



CR 2002/26 - Income tax: capital reduction and related scheme of arrangement for the demerger of BHP Steel Limited

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Class Ruling

Income tax: capital reduction and related scheme of arrangement for the demerger of BHP Steel Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are the following provisions of the *Income Tax Assessment Act 1936* ('ITAA 1936'):

- Section 6(1) (Interpretation);
- Section 44 (Dividends);
- Section 45A (Streaming of dividends and capital benefits);
- Section 45B (Schemes to provide capital benefits); and
- Section 45C (Effect of determination under sections 45A and 45B).

Class of persons

3. The class of persons to whom this Ruling applies are the shareholders with ordinary shares in BHP Billiton Limited ('BHP Billiton').

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 14 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

7. The Ruling is based on the income tax law as at 8 May 2002 and is subject to any subsequent changes in the law which may arise under the proposed demerger rules announced by the Treasurer on 22 March 2001 and by the Minister for Revenue and Assistant Treasurer on 6 May 2002. Subject to this qualification this Ruling applies for the year ending 30 June 2003.

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The Manager
Legislative Services, AusInfo
GPO Box 1920
CANBERRA ACT 2601.

Date of effect

9. This Ruling applies to the year ended 30 June 2003.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents:

- application for a class ruling in relation to the divestment of the BHP Steel Limited ('BSL') dated 18 October 2001; and
- further correspondence from BHP Billiton dated 30 November 2001, 7 December 2001, 27 February 2002, 6 March 2002, 16 April 2002, 29 April 2002, 2 May 2002 and 7 May 2002.

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

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

11. The purpose of the arrangement is the demerger of BSL and its subsidiaries from the BHP Billiton Group. BHP Billiton will undertake a reduction of capital of 69 cents per share. Under a related scheme of arrangement, each BHP Billiton shareholder's entitlement to the return of capital will be compulsorily applied as fair value consideration for the acquisition of shares in BSL. BHP Billiton shareholders will be entitled to one share in BSL for every five BHP Billiton shares held at a cost of \$3.45 for each BSL share. The cost of \$3.45 for each BSL share under the scheme of arrangement is within the preliminary Indicative Price Range for the BSL shares to be sold under the Sale Facility.

12. BHP Billiton shareholders may elect to retain, sell or apply for more BSL shares in accordance with the terms of the Sale Facility in the Scheme Booklet for the BSL demerger proposal. The BSL shares of BHP Billiton shareholders who elect to sell their shares, and the BSL shares of Ineligible Overseas Shareholders, will be sold under the Sale Facility prior to the listing of BSL on the Australian Stock Exchange ('ASX'). As part of the share Sale Facility, it is also planned that BHP Billiton will directly sell approximately 6% of the issued capital of BSL to assist in meeting retail demand.

13. No transfers have taken place, or will take place, to taint BHP Billiton's share capital account as defined by subsection 160ARDM(1) of the ITAA 1936.

14. The effective date of the scheme of arrangement will be the date the final court order is lodged with ASIC.

Ruling

15. Subject to the qualifications in paragraphs 4 to 8 of this Ruling, it is confirmed that:

- (a) BHP Billiton shareholders who participate in the capital reduction and the associated transfer of shares in BSL under the scheme of arrangement will not receive dividends to be included in their assessable income under section 44 of the Act where the capital reduction amount to be applied to acquire a BSL share is within or greater than the Indicative Price Range of the BSL shares to be advised to shareholders in the Scheme Booklet.
- (b) The Commissioner will not make a determination under sections 45A and 45B that section 45C will apply to deem any part of the capital reduction or associated transfer of shares to be an unfranked dividend in the hands of the BHP Billiton shareholders.

Explanations

Dividends

16. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined in subsection 6(1) of the ITAA 1936, paid to a shareholder out of company profits.

17. The Commissioner is satisfied that providing the proposed capital reduction is debited to an amount standing to the credit of BHP Billiton's untainted share capital account, the amount of the capital reduction would not constitute a dividend because of the exclusion in paragraph (d) in the definition of a 'dividend' in subsection 6(1) of the ITAA 1936.

18. The Commissioner accepts that under the terms of the scheme of arrangement that the BHP Billiton shareholders acquire the shares in BSL as a transfer from BHP Billiton for full consideration, being the amount of the applied proceeds of the capital reduction, and not as dividends from BHP Billiton.

19. The Commissioner accepts that the transfer of shares in BSL does not constitute a distribution of property by BHP Billiton to its shareholders for the purposes of the definition of a dividend, even if the shares in BSL subsequently trade at a premium on the ASX, on the basis that the capital reduction amount reflects the fair market value of BSL and its subsidiaries as a going concern on the effective date of the scheme of arrangement.

20. It is noted that the amount of the capital reduction applied for each BSL share acquired by the BHP Billiton shareholders is within or greater than the Indicative Price Range to be advised to shareholders in the Scheme Booklet.

Streaming of Capital Benefits

21. Section 45A does not apply as the proposed distribution is to be effected by way of a capital reduction made to all shareholders of ordinary shares, without any associated dividend payments and without any streaming of benefits to any particular shareholders or group of shareholders.

Schemes to Confer a Tax Benefit – Section 45B

22. Section 45B can apply in circumstances where there is a scheme to provide certain capital benefits to shareholders in substitution for dividends and it can be concluded from the relevant circumstances that a person entered into or carried out the scheme or a part thereof for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit.

23. The following relevant circumstances have been considered in the context of the proposed capital reduction and provision of shares in BSL:

- (a) The capital benefit will not be attributable to the profits of BHP Billiton or its subsidiaries. It is anticipated that the market value of the assets transferred to BSL and the BSL shares disposed of by BHP Billiton will be commensurate to their book value, and that little or no material profit will therefore arise. It is accepted that the amount of the capital reduction is not determined by reference to retained earnings.
- (b) BHP Billiton has maintained a consistent pattern of dividend distributions over a long period. The returns of capital during the OneSteel demerger and the present arrangement are not regarded as having established a pattern of returns of capital by the company.
- (c) BHP Billiton is unaware of or has not considered the particular individual circumstances of its shareholders for the purposes of paragraphs 45B(5)(c), (d), (e) and (g) of the ITAA 1936.
- (d) After the distribution, all shareholders will have a proportionate lesser interest in BHP Billiton than their pre-reduction interest.

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- (e) There is no evidence to suggest that the scheme, of itself, involves an increase in the value of a share.

24. After having considered the relevant circumstances the Commissioner accepts that the proposed capital reduction does not represent a scheme entered into for a purpose of providing a tax benefit to any of BHP Billiton's shareholders for the purposes of section 45B.

Detailed contents list

25. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

15 May 2002

Previous draft:

Not previously released in draft form.

Related Rulings/Determinations:

CR 2001/1; CR 2001/6; CR 2002/6;
TR 92/1; TR 97/16

Subject references:

- reduction of capital

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 45A
- ITAA 1936 45B
- ITAA 1936 45B(5)(c)
- ITAA 1936 45B(5)(d)
- ITAA 1936 45B(5)(e)
- ITAA 1936 45B(5)(g)
- ITAA 1936 45C
- ITAA 1936 160ARDM(1)

- TAA 1953 Pt IVAAA
 - Copyright Act 1968
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ATO References

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