



Status: **legally binding**

Class Ruling

American Pacific Borates Limited – exchange of options for options in 5E Advanced Materials, Inc.

❶ Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for taxpayers who held options in American Pacific Borates Limited (ABR) that were exchanged for options in 5E Advanced Materials, Inc.(5E) under the scheme to which this Ruling relates (Option Exchange).
2. Full details of the scheme are set out at paragraphs 23 to 45 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if:
 - you were the holder of one or more options in ABR (ABR Options) at 7:00 pm AEDT on 2 March 2022 (Record Date)
 - your ABR Options were exchanged for options in 5E (5E Options) under the Option Exchange on the Option Exchange Date (in the manner described in paragraphs 37 to 39 of this Ruling), and

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- at the time you were either
 - a resident of Australia for tax purposes within the meaning of section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), or
 - not a resident of Australia for tax purposes (within the meaning of section 6(1) of the ITAA 1936) and held your ABR Options as 'taxable Australian property' (section 855-15) and held your replacement 5E Options as taxable Australian property just after the Option Exchange.

5. This Ruling does not apply to anyone who was subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 23 to 45 of this Ruling.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Holders of American Pacific Borates Limited Options that qualified for tax deferral under Subdivision 83A-C after the Option Exchange Date

7. An ESS deferred taxing point did not arise upon the cancellation of your ABR Options under the Option Exchange due to the operation of section 83A-130.

8. The 5E Options issued in exchange for ABR Options issued under the American Pacific Borate & Lithium Ltd Incentive Option Plan (ABR Option Plan) are reasonably regarded as 'matching' for the purposes of paragraph 83A-130(2)(a).

9. The 5E Options issued to you under the 5E Option Plan (as consideration for the cancellation of your interest in the ABR Option Plan) are treated as a continuation of your interests. As such, a deferred taxing point did not arise at the Option Exchange Date (subsection 83A-130(2)).

10. Your employment in 5E (or a subsidiary company of 5E) is treated as a continuation of your employment in respect of which the ABR Options were acquired (subsection 83A-130(6)).

11. While CGT event C2 happened when your ABR Options were cancelled, you can disregard any capital gain (or capital loss) arising from CGT event C2 (subsection 130-80(1)).

Holders of American Pacific Borates Limited Options after the Option Exchange Date which were not subject to Division 83A

12. CGT event C2 happened when your ABR Options were cancelled under the Option Exchange. You made a capital gain if the capital proceeds received in respect of CGT event C2 happening exceeded the cost base of the ABR Options. You made a capital loss

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to the extent your capital proceeds were less than your reduced cost base (section 104-25).

13. The capital proceeds for CGT event C2 are the market value of the 5E Options received in exchange for your ABR Options; this was worked out on the Option Exchange Date (paragraph 116-20(1)(b)).

14. If an assessable capital gain arose under CGT event C2, you are able to choose roll-over relief under Subdivision 124-M (refer to paragraphs 48 to 52 of this Ruling).

If you choose roll-over relief

15. If you choose roll-over relief under Subdivision 124-M the capital gain made from the cancellation of your ABR Options under CGT event C2 is disregarded (subsection 124-785(1)) and the 5E Options received in exchange are taken to have been acquired on the date you acquired, or were taken to have acquired, your ABR Options (subsection 115-30(1)).

16. An ABR Option that was an 'ESS interest', which was subject to an ESS deferred taxing point prior to the Option Exchange Date, was taken to have been acquired immediately after the ESS deferred taxing point occurred for its market value (section 83A-125).

17. The first element of the cost base of your 5E Options should be worked out by a reasonable attribution of the cost base (or reduced cost base) of the ABR Options for which the 5E Options were exchanged and for which roll-over relief was chosen (section 124-785).

If you do not choose roll-over relief

18. If you do not choose to obtain roll-over relief under Subdivision 124-M, you are required to take into account the capital gain (or loss) made from the cancellation of your ABR Options under CGT event C2 in working out your net capital gain or net capital loss for the relevant income year (subsection 104-25(3)).

19. If you are an individual or entity of the type in section 115-10 and acquired your ABR Option more than 12 months before the Option Exchange Date (subsection 115-25(1)), you are able to treat any capital gain arising from the cancellation of your ABR Options as a discount capital gain.

20. You are taken to have acquired your 5E Options on the Option Exchange Date for the purposes of determining your eligibility for the capital gains tax discount under Division 115.

21. The first element of the cost base of your 5E Options is the market value of the ABR Options (worked out on the Option Exchange Date) provided in exchange for the relevant 5E Options (subsections 110-25(2) and 110-55(2)).

The Commissioner will not make a determination under section 45B of the ITAA 1936

22. The Commissioner will not determine under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the Option Exchange. No part of the capital benefit (being 5E Options received in exchange for the cancellation of ABR Options) will be deemed by the Commissioner to be a dividend under those provisions.

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Scheme

23. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Relevant facts

24. ABR was incorporated in Australia on 28 October 2016 and is a resident of Australia for income tax purposes. ABR was listed on the Australian Securities Exchange (ASX); however, ABR was delisted from the ASX as at the close of business on 9 March 2022.

25. 5E was a newly-formed company incorporated in Delaware, the United States of America (USA) (filing date 23 September 2021). While the initial issued share capital of 5E consisted of a single ordinary share issued to ABR for nominal consideration, as at the date of the Scheme Booklet, Holdco (now 5E) had authority to issue 180 million shares of voting common stock and 20 million shares of preferred stock.

26. ABR owned all of the shares in Fort Cady Holdings Pty Ltd (FCH), a company incorporated in Australia on 3 March 2017 and a resident of Australia for income tax purposes.

27. FCH, in turn, owns all of the shares in Fort Cady (California) Corporation (FCCC), a company incorporated in the USA.

28. The ABR group operates a borate exploration and production business (Business). The assets of the Business relate to a mine in Southern California, USA, known as the Fort Cady Borate Mine Project (the 'Fort Cady Project') and rights in respect of certain borate and lithium projects located in Churchill County, Nevada, USA (the 'Salt Wells Projects'). The assets relating to the Fort Cady Project are legally owned by FCCC, whereas the assets relating to the Salt Wells Projects are legally owned by ABR.

29. As at the Record Date, ABR had:

- \$172,175,996 issued capital
- \$20,873,533 reserves, and
- \$50,214,715 accumulated losses.

30. As at the Record Date, ABR had 418,685,262 ordinary shares on issue. There were also 55.1 million ABR options on issue. The ordinary shares are not subject to this Ruling.

31. ABR announced to the market on 9 March 2022 that pursuant to the Scheme, 41,869,315 shares of 'common stock' were issued, consisting of:

- 11,768,288 5E Advance Materials shares quoted on the NASDAQ, and
- 30,106,027 shares held by CHESS Depositary Nominees Pty Ltd (as depositary nominee) quoted on the ASX.

32. ABR also announced that there were 5.51 million options on issue pursuant to the Scheme.

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The Share Exchange

33. On 1 October 2021, ABR announced a proposal to re-domicile to the USA via the acquisition of all its shares by 5E in exchange for shares in 5E (with ABR shareholders to receive one 5E share for every 10 ABR shares held at the Record Date).

34. ABR announced to the market on 27 October 2021 that the First Court Hearing to approve the Scheme of Arrangement had occurred. The Scheme Booklet in respect of the Share Exchange (re-domiciliation) scheme was issued to ABR shareholders on 28 October 2021 and approved by the requisite majority of shareholders at the shareholders meeting on 3 December 2021 (Part 5.1 of the *Corporations Act 2001*).

35. ABR applied to the Court on 25 February 2022 for Scheme Approval. The Scheme was approved with an Effective Date of 28 February 2022 (the date upon which the Scheme came into effect and bound ABR shareholders).

36. The Scheme provided for ABR shareholders to receive either 5E shares (tradeable on the NASDAQ) or Chess Depository Interests (CDIs) tradeable on the ASX. Shareholders who chose CDIs received 10 CDIs for each 5E share held by CHES Depositary Nominees Pty Limited on their behalf; these shareholders are referred to as holding 5E CDIs.

The Option Exchange

37. Pursuant to the Scheme Booklet (sections 6.3(b) and 8.2(b)) and Scheme Implementation Deed (clauses 3.1(j) and 4.13 to 4.15), a condition to the Scheme becoming effective was that before 8:00 am on the Second Court Date (25 February 2022), ABR and 5E must have entered into binding agreements with each ABR Option holder to cancel their ABR Options in consideration for the grant of equivalent 5E Options (the Option Exchange).

38. The options issued (or granted) by 5E under the Option Exchange had the same terms and conditions (including the same vesting conditions) as the ABR Options, with ABR Option holders receiving one 5E Option for every 10 ABR Options held (and cancelled) at the Option Exchange Date.

39. The Option Exchange Date is defined in the Scheme Booklet (section 12.1) as the date on which the Option Exchange occurs, which was as soon as possible after the (proposed) Scheme Implementation Date of 9 March 2022.

American Pacific Borate & Lithium Ltd Incentive Option Plan

40. ABR maintained the American Pacific Borate & Lithium Ltd Incentive Option Plan (ABR Option Plan) designed to assist in the reward, retention and motivation of qualified directors, as well as current and prospective employees of ABR (and its associated bodies corporate) in addition to certain contractors of ABR (and its associated bodies corporate) (Eligible Participants).

41. Under the ABR Option Plan, Eligible Participants may have been issued ABR Options at the discretion of the ABR board of directors.

42. The features of the ABR Options issued under the ABR Option Plan were as follows:

- ABR Options were granted to Eligible Participants for no more than nominal cash consideration and were therefore acquired at a discount to market value.

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- Eligible Participants were required to hold ABR Options for a compulsory period or subject to such other vesting conditions as stipulated in the offer document accompanying the ABR Options.
- Eligible Participants were required to hold ABR shares issued upon the exercise of ABR Options for up to a maximum of 7 years from the grant date of the ABR Options, subject to the discretion of the ABR board of directors.
- Upon vesting, an Eligible Participant could choose to exercise ABR Options and acquire the underlying ABR shares by payment of an exercise which was to be determined by the ABR board of directors.

43. ABR Options issued under the ABR Option Plan to persons who were, or were treated as, employees for the purposes of Division 83A qualified as ESS interests that met all the requirements set out in section 83A-105 for tax deferral until the ESS deferred taxing point.

44. As at the Option Exchange Date, ABR had approximately 55.1 million options on issue, of which approximately 14.6 million were ESS interests under Division 83A, which were not (before that time) subject to a deferred taxing point.

45. ABR Options, not subject to Division 83A, were issued either:

- under the ABR Option Plan to persons who were not considered employees for the purposes of Division 83A (for example, companies that are independent contractors), or
- outside of the ABR Option Plan.

Commissioner of Taxation
8 June 2022

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Appendix – Explanation

❶ *This Explanation 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.*

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Holders of American Pacific Borates Limited Options that qualified for tax deferral under Subdivision 83A-C immediately after the Option Exchange Date

46. No ESS deferred taxing point occurred upon the cancellation of the ABR Options held under the ABR Option Plan pursuant to restructure roll-over relief under section 83A-130 as:

- ABR Options that qualified as ESS interests could reasonably be regarded as having been replaced by 5E options that qualified as ESS interests as a result of a restructure (subparagraph 83A-130(1)(a)(ii))
- just before the restructure, you held your ESS interest in the form of an ABR Option that you acquired under an employee share scheme (paragraph 83A-130(1)(b))
- your employment with 5E or a subsidiary of 5E is regarded as a continuation of your employment with ABR or one of its subsidiaries (subsection 83A-130(6)), and
- at the time of acquiring the 5E Options (and taking into account the rights you will acquire on exercise of these options), you did not hold a beneficial interest in more than 10% of the shares in 5E and did not control more than 10% of the maximum number of voting rights that may be cast at a 5E general meeting (subsections 83A-130(9) and (10)).

47. Any capital gain or capital loss you made on the ABR Option being cancelled was disregarded because:

- the CGT event happened in relation to the ABR Option acquired under the ABR employee share scheme (paragraph 130-80(1)(a))
- the CGT event was not CGT event E4, G1 or K8 (paragraph 130-80(1)(b))
- the CGT event happened on the Option Exchange Date and a deferred taxing point under Subdivision 83A-C had not been reached (subparagraph 130-80(1)(d)(ii), and
- subsection 130-80(2) (pertaining to loss or forfeiture of your ESS interests) did not apply.

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Holders of American Pacific Borates Limited Options after the Option Exchange Date (not subject to Division 83A)

48. Subdivision 124-M allows a taxpayer to choose to disregard a capital gain that arises on the exchange of post-CGT shares or post-CGT options to acquire shares in the original company for shares or options to acquire shares in the replacement company, subject to the conditions in subsections 124-780(2) or (2A), 124-780(3) and (if applicable) 124-780(5) being met, and none of the exclusions in section 124-795 (including the replacement entity not making a choice under subsection 124-795(4)) applying.

49. The condition in subsection 124-780(2A) is satisfied as the acquiring company (5E) will, pursuant to a Part 5.1 of the *Corporations Act 2001* Scheme of Arrangement, become the owner of 100% of the voting shares in the original company (ABR) (subsection 124-780(2A)).

50. With regard to the conditions in subsection 124-780(3), these are either met or have no application.

51. Subsection 124-780(5) does not apply, as the original interest holders and the acquiring entity (5E) are dealing with each other at arm's length.

52. The replacement entity (5E) will not make a choice under subsection 124-795(4).

Section 45B of the ITAA 1936 does not apply

53. Section 45B of the ITAA 1936 is an anti-avoidance provision aimed, among other things, at ensuring that amounts are treated as dividends for tax purposes where certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

54. Subsection 45B(2) of the ITAA 1936 provides that section 45B applies if:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936, and
- having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling a taxpayer to obtain the tax benefit.

55. With regard to the present scheme, the Commissioner does not conclude that the scheme was entered into or carried out for a more than incidental purpose of enabling any taxpayer to obtain a tax benefit in the manner described in paragraph 54 of this Ruling, and therefore section 45B of the ITAA 1936 does not apply.

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References

Related Rulings/Determinations:

CR 2022/50

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 45B
- ITAA 1936 45B(1)
- ITAA 1936 45B(2)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1997 Div 83A
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-125
- ITAA 1997 83A-130
- ITAA 1997 83A-130(1)(a)(ii)
- ITAA 1997 83A-130(1)(b)
- ITAA 1997 83A-130(2)
- ITAA 1997 83A-130(2)(a)
- ITAA 1997 83A-130(6)
- ITAA 1997 83A-130(9)
- ITAA 1997 83A-130(10)
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 110-25(2)
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- ITAA 1997 Div 115
- ITAA 1997 115-10
- ITAA 1997 115-25(1)
- ITAA 1997 115-30(1)
- ITAA 1997 116-20(1)(b)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780(2)
- ITAA 1997 124-780(2A)
- ITAA 1997 124-780(3)
- ITAA 1997 124-780(5)
- ITAA 1997 124-785
- ITAA 1997 124-785(1)
- ITAA 1997 124-795
- ITAA 1997 124-795(4)
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(1)(a)
- ITAA 1997 130-80(1)(b)
- ITAA 1997 130-80(1)(d)(ii)
- ITAA 1997 130-80(2)
- ITAA 1997 Div 230
- ITAA 1997 Div 615
- ITAA 1997 855-15
- Corporations Act 2001 Part 5.1

ATO references

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