

CR 2009/33 - Income tax: demerger of ImmuneTX Limited by Equatorial Coal Limited

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Class Ruling

Income tax: demerger of ImmuneTX Limited by Equatorial 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, 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 provisions 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 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-160 of the ITAA 1997;
- section 104-165 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- Division 125 of the ITAA 1997;
- Division 855 of the ITAA 1997;

- section 960-195 of the ITAA 1997; and
- section 104-165 of the *Income Tax (Transitional Provisions) Act 1997*.

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 shareholders of Equatorial Coal Limited (Equatorial) who:
- (a) participated in the scheme that is the subject of this Ruling; and
 - (b) owned ordinary shares in Equatorial and held those on capital account at the time of the demerger.

In this Ruling, a person belonging to this class of entities is referred to as an 'Equatorial shareholder'.

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 9 to 24 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 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 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 settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. 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 23 September 2008; and
- correspondence received from the applicant between 28 November 2008 and 14 May 2009.

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.

10. Equatorial, an Australian resident company formerly named EQiTX Limited, was incorporated in 1986 and listed on the Australian Securities Exchange in 1987.

11. By 30 June 2006, Equatorial held investments of 54.7% in ZingoTX Pty Ltd (ZingoTX) and 30.66% in VacTX Pty Ltd (VacTX) which both conducted biotechnology projects. Equatorial had also formed a tax consolidated group with its wholly owned subsidiary ImmunoTX Pty Ltd.

12. On 20 June 2008, Equatorial incorporated ImmuneTX Limited (ImmuneTX) for the purpose of seeking opportunities for the potential commercialisation of the two biotechnology projects. Equatorial owned 100% of ImmuneTX's 5,000,000 issued shares. The value of these shares in the accounts of Equatorial was \$1,170,559.

13. Equatorial had changed its business direction moving from a biotechnology focus to that of coal exploration and production. Equatorial proposed the demerger of ImmuneTX so each company could conduct their business undertakings independently. The proposed demerger would allow each company to pursue focused strategies consistent with their strengths and capabilities.

14. As part of the proposed restructure, Equatorial sold its investments in VacTX and ZingoTX to ImmuneTX at their carrying value of \$1,170,559. No profit was recognised by Equatorial as a result of this transaction.

15. On 30 July 2008, Equatorial shareholders passed a resolution approving a capital reduction of \$1,170,559 in total (or \$0.00713 per Equatorial share – the capital reduction amount) that was satisfied by the *in specie* distribution of the 5,000,000 ImmuneTX shares held by Equatorial.
16. As at 12 August 2008, Equatorial had 164,064,170 ordinary shares on issue. It also had 2,750,000 unlisted options on issue.
17. The options issued represented less than 10% of all ownership interests in Equatorial. As a consequence of the demerger the price at which these options could be exercised was reduced.
18. There were no other ownership interests in Equatorial just before the demerger.
19. Equatorial shareholders received 1 ImmuneTX share for every 32.81 Equatorial shares held (with fractions rounded up to the nearest whole number).
20. No foreign resident Equatorial shareholder (either alone or together with their associates) held 10% or more of the direct participation interests (as that term is defined in section 960-190) in Equatorial either at the time of the demerger or for a continuous period of at least 12 months in the 24 months immediately preceding the demerger. Just after the demerger, no foreign resident shareholder of Equatorial held 10% or more of the direct participation interests in ImmuneTX.
21. Equatorial owned no taxable Australian real property (as defined in section 855-20) in the 24 months immediately preceding the demerger.
22. Equatorial accounted for the demerger as follows:
- | | | | |
|----|--------------------|------------------------|-------------|
| Dr | Contributed Equity | \$1,170,559 | |
| | Cr | Investment in ImmuneTX | \$1,170,559 |
23. The capital reduction amount reflects the share capital of Equatorial that was applied to the ImmuneTX investment. The market value of Equatorial's investment in ImmuneTX at the time of the demerger was not more than the capital reduction amount.
24. Equatorial confirms that there have been no transfers to its share capital account, as defined in section 975-300, from any of its other accounts and accordingly its share capital account is not tainted (within the meaning in Division 197).

Ruling

CGT event G1

25. CGT event G1 happened in relation to each share owned by Equatorial shareholders at the time Equatorial made the payment of the capital reduction amount (section 104-135).

26. An Equatorial shareholder made a capital gain under CGT event G1 if the capital reduction amount exceeded the cost base of the Equatorial share. The capital gain is equal to the amount of the excess (subsection 104-135(3)).

(A) CGT consequences for Australian residents

27. The following CGT consequences apply to an Equatorial shareholder who was a resident of Australia (as that term is defined in subsection 6(1) of the ITAA 1936) at the time of the demerger.

Demerger roll-over relief

28. A demerger, as described under section 125-70, happened to this demerger group under the scheme.

29. An Equatorial shareholder can choose demerger roll-over under subsection 125-55(1) for their Equatorial shares.

CGT consequences of choosing roll-over

30. An Equatorial shareholder who chooses demerger roll-over will disregard any capital gain made when CGT event G1 happened to their Equatorial shares under the demerger (subsection 125-80(1)).

Other consequences of choosing roll-over

31. If an Equatorial shareholder chooses roll-over relief, they must also recalculate the cost base and reduced cost base of their Equatorial and ImmuneTX shares.

32. The first element of the cost base and reduced cost base of each Equatorial share and corresponding ImmuneTX shares received under the demerger is worked out as follows:

- sum the cost bases of the Equatorial shares (just before the demerger); and
- apportion that sum over the remaining Equatorial shares and corresponding new ImmuneTX shares received under the demerger.

The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Equatorial and ImmuneTX shares, or a reasonable approximation of those market values (subsections 125-80(2) and (3)).

33. The Commissioner accepts that a reasonable apportionment of the summed cost base is to:

- attribute 98.33% of the summed cost base to the Equatorial shares; and
- attribute 1.67% of the summed cost base to the ImmuneTX shares.

Equatorial shareholders who do not choose demerger roll-over

34. An Equatorial shareholder who does not choose demerger roll-over will not disregard any capital gain made when CGT event G1 happened to their Equatorial share under the demerger.

35. The first element of the cost base and reduced cost base of each Equatorial share and corresponding ImmuneTX shares is as described in paragraph 33 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the ImmuneTX shares for the purposes of the CGT discount

36. For the purpose of determining eligibility to a discount capital gain, the ImmuneTX share received by an Equatorial shareholder will be taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding Equatorial shares (item 2 in the table in subsection 115-30(1)). This will be the case whether or not demerger roll-over was chosen.

(B) CGT consequences for foreign residents

37. At the time of the demerger, no Equatorial shareholder held an interest in Equatorial that passed the non-portfolio interest test (section 960-195 of the ITAA 1997). It follows that no Equatorial shareholder held shares in Equatorial that were taxable Australian property (TAP), except for those foreign resident individuals who:

- (a) were Australian residents when they acquired their Equatorial shares;
- (b) stopped being Australian residents while holding their Equatorial shares; and
- (c) chose, under subsection 104-165(2) of the ITAA 1997 to disregard a capital gain or capital loss from CGT event I1 (section 104-160 of the ITAA 1997) in relation to their Equatorial shares (subsection 104-165(3) of the ITAA 1997 and subsections 104-165(1) and (2) of the *Income Tax (Transitional Provisions) Act 1997*).

Foreign residents whose shares in Equatorial were not TAP

38. A foreign resident Equatorial shareholder whose shares in Equatorial were not TAP will disregard any capital gain made when CGT event G1 happened under the demerger (section 855-10 of the ITAA 1997).

Foreign residents whose shares in Equatorial were TAP

39. A foreign resident Equatorial shareholder whose shares in Equatorial were TAP cannot disregard, under section 855-10, any capital gain made when CGT event G1 happened under the demerger.

Foreign residents cannot choose demerger roll-over

40. A foreign resident Equatorial shareholder cannot choose demerger roll-over to disregard any capital gain made when CGT event G1 happened under the demerger as, just after the demerger, there were no non-portfolio interests in ImmuneTX (subsection 125-55(2) and sections 855-25 and 960-195).

Cost base of the Equatorial and ImmuneTX shares

41. The first element of the cost base and reduced cost base of each Equatorial share and corresponding ImmuneTX shares is as described in paragraph 33 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the ImmuneTX shares for the purposes of the CGT discount

42. For the purpose of determining eligibility to a discount capital gain, the ImmuneTX shares received by a foreign resident Equatorial shareholder will be taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding Equatorial shares (item 2 in the table in subsection 115-30(1)). This will be the case even if the foreign resident Equatorial shareholder cannot choose roll-over.

(C) Dividend consequences

43. As the entire capital reduction amount will be debited to Equatorial's share capital account it will not be a dividend, as defined in subsection 6(1) of the ITAA 1936 (see the exclusion contained in paragraph (d) of the definition of a dividend in subsection 6(1)).

Application of sections 45B and 45C

44. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the capital benefit provided to participating Equatorial shareholders under the demerger.

Commissioner of Taxation

17 June 2009

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.*

45. The significant tax consequences of the scheme are the availability of demerger roll-over under Division 125. Broadly, they enable Equatorial shareholders (other than those whose Equatorial shares were TAP) to disregard a capital gain made under a demerger. They also provide special rules for calculating the cost base and reduced cost base of the Equatorial and ImmuneTX shares.

Conditions for demerger roll-over relief

46. The demerger roll-over provisions in Division 125 contain a number of conditions for eligibility to choose demerger roll-over relief. The main conditions that are relevant to the scheme are:

- (a) a shareholder owns a share in a company;
- (b) the company is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity.

47. Under the scheme the conditions for choosing demerger roll-over relief under Division 125 were satisfied. As a consequence the demerger concessions are available to the resident Equatorial shareholders.

Dividend

48. 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 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 foreign resident).

49. The definition of a 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of that definition excludes amounts debited against an amount standing to the credit of the share capital account of the company.

50. 'Share capital account' is defined in section 975-300 as an account that 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.

51. However, subsection 975-300(3) provides that an account is not a share capital account if it is tainted. A share capital account is tainted if an amount to which Division 197 applies is transferred to the share capital account where the account is not already tainted.

52. In the circumstances of this demerger, the amount that Equatorial debits to its share capital account will not constitute a dividend for the purposes of subsection 6(1) of the ITAA 1936 and will not be assessable as a dividend under subsection 44(1) of the ITAA 1936.

Section 45B – schemes to provide certain benefits

53. Section 45B of the ITAA 1936 applies to ensure that relevant amounts are treated as dividends for taxation purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

54. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the participating Equatorial shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

55. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the scheme to which this Ruling relates.

Appendix 2 – Detailed contents list

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

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 - ITAA 1997 104-165(2)
- Related Rulings/Determinations:*
- ITAA 1997 104-165(3)
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