


# ***CR 2012/11 - Income tax: Return of capital: Exco Resources Limited***

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## Class Ruling

### Income tax: Return of capital: Exco Resources 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

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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 45B of the ITAA 1936;
  - section 45C of the ITAA 1936;
  - section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 104-135 of the ITAA 1997; and
  - section 855-10 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 is the ordinary shareholders of Exco Resources Ltd (Exco) who:

- (a) are registered on the Exco share register on the Record Date, being the date for determining entitlement under the return of share capital and dividend payment;
- (b) hold their shares on capital account; and
- (c) are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Exco shares.

(Note: Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

## 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 29 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

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8. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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).

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## Scheme

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9. The following description of the scheme is based on information provided by the applicant.

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

### Overview

10. Exco is an Australian resident exploration and mining company that was incorporated on 12 November 1998 and is listed on the Australian Securities Exchange (ASX).

11. Over the next twelve years, Exco grew its portfolio through exploration, evaluation and acquisition, chiefly in the North West Queensland area. In particular the company invested considerable equity funds in the Cloncurry Copper Project (CCP).

12. In the last two years, Exco conducted negotiations with a number of interested parties which resulted in an offer from Xstrata in December 2010 for an outright purchase of CCP for consideration of \$175 million in cash.

13. The sale was completed on 30 June 2011.

14. Following the sale of CCP, Exco has continuing assets, including prospects in NW Queensland and the White Dam Gold Project. Exco is pursuing new growth opportunities and intends to add further value to its remaining copper and gold assets in the Cloncurry region. Exco will continue its gold mining and focus on the exploration, development and the bringing to production of Greenfield exploration opportunities.

15. The scale of these ambitions is such that the company's capital requirements are less than they were when CCP was held. Exco is well funded for at least a three to four year period of normal operations which represents about double the normal fund raising cycle of the company.

16. It is therefore intended that the capital invested in CCP as well as other unspent capital related to its Queensland copper projects be returned to shareholders.

## ***Ordinary shares***

17. As at 2 December 2011, Exco had 356,044,187 ordinary shares on issue (Record Date). None of the ordinary shares in Exco were acquired before 20 September 1985.

18. As at 2 May 2011, the foreign shareholding (based on the address of the registered shareholders) was as follows:

- Foreign Custodians 0.92%
- Foreign Brokers 0.57%
- Foreign Private Investors 0.46%
- Foreign Corporations and Foreign Not for Profits 4.33%
- Foreign Institutions 11.04%
- Total foreign holding 17.32%

## ***Capital Management strategies of Exco***

19. Other than the return of capital, the subject of this Ruling, there have been no previous share buy backs or returns of capital. Consistent with their intention of returning capital to its shareholders, Exco has no current intention of undertaking any equity raising in the short to medium term.

20. Exco does not have a dividend re-investment plan.

21. Exco has never previously paid dividends and other than the dividend stated in this Ruling, Exco has no current intention to pay a dividend.

## ***Distribution to shareholders***

22. Exco returned \$135,296,791.06 to shareholders by way of a \$0.38 distribution per share (Shareholder Distribution). The Shareholder Distribution comprised a capital and a dividend component.

23. The capital component was \$0.10 per ordinary share and amounts to \$35,604,418.70 of the Shareholder Distribution (Capital Component).

24. The dividend component was \$0.28 per ordinary share and amounts to \$99,692,372.36 of the Shareholder Distribution (Dividend Component).

25. Exco confirms that its share capital account is not tainted. There are no non-share capital accounts in Exco.

26. Given the relative size of the distribution compared to the value of the company as a whole, Exco obtained approval of the distribution from its ordinary shareholders by way of ordinary resolution at the Annual General Meeting on 24 November 2011.

27. The payment of the Dividend Component and Capital Component occurred on 9 December 2011 (Payment Date).

### ***Accounting Treatment of Return of Capital***

28. The accounting journal entries to give effect to the Shareholder Distribution by Exco (based on a maximum distribution of \$0.38 per share fully diluted) are:

Dr Contributed Capital	\$35,604,418.70
Dr Retained Earnings	\$99,692,372.36
Cr Cash	\$135,296,791.06

### ***Franking***

29. The Dividend Component of the distribution was fully franked.

## **Ruling**

### **Distribution of capital is not a dividend**

30. The \$0.10 cents per share return of capital is not a dividend as defined in subsection 6(1).

### **The application of sections 45B and 45C to the return of capital**

31. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of Exco's return of share capital of \$0.10 cents per ordinary share. Accordingly, no part of the return of capital will be taken to be a dividend for income tax purposes.

### **Capital gains tax (CGT) consequences**

32. CGT event G1 (section 104-135 of the ITAA 1997) happened when Exco paid the \$0.10 cents per share return of capital to an Exco shareholder in respect of an Exco share that they own at the Record Date and continue to own at the Payment Date.

33. CGT event C2 (section 104-25 of the ITAA 1997) happened when Exco paid the \$0.10 cents per return of capital to an Exco shareholder in respect of an Exco share that they own at the Record Date but cease to own before the Payment Date.

## **Foreign resident shareholders**

34. A foreign resident Exco shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happens if their Exco share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

35. A foreign resident Exco shareholder who is paid the return of capital but no longer owns Exco shares on the Payment Date disregards any capital gain or capital loss made as a result of CGT event C2 happening (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**

15 February 2012

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## **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 of capital is not a dividend**

36. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), 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).

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

38. 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.

39. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account 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.

40. The return of capital will be recorded as a debit to Exco's share capital account. As the share capital account of Exco is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph 6(1)(d) of the ITAA 1936 will apply.

41. Accordingly, the return of share capital by Exco to the ordinary shareholders will not be a dividend as defined in subsection 6(1).

### **Application of sections 45B and 45C to the return of capital**

42. Section 45B is an anti-avoidance provision, which, if it applies, allows the Commissioner to make a determination that section 45C applies to treat all or part of the return of the share capital amount as an unfranked dividend.

43. Section 45B applies where certain capital payments 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 below.

## **Scheme**

44. 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 or undertaking, scheme, plan or proposal.

45. The arrangement involving Exco's return of capital to its ordinary shareholders constitutes a 'scheme' for the purposes of section 45B.

## **Capital benefit**

46. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) and includes a distribution by a company to a person of share capital.

47. As Exco's return of capital is recorded by means of a debit to Exco's share capital account, its ordinary shareholders will be taken to have been provided with a capital benefit as defined under paragraph 45B(5)(b).

## **Tax benefit**

48. A taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) if an amount of tax or other amount payable under the income tax laws would, apart from section 45B, be less than the amount that would have been payable, or payable at a later time, if the capital benefit had instead been assessed as a dividend.

49. 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 of the ITAA 1936. Therefore, Exco shareholders will obtain tax benefits from the return of capital.

### **Relevant circumstances**

50. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the circumstances set out under subsection 45B(8) 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.

51. The test of purpose is an objective one. The question is whether, objectively, it would be concluded that a person who entered into or carried out the scheme, or any part of the scheme, did so for the purpose 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.

52. Subsection 45B(8) lists a number of factors in paragraphs 45B(8)(a) to 45B(8)(k) that are relevant circumstances in determining whether a person entered into or carried out a scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. The list of factors is not exclusive and not all factors listed will be relevant to every scheme.

53. The relevant circumstances under subsection 45B(8) cover both the circumstances of the company and the shareholders. In this instance, as the return of capital was made to all Exco shareholders, regardless of their individual circumstances, paragraphs 45B(8)(c) to (h) do not incline for, or against, a conclusion as to purpose.

54. The factors within paragraphs 45B(8)(i) and 45B(8)(j), pertaining to the provision of ownership interests and demerger, are not relevant to the circumstances of this scheme. The relevant factors are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

55. Paragraph 45B(8)(a) refers to the extent to which a capital benefit is attributable to capital and realised and unrealised profits of the company. The sale of Exco's interest in CCP has released funds that Exco considers to be in excess of its requirements for the foreseeable future. The major part of these funds was distributed as a fully franked dividend and a lesser part as a return of the capital invested in CCP. In the circumstances of the scheme, it is accepted that the return of share capital is not attributable to the profits of Exco.

56. Paragraph 45B(8)(b) refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of Exco. Exco has not paid any dividends or made any other distributions since its listing. The dividend is said to represent profit derived from the disposal of the CCP and in its absence no dividend would have been paid. Accordingly, Exco's pattern of distribution does not suggest that the return of capital has been made in substitution for a dividend.

57. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) and 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. These matters include, among other things, the form and substance of the scheme and its financial implications for the parties involved.

58. The practical implications of the scheme by Exco to return an amount of capital arising from the disposal of part of its business to the ordinary shareholders is consistent with it being, in form and substance, a return of capital.

59. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the return of capital.

## **Section 45C**

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

## **CGT consequences**

### ***CGT event G1 – section 104-135***

61. CGT event G1 happened when Exco paid \$0.10 cents per share return of capital amount to an Exco shareholder in respect of a share that they own at the Record Date and continues to own at the Payment Date (section 104-135 of the ITAA 1997).

62. If the return of capital (\$0.10 per share) is equal to or less than the cost base of the Exco share at the Payment Date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

63. An Exco shareholder made a capital gain if the \$0.10 cents per share return of capital is more than the cost base of their Exco share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess.

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

65. 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 Exco share was acquired at least 12 months before the payment of the return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions in that Subdivision are satisfied.

### ***CGT event C2 – section 104-25***

66. The right to receive the return of capital is one of the rights inherent in an Exco share at the Record Date. If, after the Record Date but before the Payment Date, an Exco shareholder ceases to own an Exco share in respect of which the return of capital is payable, the right to receive the return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset.

67. CGT event C2 happened when the return of capital was 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 was made.

68. An Exco 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 Exco 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.

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

70. The cost base of the Exco shareholder's right to receive the 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 an Exco 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 Exco shareholder disposed of the share after the Record Date.

71. Therefore, if the full cost base or reduced cost base of the Exco share has been previously applied in working out a capital gain or capital loss when a CGT event happened to that share, then the right to receive the return of capital is likely to have a nil cost base. As a result, the Exco shareholder will generally make a capital gain equal to the amount of the return of capital.

72. As the right to receive the payment of the return of capital was inherent in the Exco 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 Exco share was acquired at least 12 months before the payment of the return of capital, a capital gain made from the ending of the corresponding right satisfies the requirements of section 115-25 of the ITAA 1997. Such a capital gain is 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.

### **Foreign resident shareholders**

73. Under subsection 855-10(1) of the ITAA 1997, 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 and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

74. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

75. Therefore, a foreign resident Exco shareholder who receives a payment of the return of capital and makes a capital gain when CGT event G1 happens to their Exco shares, can disregard the capital gain if the Exco shares are not 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

76. However, a foreign resident Exco shareholder, just before CGT event G1 happens, cannot disregard a capital gain under subsection 855-10(1) of the ITAA 1997 if the Exco share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

77. If the return of capital is equal to or less than the cost base of the Exco share at the Payment Date, a foreign resident Exco shareholder will need to reduce their cost base and reduced cost base by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997). The adjusted cost base will be relevant for the purpose of determining if a capital gain or loss will be made on any later disposal.

78. A foreign resident Exco shareholder who is entitled to the return of capital but who no longer owns Exco shares on the Payment Date shall disregard any capital gain or capital loss made when CGT event C2 happens (section 855-10 of the ITAA 1997). This is because the right to the payment will not be 'taxable Australian property' as defined in section 855-15 of the ITAA 1997.

## Appendix 2 – Detailed contents list

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

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- capital benefit
- CGT events C1-C3 – end of a CGT asset
- return on capital on shares

### *Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6(1)(d)
- ITAA 1936 44(1)
- ITAA 1936 45B
- 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(8)(a)
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- ITAA 1936 45B(8)(i)
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- ITAA 1936 45B(8)(k)
- ITAA 1936 45C
- ITAA 1936 128B
- ITAA 1936 Pt IVA
- ITAA 1936 177A(1)
- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(viii)
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
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- ITAA 1997 104-165(3)
- 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 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
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### ATO references

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