


CR 2013/60 - Income tax: exchange of performance rights in Bathurst Resources Limited for performance rights in NZ NewCo

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Class Ruling

Income tax: exchange of performance rights in Bathurst Resources Limited for performance rights in NZ NewCo

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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 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83A-10 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-130 of the ITAA 1997; and
- section 130-80 of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who:

- (a) hold performance rights in Bathurst Resources Limited (BRL);
- (b) from the time of acquisition of the performance rights up to the time of the proposed restructure (see paragraph 19 below), are 'residents of Australia' for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (c) participate in the exchange of their performance rights in BRL (the BRL Performance Rights) for equivalent performance rights in NZ NewCo (the NZ NewCo Performance Rights); and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their BRL performance rights.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

4. In this Ruling, the entities belonging to this class are referred to as 'participants'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 22 of this Ruling.

7. 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

8. This Ruling applies from 1 July 2012 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

9. The following description of the scheme is based on information provided to the Commissioner. The following documents or relevant parts of them form part of and are to be read with the description:

- Class Ruling application dated 22 April 2013 from PricewaterhouseCoopers (PwC);
- Amendment to Class Ruling application dated 1 May 2013 from PwC;
- Copy of relevant clauses in the original performance rights plan sent in by PwC;
- Email from PwC sent on 31 May 2013; and
- Copy of an Offer to purchase performance rights sent in by PwC on 28 June 2013.

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

Bathurst Resources Limited (BRL)

10. BRL and its 100% owned New Zealand resident subsidiaries carry on the business of coal mining in New Zealand.

11. BRL is a public company limited by shares that was incorporated on 30 May 2007 and is a resident of Australia for income tax purposes.

12. All of the shares in BRL are ordinary shares and are listed on both the Australian Securities Exchange (ASX) and NZX Main Board (NZSX).

13. In addition to options, BRL has issued the following performance rights to certain employees and management personnel of BRL (the participants) in accordance with its Long Term Incentive Plan (LTIP):

<u>Issue Date</u>	<u>Number of Performance Rights Issued</u>
2 April 2013	1,410,932
26 April 2013	308,643

14. Prior to 27 June 2013 (the Record Date) for the Proposed Restructure, an additional 1,388,889 performance rights were issued (on 13 June 2013). This issue was subject to shareholder approval.

15. The performance rights are issued by BRL for no consideration, i.e. issued at a discount.

16. Under the LTIP, the BRL Performance Rights are offered to Eligible Executives', being an executive of BRL or any other person that the board of BRL determines should be allowed to participate in the LTIP, provided that person is an employee of BRL and takes part in the management of the BRL Group.

17. The earliest vesting date for the BRL Performance Rights expected to be on issue at the Record Date was 30 June 2013.

The proposed restructure

18. On 2 April 2013, BRL announced to both the ASX and NZSX, the intention to proceed with a reorganisation of BRL's corporate structure, subject to Federal Court, shareholder and regulatory approvals.

19. The reorganisation (the Proposed Restructure) will broadly involve the following steps:

- (a) the incorporation of a new holding company in New Zealand (NZ NewCo);
- (b) the exchange, by BRL's existing shareholders, of their BRL Shares for equivalent shares in NZ NewCo;
- (c) the exchange, by way of a binding agreement between BRL and each Option Holder, by the Option Holders of their options in BRL for replacement options over shares in NZ NewCo;
- (d) the exchange, by way of a binding agreement between BRL and each participant, by the participants of their performance rights in BRL (BRL Performance Rights) for replacement performance rights over shares in NZ NewCo (the NZ NewCo Performance Rights);

- (e) the listing of NZ NewCo on both the ASX and NZSX;
- (f) the sale, by BRL, of the shares in its New Zealand subsidiaries (all of whom only hold New Zealand assets) to NZ NewCo; and
- (g) the in-specie distribution of any assets held by BRL to NZ NewCo.

20. Under the Proposed Restructure, each participant will enter into a binding agreement with BRL to exchange their BRL Performance Rights for the same number of NZ NewCo Performance Rights. The terms of the NZ NewCo Performance Rights will be substantially similar to the terms of the BRL Performance Rights. The binding agreements will supersede the 'change of control event' accelerated vesting provision in the LTIP.

21. The reorganisation is subject to both shareholder and court approval, and will be undertaken by way of a court-approved scheme of arrangement (the scheme of arrangement) under section 411 of the *Corporations Act 2001 (Cth)*.

22. The scheme of arrangement requires both shareholder and court approval. For the shareholders, approval was obtained by the requisite majority of ordinary shareholders, and by at least 75% in value of the votes cast, at the scheme meeting held on 13 June 2013.

Ruling

23. A BRL Performance Right held by a participant prior to the Proposed Restructure is an Employee Share Scheme (ESS) interest for the purposes of Division 83A (section 83A-10).

24. Where a participant's BRL Performance Right is replaced with a NZ NewCo Performance Right under the Proposed Restructure, the NZ NewCo Performance Right will be treated as a continuation of the ESS interest (BRL Performance Right) they replaced for the purposes of section 83A-130.

Performance Rights acquired on or after 1 July 2009

25. As the NZ NewCo Performance Right will be treated as a continuation of the ESS interests, neither the vesting of nor subsequent disposal of BRL Performance Rights in exchange for NZ NewCo Performance Rights will be an ESS deferred taxing point (sections 83A-120 and 83A-130).

Capital gains and losses

26. Any capital gains or capital losses that arise as a result of the exchange of BRL Performance Rights for NZ NewCo Performance Rights under the Proposed Restructure will be disregarded in accordance with section 130-80.

Commissioner of Taxation

31 July 2013

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.***

Application of Division 83A

27. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

28. By virtue of paragraph 83A-5(2)(a) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), Division 83A applies to certain shares, rights and stapled securities acquired before 1 July 2009.

29. The LTIP falls within the meaning of an 'employee share scheme' in subsection 83A-10(2) as:

- it falls within the broad definition of a 'scheme' in section 995-1;
- the BRL Performance Rights are ESS interests (paragraph 83A-10(1)(b)), as they are rights that entitle participants to acquire a beneficial interest in an ordinary share in BRL, subject to satisfying the applicable performance conditions; and
- the BRL Performance Rights are offered to 'Eligible Executives' of BRL in relation to their employment.

30. As the NZ NewCo Performance Rights will be granted to the participants on substantially the same terms as the BRL Performance Rights, the NZ NewCo Performance Rights will also be ESS interests.

Section 83A-130

31. The employee share scheme rules contained in section 83A-130 ensure that employees are not adversely affected by takeovers and restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to a restructure.

32. The Proposed Restructure satisfies the requirements of section 83A-130 because:

- the Proposed Restructure is a takeover, as it will result in BRL becoming a 100% subsidiary of NZ NewCo (subparagraph 83A-130(1)(a)(i)); and
- just before the takeover or restructure, the participants:

- held the ESS interests (the old interests), being the BRL Performance Rights that entitle participants to acquire a beneficial interest in an ordinary share in BRL, that they acquired under an employee share scheme, as the LTIP would be a 'scheme' under which the BRL Performance Rights are offered to 'Eligible Executives' of BRL (paragraph 83A-130(1)(b));
- the participants will acquire ESS interests (the new interests), being the NZ NewCo Performance Rights, in NZ NewCo (the new company) in connection with the takeover (subsection 83A-130(2)), where:
 - as a result of the takeover, the participants stop holding the old interests (paragraph 83A-130(2)(a)); and
 - the new interests have been acquired on substantially the same terms as the old interests (paragraph 83A-130(2)(b));
- subsection 83A-35(8) applies to the ESS interests (subsection 83A-130(3));
- the new interests relate to ordinary shares (subsection 83A-130(4));
- the participants were employed by BRL at the time they acquired the BRL Performance Rights and did not cease that employment as a result of the takeover when BRL became a 100% subsidiary of NZ NewCo (subsection 83A-130(6) and paragraph 83A-130(9)(a)); and
- as a result of acquiring NZ NewCo Performance Rights, no participant will hold a legal or beneficial interest in more than 5% of NZ NewCo shares or be in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a NZ NewCo general meeting (paragraph 83A-130(9)(b)).

33. Accordingly, the NZ NewCo Performance Rights acquired by participants will be, for the purposes of Division 83A, treated as a continuation of BRL Performance Rights, by deeming the three-year holding period to have been met and providing a form of roll-over relief for ESS deferred taxing points.

34. However, if a participant disposes of the beneficial interest in a NZ NewCo share within 30 days of acquiring the NZ NewCo Performance Right, then the ESS deferred taxing point is the time of the disposal of the share in accordance with paragraph 83A-120(3)(b).

Capital gains and losses

35. When the BRL Performance Rights are released in exchange for the NZ NewCo Performance Rights, CGT event A1 will occur.

36. Subsection 130-80(1) operates to disregard any capital gain or capital loss to the extent that it resulted from that CGT event because:

- the CGT event happened in relation to an ESS interest (the BRL Performance Rights) acquired under an employee share scheme (the LTIP) (paragraph 130-80(1)(a));
- the CGT event was not CGT event E4, G1 or K8 (paragraph 130-80(1)(b));
- the CGT event occurred on or before the ESS deferred taxing point for the ESS interest (subparagraph 130-80(1)(d)(ii)); and
- subsection 130-80(2) does not apply.

37. However, there would be no disposal where the participant's replacement NZ NewCo Performance Rights are, for the purposes of section 83A-130, treated as a continuation of rights in NZ NewCo. In such circumstances, the reorganisation alone would not trigger a cessation time and therefore there would be no ESS deferred taxing point.

Appendix 2 – Detailed contents list

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

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References

- Previous draft:*
- ITAA 1997 83A-130
- Not previously issued as a draft
- ITAA 1997 83A-130(1)(a)(i)
 - ITAA 1997 83A-130(1)(b)
- Related Rulings/Determinations:*
- TR 2006/10
- ITAA 1997 83A-130(2)
 - ITAA 1997 83A-130(2)(a)
 - ITAA 1997 83A-130(2)(b)
 - ITAA 1997 83A-130(3)
 - ITAA 1997 83A-130(4)
 - ITAA 1997 83A-130(6)
- Subject references:*
- capital gains tax
 - continuation of ESS interests
 - employee share schemes
 - performance rights
 - restructure
 - roll-over
 - takeover
- ITAA 1997 83A-130(9)(a)
 - ITAA 1997 83A-130(9)(b)
 - ITAA 1997 130-80
 - 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 995-1
 - Taxation Administration Act 1953
 - Copyright Act 1968
 - Corporations Act 2001 411
- Legislative references:*
- ITAA 1936 6(1)
 - IT(TP)A 1997 83A-5(2)(a)
 - ITAA 1997 Div 83A
 - ITAA 1997 83A-10
 - ITAA 1997 83A-10(1)(b)
 - ITAA 1997 83A-10(2)
 - ITAA 1997 83A-35(8)
 - ITAA 1997 83A-120
 - ITAA 1997 83A-120(3)(b)
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ATO references

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