



Class Ruling

Income tax: off-market share buy-back: U&D Coal Limited

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	6
Scheme	7
Ruling	38
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	45
Appendix 2:	
Detailed contents list	75

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:

- Division 16K of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 6(1) of the ITAA 1936
- subsection 45A(2) of the ITAA 1936
- subsection 45B(3) of the ITAA 1936
- section 45C of the ITAA 1936
- paragraph 159GZZZK(d) of the ITAA 1936
- paragraph 159GZZZP(1) of the ITAA 1936
- paragraph 159GZZZQ of the ITAA 1936

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- section 855-10 of the ITAA 1997.

All subsequent 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 shareholders of U&D Coal Limited (U&D) who:

- (a) acquired shares under the replacement prospectus of 5 December 2013 (the Prospectus) or on market at any time between 19 February 2014 and 11 March 2014 (both inclusive)
- (b) held shares on the Buy-Back Record Date, being 21 November 2014 at 5:00pm (AEDT)
- (c) participated in the Buy-Back such that U&D shares were purchased by U&D, and
- (d) hold their shares on capital account.

In this Ruling, a person belonging to this class of entities is referred to as a 'Participating Shareholder'.

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 7 to 37 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.

Date of effect

6. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

7. 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 7 January 2015
- U&D Coal Limited Proposed Off-Market Share Buy-Back – ATO Briefing Pack, and
- U&D Coal Limited Off-Market Buyback Booklet dated 28 November 2014.

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

8. U&D is a coal exploration and development company, incorporated in Queensland on 19 September 2013, and listed on the Australian Stock Exchange (ASX) since 19 February 2014.

9. U&D is the head company of a tax consolidated group for Australian income tax purposes.

10. In preparing for U&D to be listed on the ASX, an internal restructure and a share split were undertaken on 7 February 2014 which resulted in 1,000,000,000 U&D shares being issued to U&D's three major shareholders at that time. One of the major shareholders was Australian Kunqian International Energy Co., Ltd (KQ).

The Initial Public Offering

11. A Prospectus was issued by U&D on 5 December 2013 to raise between \$50 million and \$125 million of capital. The offer opened on 6 December 2013 and closed on 31 January 2014.

12. On 10 February 2014, U&D received a letter from KQ indicating that it no longer supported U&D's IPO. However, U&D proceeded with the IPO and despatched holding statements to shareholders on 13 February 2014.

13. On 19 February 2014, U&D commenced trading on the ASX.

14. Through the ASX Bookbuild and Prospectus allocation process, U&D issued a total of 108,557,800 shares at a price of \$0.50 per share, raising a total of \$54,278,900. Of this number, 100,000,000 shares were issued to KQ.

15. On 10 March 2014, U&D received a Notice of Exercise of Statutory Right under section 737 of the *Corporations Act 2001* from KQ to return the 100,000,000 shares issued under the IPO and be repaid \$50,000,000 for shares issued on 13 February 2014 for an alleged contravention of section 724 of the *Corporations Act 2001*.

16. On 11 March 2014, U&D requested a trading halt in relation to the purported notice from the major shareholder.

17. On 13 March 2014, U&D requested a voluntary suspension of their securities.

18. During the period between 19 February 2014 and 13 March 2014, U&D shares traded between \$0.51 and \$0.58.

Legal proceedings

19. On 21 March 2014, U&D advised the market that, in the best interests of all shareholders, it had commenced proceedings against KQ in the Supreme Court of Victoria seeking, amongst other things, a declaration to the effect that the section 737 of the *Corporations Act 2001* notice issued by KQ was invalid and unenforceable.

20. On 15 August 2014, U&D reached an agreement and entered into a Deed of Settlement with KQ. On 18 August 2014, U&D and KQ obtained consent orders from the Supreme Court of Victoria that proceedings be dismissed, without admission of liability by any parties and with no order as to costs.

21. The key terms of the Deed of Settlement are as follows:

- KQ will immediately loan a sum of \$20,000,000 to U&D.
- Immediately upon receipt of the loan, U&D will acquire and cancel KQ's IPO Prospectus shares at a cost of \$0.50 per share.
- Upon U&D receiving the loan and subject to receiving shareholder approval in accordance with the Corporations Act, U&D will make a selective Buy-Back offer at a price of \$0.50 per share to all other persons who were issued shares under the Prospectus and who remain holders of those shares as at the record date for the Buy-Back.
- The decision whether to participate in the Buy-Back will be at the election of the relevant shareholders. Any shares not acquired as part of the Buy-Back will remain issued capital of U&D.

ASX Correspondence

22. The ASX wrote to U&D advising, amongst other things, that the selective Buy-Back needed to have a broader range. The ASX advised that the Buy-Back offer was to be made to each person who:

- was issued shares under the Prospectus, or
- who acquired shares on market at any time between the date of U&D's listing on 19 February 2014 and the date when trading in U&D was halted on 11 March 2014 (both inclusive) and who remain shareholders as at the effective date of the Buy-Back offer.

Further the ASX have advised that they will apply to de-list U&D should the Buy-Back offer not proceed.

Capital management policy and rationale for the Buy-Back

23. Following the settlement of the legal proceedings, U&D had cash reserves of approximately \$11 million which is substantially made up of the IPO subscription funds from investors other than KQ.

24. As part of the Deed of Settlement, U&D agreed it was fair and equitable to allow other shareholders who invested under the Prospectus to have the opportunity to, in effect, return their shares to U&D in exchange for repayment of the subscription monies. This would afford those shareholders similar treatment to that received by KQ under the settlement of the legal proceedings.

The Buy-Back

25. The timetable for the Buy-Back was as follows:

Description	Date
Shareholder vote on Buy-Back	12 November 2014
Buy-Back record date	21 November 2014
Buy-Back offer period commenced	28 November 2014
Buy-Back offer period closed	16 January 2015
Buy-Back consideration distributed	21 January 2015

26. U&D shareholders who acquired shares in the IPO or on market between 19 February 2014 and 11 March 2014 (both inclusive) and who hold shares on the Buy-Back record date, being 21 November 2014 at 5:00pm (AEDT), may participate in the Buy-Back.

27. The decision whether to participate in the Buy-Back will be at the election of the relevant eligible shareholders. Any shares not acquired as part of the Buy-Back will remain issued capital of U&D.

28. The Buy-Back price is \$0.50 per share, being the price at which the shares were issued under the IPO.

29. The Buy-Back will be funded from U&D's cash reserves resulting from the IPO subscription funds from investors other than KQ, and from loans provided from KQ (to the extent a shortfall exists).

30. All shares bought back under the Buy-Back will be cancelled.

31. Under the Buy-Back offer, up to \$4,278,900 will be debited to U&D's untainted share capital account on completion of the Buy-Back. The journal entry to give effect to the Buy-Back is:

DR	Share Capital	\$4,158,046	
CR	Cash		\$4,158,046

32. No part of the Buy-Back price will be paid out of the profits of U&D.

Other information

33. As at 30 June 2014, the equity of U&D comprised of \$100,099,441 issued capital, \$832,674 reserves and \$8,474,996 accumulated losses.

34. For the year ended on 30 June 2014, U&D had incurred a loss of \$6,113,206.

35. U&D has never paid a dividend to shareholders.

36. U&D's share capital account is not tainted within the meaning of Division 197.

37. The share register of U&D comprises 483 different shareholders, with 471 being individuals and 12 being companies. The major shareholders are excluded from the buy-back, leaving the remaining 479 shareholders able to participate. Of this number 350 are non-resident shareholders.

Ruling

Off-market Buy-Back

38. For the purposes of Division 16K of Part III of the ITAA 1936, the Buy-Back is an off-market Buy-Back within the meaning given by paragraph 159GZZZK(d) of the ITAA 1936.

Distribution is not a dividend

39. The purchase price is not a dividend under subsection 159GZZZP(1) of the ITAA 1936 or under subsection 6(1).

Consideration in respect of the sale of each share bought back

40. Participating Shareholders are taken to have received \$0.50 per share as consideration in respect of the sale of each of their shares bought back under the Buy-Back pursuant to section 159GZZZQ of the ITAA 1936.

Capital gains tax (CGT) consequences***U&D shares held neither as 'revenue assets' nor as 'trading stock'***

41. Under section 104-10, CGT event A1 happens to Participating Shareholders as a result of the capital-only off market voluntary share Buy-Back to eligible U&D shareholders on 21 January 2015.

Foreign resident shareholders

42. A foreign resident U&D shareholder who was eligible to participate, and participated in the share Buy-Back disregards any capital gain or capital loss made when CGT event A1 happened as their U&D share is not 'taxable Australian property' (section 855-10).

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

43. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applied to the whole or any part of the distribution to Participating Shareholders.

44. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applied to the whole or any part of the distribution to Participating Shareholders.

Commissioner of Taxation**4 March 2015**

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.*

Off-market Buy-Back

45. The Buy-Back is an 'off-market buy-back' as defined in paragraph 159GZZZK(d) of the ITAA 1936, as it is not made in the ordinary course of trading in U&D shares on the ASX.

Distribution is not a dividend

46. The Buy-Back price was debited entirely against U&D's share capital account. Therefore, no part of the Buy-Back price is taken to be a dividend for income tax purposes under section 159GZZZP of the ITAA 1936.

47. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders 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).

48. The term 'dividend' is defined in subsection 6(1) and 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.

49. The term 'share capital account' is defined in section 975-300 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.

50. As mentioned above, the distribution was recorded as a debit to U&D's share capital account. Paragraph (d) of the definition of 'dividend' in subsection 6(1) will apply. Accordingly, no part of the Buy-Back price is a dividend, as defined in subsection 6(1).

Consideration in respect of the sale of each share bought back

51. For the purpose of determining the amount of capital gain or capital loss (where the shares are held on capital or revenue account) the consideration in respect of the disposal of a share, the Sale Consideration, under a Buy-Back is determined in accordance with section 159GZZZQ of the ITAA 1936.

52. Subsection 159GZZZQ(1) of the ITAA 1936 provides that a shareholder is taken to have received an amount equal to the purchase price (in this case the \$0.50) received for each share bought back as consideration in respect of the sale of the share bought back.

Capital gains tax (CGT) consequences***U&D shares held neither as 'revenue assets' nor as 'trading stock'***

53. Under the Buy-Back, U&D purchased U&D shares from Participating Shareholders (that is Participating Shareholders disposed of U&D shares, which were CGT assets as defined in section 108-5). This disposal of the shares was a CGT event A1.

54. The date on which the capital-only off market share Buy-Back was completed is the relevant date of disposal for CGT event A1. This occurred on 21 January 2015.

55. Section 159GZZZQ of the ITAA 1936 provides that a shareholder is taken to have received an amount equal to the purchase price received for each share bought back as consideration in respect of the sale of the share bought back. The purchase price was \$0.50 per share. This amount represents the capital proceeds for CGT purposes under section 116-20.

56. Accordingly, a Participating Shareholder makes a capital gain (or capital loss) if the amount received from U&D for the share is more than (or less than) the cost base (or reduced cost base) of those shares.

Foreign resident shareholders

57. Under subsection 855-10(1), an entity disregards a capital gain (or capital loss) made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'. The term 'taxable Australian property' is defined in the table in section 855-15 and covers the five categories or assets.

58. Broadly, these categories are:

- (a) taxable Australian real property which is held directly
- (b) indirect Australian real property interests which are not covered by item 5 of the table in section 855-15
- (c) CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table in section 855-15
- (d) options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table in section 855-15, and
- (e) CGT assets covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

59. A foreign resident U&D shareholder that participated in the Buy-Back and made a capital gain when CGT event A1 happened to their U&D shares, disregards the capital gain as the U&D shares are not 'taxable Australian property' under section 855-10.

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

Section 45A – streaming of dividends and capital benefits

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

61. Although a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) has been provided to Participating Shareholders, the circumstances of the Buy-Back indicate that there is no 'streaming' of capital benefits to some shareholders and dividends to other shareholders. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applied to the Buy-Back.

Section 45B – Provision of capital benefits in substitution for dividends

62. Section 45B of the ITAA 1936 applies where certain payments are made to shareholders in substitution for dividends.

63. Subsection 45B(2) of the ITAA 1936 sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies. These conditions are that:

- (a) 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)
- (b) 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) of the ITAA 1936), and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Scheme

64. A 'scheme' for the purposes of section 45B of the ITAA 1936 is taken to have the same meaning as provided in subsection 177A(1) of Part IVA of the ITAA 1936. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

65. The distribution of share capital by U&D will constitute a scheme for the purposes of paragraph 45B(2)(a) of the ITAA 1936.

Capital benefit

66. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. It states that a person is provided with a capital benefit if:

- (a) an ownership interest in a company is issued to the person
- (b) there is a distribution to the person of share capital, or
- (c) 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.

67. Therefore, the distribution of share capital under the Buy-Back will constitute the provision of a capital benefit under paragraph 45B(5)(b) of the ITAA 1936.

Tax benefit

68. A taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936 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 would be payable at a later time than it would have been payable if the capital benefit had instead been a dividend.

69. On the basis of the information provided by U&D, it is likely that its shareholders will obtain a tax benefit from the Buy-Back. A dividend would generally be included in the assessable income of a resident shareholder.

Relevant circumstances

70. Under paragraph 45B(2)(c) of the ITAA 1936 the Commissioner is required to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

71. The test is objective, based on the facts of each case. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purposes of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. This purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

72. Having regard to the 'relevant circumstances' (as set out in subsection 45B(8) of the ITAA 1936) of U&D's Buy-Back, it is apparent that:

- The Buy-Back was driven by the specific and uncontrollable facts surrounding U&D's IPO.
- The sole purpose of the Buy-Back is to allow Participating Shareholders to have the opportunity to return their shares to U&D in exchange for repayment of their subscription monies, so that the parties can return to the position where the IPO had never occurred.
- The unique circumstances of U&D also include the consent orders of the Supreme Court of Victoria and the intervention of the ASX in facilitating this selective off-market share Buy-Back.
- As a widely-held listed public company, U&D is unaware of the tax status of its shareholders.
- The Buy-Back amount cannot be said to be attributable to the profits of U&D.
- The unique circumstances of U&D indicate that the Buy-Back amount was not paid in substitution of dividends.

73. Accordingly the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applied to the Buy-Back.

Section 45C – deeming dividends to be paid where determinations under sections 45A or 45B are made

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

Appendix 2 – Detailed contents list

75. 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	4
Date of effect	6
Scheme	7
The Initial Public Offering	11
Legal proceedings	19
ASX Correspondence	22
Capital management policy and rationale for the Buy-Back	23
The Buy-Back	25
Other information	33
Ruling	38
Off-market Buy-Back	38
Distribution is not a dividend	39
Consideration in respect of the sale of each share bought back	40
Capital gains tax (CGT) consequences	41
<i>U&D shares held neither as 'revenue assets' nor as 'trading stock'</i>	41
<i>Foreign resident shareholders</i>	42
<i>The application of sections 45A, 45B and 45C</i>	43
Appendix 1 – Explanation	45
Off-market Buy-Back	45
Distribution is not a dividend	46
Consideration in respect of the sale of each share bought back	51
Capital gains tax (CGT) consequences	53
<i>U&D shares held neither as 'revenue assets' nor as 'trading stock'</i>	53
<i>Foreign resident shareholders</i>	57
The application of sections 45A, 45B and 45C	60
<i>Section 45A – streaming of dividends and capital benefits</i>	60

<i>Section 45B – Provision of capital benefits in substitution for dividends</i>	62
<i>Scheme</i>	64
<i>Capital benefit</i>	66
<i>Tax benefit</i>	68
<i>Relevant circumstances</i>	70
<i>Section 45C – deeming dividends to be paid where determinations under sections 45A or 45B are made</i>	74
Appendix 2 – Detailed contents list	75

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- CGT event A1 – disposal of a CGT asset
- CGT exemptions
- CGT taxable Australian property
- Share buy backs

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(5)(b)

- ITAA 1936 45B(8)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 Pt III Div 16K
- ITAA 1936 159GZZZK(d)
- ITAA 1936 159GZZZP
- ITAA 1936 159GZZZP(1)
- ITAA 1936 159GZZZQ
- ITAA 1936 159GZZZQ(1)
- ITAA 1936 Pt IVA
- ITAA 1936 177A(1)
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-165(3)
- ITAA 1997 108-5
- ITAA 1997 116-20
- ITAA 1997 Div 197
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 975-300
- Corporations Act 2001 724
- Corporations Act 2001 737
- TAA 1953

Other references:

- Law Administration Practice Statement PS LA 2007/9
- Share buy-backs

ATO references

NO: 1-68WBKJV

ISSN: 1445-2014

ATOlaw topic: Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 – disposal of a CGT asset
Income tax ~~ Capital management ~~ Share buy back

**© AUSTRALIAN TAXATION OFFICE FOR THE
COMMONWEALTH OF AUSTRALIA**

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).