

Dividend History

17. Since the merger of Oxiana and Zinifex on 1 July 2008, OZ Minerals:

- has paid a dividend of 5 cents per share, totalling \$156.1 million, on 29 September 2008;
- has paid a dividend of 3 cents per share, totalling \$93 million, on 21 September 2010; and
- has paid a dividend of 4 cents per share, totalling \$129.5 million, on 9 March 2011.

18. The inconsistent dividend history is due to financial difficulties the company faced following the merger of Oxiana and Zinifex. In 2008, OZ Minerals on a consolidated basis generated a loss after impairment of \$2,484.9 million and had accumulated losses of \$2,152 million. In 2009, OZ Minerals on a consolidated basis generated a loss of \$512.4 million and had accumulated losses of \$2,663 million. In 2010, OZ Minerals on a consolidated basis generated a profit of \$586.9 million and had accumulated losses of \$2,024.4 million.

19. In a letter to shareholders dated 31 March 2010 contained in the 2009 Annual Report, the Chairman of OZ Minerals expressed the view that there was no capacity to pay dividends in respect of 2009; however, the company intended to review the position to consider the company's future dividend policy.

20. The September 2010 and March 2011 dividends were paid in accordance with the company's subsequently announced dividend policy of paying between 30 to 60 percent of net profit after tax from normal operations as dividends.

Capital Structure

21. OZ Minerals has 3,238,546,504 fully paid up ordinary shares on issue amounting to \$5.2 billion of share capital. OZ Minerals has no other classes of shares on issue. OZ Minerals has not undertaken a cancellation of shares, reduction of capital or share buyback since the merger of Oxiana and Zinifex on 1 July 2008.

Ruling

Distribution is not a dividend

22. The proposed return of capital will not be a dividend, as defined in subsection 6(1).

The application of sections 45A, 45B and 45C

23. The Commissioner will not make a determination under section 45A that section 45C applies to the whole or any part of the proposed return of capital.

24. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of the proposed return of capital.

Capital gains tax

25. CGT event G1 will happen when OZ Minerals pays the proposed return of capital to an OZ Minerals shareholder in respect of an OZ Minerals share that they own at the Record Date and continue to own at the time of the payment (section 104-135 of the ITAA 1997).

26. CGT event C2 will happen when OZ Minerals pays the proposed return of capital to an OZ Minerals shareholder in respect of an OZ Minerals share that they own at the Record date but cease to own before the time of the payment (section 104-25 of the ITAA 1997).

Commissioner of Taxation

16 March 2011

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.*

Distribution is not a dividend

27. Subsection 44(1) includes in a shareholder's assessable income any dividends paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

28. The term 'dividend', defined in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

29. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

30. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account, except for certain limited purposes, if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account and the account is not already tainted.

31. The proposed return of capital will be recorded as a debit to OZ Minerals' share capital account. As the share capital account of OZ Minerals is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 will apply. Accordingly, the return of capital will not be a dividend as defined in subsection 6(1).

Anti-avoidance provisions

32. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the proposed return of capital amount received by the shareholders as an unfranked dividend paid by the company out of profits to the shareholder.

Section 45A – streaming of dividends and capital benefits

33. Section 45A 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.

34. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include a distribution to the shareholder of share capital. OZ Minerals will provide its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b). The capital benefit will be provided to all of its shareholders in the same proportion as their share holdings.

35. As all shareholders will benefit equally from the proposed return of capital, there is no 'streaming' of capital benefits to some shareholders and not to others.

36. Accordingly, section 45A will not apply to the proposed return of capital, and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the whole or any part of the proposed return of capital amount.

Section 45B – schemes to provide capital benefits

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

Each of these conditions is considered in paragraphs 38 to 54 of this Ruling.

Scheme

38. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

39. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

40. As the proposed return of capital will be debited to OZ Minerals' share capital account, OZ Minerals will provide shareholders with a capital benefit under paragraph 45B(5)(b) in the form of a distribution of share capital.

Tax benefit

41. A relevant taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B, 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 instead had been a dividend.

42. The proposed distribution to OZ Minerals' ordinary shareholders includes a return of capital and therefore constitutes a capital benefit. In the event that the relevant distribution were a dividend rather than a capital benefit, it is likely that the amount of tax payable by OZ Minerals' shareholders would be greater than is payable in respect of the proposed return of capital payment (that payment being the capital benefit). Consequently, the receipt of the capital benefit is a 'tax benefit'.

43. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax under section 128B. Therefore, OZ Minerals shareholders will obtain tax benefits from the proposed return of capital.

Relevant circumstances

44. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8). Considering these circumstances determines whether any part of the scheme will be entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (an ordinary shareholder in OZ Minerals) to obtain a tax benefit.

45. The test of purpose is an objective one. The question is whether it would be concluded that a person who enters into or carries out the scheme does so for the purpose of obtaining a tax benefit for the relevant taxpayer. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

46. The purpose which causes section 45B to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of OZ Minerals. The Commissioner cannot ascertain the purposes of OZ Minerals numerous shareholders, all of whom will be eligible to vote on the proposed return of capital under section 256C of the *Corporations Act 2001*, and all of whom may participate in the proposed return of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the payment.

47. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, because the proposed return of capital will be made to all OZ Minerals shareholders, regardless of individual circumstances, paragraphs 45B(8)(c) to 45B(8)(h) do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and 45B(8)(j), pertaining to the provision of ownership interests and demerger respectively, are not relevant. The relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

48. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company.

49. The proposed return of capital is not considered attributable to the profits of OZ Minerals. Rather, as OZ Minerals did not generate any profit from the sale of the relevant assets, the proposed return of capital is considered attributable to capital only and not to any realised or unrealised profits of OZ Minerals.

50. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company.

51. OZ Minerals paid three dividends between September 2008 and March 2011 which were sourced out of profits generated in the respective periods. OZ Minerals had outlined, in a letter to shareholders contained in the 2009 Annual Report, an intention to review their dividend policy to potentially pay dividends as future profits are generated. This intention has been given effect by the dividends declared in respect of the 2010 year in accordance with the company's dividend policy. Overall, the pattern of distributions made by OZ Minerals does not suggest that the proposed return of capital will be made in substitution for dividends.

52. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to 177D(b)(viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

53. In this case, the form and substance of OZ Minerals' proposed return of capital does not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

54. Accordingly, it cannot be concluded that OZ Minerals or participating OZ Minerals shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit. As such, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the proposed return of capital.

Section 45C

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

Capital gains tax

CGT event G1 – section 104-135 of the ITAA 1997

56. CGT event G1 will happen when OZ Minerals pays the proposed return of capital to an OZ Minerals shareholder in respect of a share that they own in OZ Minerals at the Record Date and continue to own at the time of the payment (section 104-135 of the ITAA 1997).

57. If the proposed return of capital is equal to or less than the cost base of the OZ Minerals share at the time of payment, the cost base and reduced cost base of the share will be reduced (but not below nil) by the amount of the payment (subsection 104-135(4) of the ITAA 1997).

58. An OZ Minerals shareholder will make a capital gain if the proposed return of capital is more than the cost base of the OZ Minerals share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess amount.

59. If an OZ Minerals shareholder makes a capital gain when CGT event G1 happens, the cost base and reduced cost base of the OZ Minerals share is reduced to nil (subsection 104-135(3) of the ITAA 1997). An OZ Minerals shareholder cannot make a capital loss when CGT event G1 happens.

60. A capital gain made when CGT event G1 happens will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the OZ Minerals share was acquired at least 12 months before the payment of the proposed return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions of that Subdivision are satisfied.

CGT event C2 – section 104-25 of the ITAA 1997

61. The right to receive the proposed return of capital is one of the rights inherent in an OZ Minerals share at the Record Date. If, after the Record Date but before the payment date of the proposed return of capital, an OZ Minerals shareholder ceases to own an OZ Minerals share, the right to receive the proposed return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset.

62. CGT event C2 will happen when the proposed return of capital is paid (section 104-25 of the ITAA 1997). The right to receive the payment (being an intangible CGT asset) will end by the right being discharged or satisfied when the payment is made.

63. An OZ Minerals shareholder will make a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. An OZ Minerals shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base (subsection 104-25(3) of the ITAA 1997). The capital loss is equal to the amount of the difference.

64. In working out the capital gain or capital loss made when CGT event C2 happens, the capital proceeds will be the amount of the proposed return of capital (subsection 116-20(1) of the ITAA 1997).

65. The cost base of an OZ Minerals shareholder's right to receive the proposed return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by the OZ Minerals shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share – for example, when the OZ Minerals shareholder disposed of the share after the Record Date.

66. Therefore, if the full cost base or reduced cost base of an OZ Minerals share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, the right to receive the proposed return of capital will have a nil cost base.

67. As the right to receive the proposed return of capital was inherent in the OZ Minerals share during the time it was owned, the right is considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997). Accordingly, if the OZ Minerals share was acquired at least 12 months before the proposed return of capital, a capital gain made from the ending of the corresponding right will satisfy the requirements of section 115-25 of the ITAA 1997. Such a capital gain will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided the other conditions of that Subdivision are satisfied.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital gains tax
- CGT events C1 –C3 – end of a CGT asset
- CGT events G1-G3 – shares
- capital benefit
- capital reductions
- dividend income
- shareholder payments
- return of capital on shares
- share capital

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6(1)(d)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
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- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 128B
- ITAA 1936 177A(1)
- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(viii)
- ITAA 1936 318
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001 256-C

ATO references

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Income Tax ~~ Capital Gains Tax ~~ CGT events G1 to G3 – shares
Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 – end of a CGT asset
Income Tax ~~ Return of capital