

# ***CR 2015/26 - Income tax: return of capital: in specie distribution by Black Fire Minerals Ltd***

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## Class Ruling

### Income tax: return of capital: in specie distribution by Black Fire Minerals Ltd

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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

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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 shareholders of Black Fire Minerals Limited (BFM) who:

- (a) were registered on the BFM share register on the Record Date of 30 October 2014 (Record Date)
- (b) held their BFM shares on capital account, and
- (c) were not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their BFM 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).

In this Ruling, a person belonging to this class of entities is referred to as a 'BFM 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 8 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.

## Date of effect

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7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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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8. The following description of the scheme is based on information provided by the applicant.

### **Background**

9. BFM was an Australian resident company which listed on the Australian Securities Exchange (ASX) on 30 April 2007.

10. At the time of the return of capital (the subject of this Ruling), BFM's principal activity was mineral exploration.

11. On 23 June 2014, BFM announced:

- the signing of an agreement to acquire 100% of the issued capital of British Virgin Islands company Animoca Brands Corporation
- a proposal to change its business to the creation and publication of mobile games
- a proposal to change its name to Animoca Brands Corporation Limited, and
- its intention to divest its existing core assets that may result in an in specie distribution to BFM shareholders.

12. On 23 October 2014 BFM securities were suspended from official quotation.

13. On 23 October 2014, an Extraordinary General Meeting was held where BFM shareholders approved the change to the nature and scale of BFM's business activities, the change of BFM's name and the disposal of its core assets and subsequent in specie distribution to BFM shareholders.

14. By 8 January 2015, the company restructure was complete and BFM (now called Animoca Brands Corporation Ltd) securities were reinstated to official quotation on 23 January 2015.

### **Business Disposal**

15. On 10 June 2014, BFM announced that it had entered into a Term Sheet for the sale of its fully owned subsidiary Black Fire Industrial Minerals Pty Ltd (BFI) to Thor Mining Plc (Thor).

16. BFI's main asset was a 100% interest in the Pilot Mountain Tungsten-Copper Project in Nevada, USA. Its sale was in line with BFM's intention to divest its core assets.

17. The proposed terms of the sale were:

- BFM would receive scrip consideration of 418,750,000 Thor CHESS Depository Interests (CDIs), with a notional value of \$1,675,000 based on a deemed Thor CDI price of \$0.004, (subject to a 12 month escrow period), and
- Thor would assume a BFM debt obligation of \$625,000.

## **In Specie Distribution of Thor CDIs to BFM shareholders**

18. At the Extraordinary General Meeting of BFM on 23 October 2014, shareholders approved the resolutions to sell BFI to Thor followed by the in specie distribution of the Thor CDIs to BFM shareholders.

19. On 29 October 2014, Thor issued the 418,750,000 Thor CDIs to BFM.

20. BFM distributed the Thor CDIs on 6 November 2014 to each BFM shareholder listed on BFM's share register on the Record Date, on the basis of 1.003373 Thor CDIs for every one BFM share held.

21. On 6 November 2014 the market value of each Thor CDI was \$0.003 representing a total distribution of \$1,256,250. BFM debited the full amount of \$1,256,250 against its share capital account.

## **Other Matters**

22. BFM's Annual Report for the year ended 30 June 2014 disclosed a total loss of \$3,383,579 for that year and accumulated losses of \$12,944,831 as at 30 June 2014.

23. Total equity of \$1,520,542 as at 30 June 2014 was represented solely by contributed equity.

24. BFM recorded a loss on the sale of BFI to Thor.

25. BFM has no history of paying dividends, and no history of returning capital to shareholders or undertaking share buy-backs since listing on the ASX.

26. At the time of the capital reduction, BFM had 417,344,536 ordinary shares on issue.

27. BFM has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

28. All BFM shareholders acquired their BFM shares after 20 September 1985.

29. BFM had no knowledge of any capital losses available to its shareholders.

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## Ruling

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

30. The amount of the in specie distribution of Thor CDIs to BFM shareholders is not a 'dividend' as defined by subsection 6(1).

### **Anti-avoidance provision – section 45B**

31. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of the return of capital received by BFM shareholders.

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

32. CGT event G1 happened to a BFM shareholder when BFM made the in specie distribution of Thor CDIs in respect of the BFM shares that they owned at the Record Date and continued to own at the time of the distribution (section 104-135 of the ITAA 1997).

33. CGT event C2 happened to a BFM shareholder when BFM made the in specie distribution of Thor CDIs in respect of the BFM shares that they owned at the Record Date but had ceased to own at the time the distribution was made (section 104-25 of the ITAA 1997).

### **Foreign resident shareholders**

34. A foreign resident BFM shareholder who received Thor CDIs may disregard any capital gain made when CGT event G1 happened if their BFM share did not constitute 'taxable Australian property' (section 855-10 of the ITAA 1997).

35. A foreign resident BFM shareholder who received Thor CDIs may disregard any capital gain or capital loss made when CGT event C2 happened if their right to receive the Thor CDIs was not 'taxable Australian property' (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**

15 April 2015

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

37. Subsection 975-300(3) of the ITAA 1997 states that an account is generally not taken to be a share capital account if it is tainted. BFM has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

38. The amount of the property distributed (being the market value of the Thor CDIs) has been debited against BFM's share capital account. Therefore, the in specie distribution of Thor CDIs is not a dividend as defined in subsection 6(1).

### **Anti-avoidance provision – section 45B**

39. Section 45B is an anti-avoidance provision which, if it applies, allows the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the capital benefit received by the BFM shareholders under the scheme is treated as an unfranked dividend.

40. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. Specifically, section 45B 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 involved 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, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer (the relevant taxpayer) to obtain a tax benefit (paragraph 45B(2)(c)).

41. The in specie distribution of Thor CDIs to BFM shareholders constitutes a scheme for the purposes of section 45B.

42. As the in specie distribution is debited against the company's share capital account, there is a provision of a capital benefit for the purposes of subsection 45B(5).

43. The meaning of 'obtaining a tax benefit' is defined in subsection 45B(9) as occurring where the amount of tax payable from the treatment of a return of capital distribution as a capital benefit under the CGT provisions would, apart from the operation of 45B, be less than the amount that would be payable if the distribution had instead been a dividend.

44. As a return of capital will generally result in a lesser amount of tax payable than a dividend, BFM will obtain a tax benefit.

45. Subsection 45B(8) sets out circumstances that are relevant in determining whether, in relation to the scheme, any person has more than an incidental purpose of enabling a taxpayer to obtain a tax benefit. In the present situation, it is considered that the circumstances covered by paragraphs 45B(8)(a), (b) and (e) are the most relevant.

46. Paragraph 45B(8)(a) refers to the extent to which the distribution is attributable to capital or profits of the company. BFM recorded a loss on the sale of BFI to Thor and had significant carried forward losses for both accounting and taxation purposes as at 30 June 2014. Therefore, the full amount of the return of capital can be reasonably attributable to the share capital invested by BFM in the assets disposed of.

47. Paragraph 45B(8)(b) considers the pattern of distributions of dividends and returns of capital by the company. Given BFM has never generated an accounting profit and has not previously declared a dividend or returned capital, the in specie distribution cannot be said to be in any way a substitute for a dividend distribution by BFM.

48. Paragraph 45B(8)(e) of the ITAA 1936 requires consideration of 'whether the relevant taxpayer is a non-resident'. Non-resident shareholders held 20.42% of shares in BFM which does not of itself give rise to a more-than-incidental-purpose of obtaining a tax benefit.

49. Having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme entered into or carried out was for more than an incidental purpose of enabling BFM shareholders to obtain a tax benefit.

## **CGT Consequences**

### ***CGT event G1 – section 104-135 of the ITAA 1997***

50. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of a share they own in the company and some or all of the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47 of the *Income Tax Assessment Act 1936*.



51. The payment can include giving property (section 103-5 of the ITAA 1997). Accordingly the amount of the payment for the purposes of CGT event G1 was the market value of the Thor CDIs at the time they were distributed (that is, when the payment was made).

52. Therefore, CGT event G1 happened to a BFM shareholder in respect of the BFM shares that they owned as at the Record Date and continued to own at the time of the in specie distribution of the Thor CDIs.

53. As a result of CGT event G1 happening, if the amount of the payment is equal to or less than the cost base of the BFM share at the time of the in specie distribution, the cost base and reduced cost base of each BFM share is reduced (but not below nil) by that amount (subsection 104-135(4) of the ITAA 1997).

54. A BFM shareholder will make a capital gain if the amount of the payment is more than the cost base of the BFM share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is the excess.

55. If a BFM shareholder makes a capital gain when CGT event G1 happens, the cost base and reduced cost base of the BFM share are reduced to nil.

56. A BFM shareholder cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3) of the ITAA 1997).

57. A capital gain made when CGT event G1 happens will be a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the BFM share was acquired at least 12 months before the date of distribution (subsection 115-25(1) of the ITAA 1997) and the other conditions in that Subdivision are satisfied.

## ***CGT Event C2 – section 104-25 of the ITAA 1997***

58. The right to receive the in specie distribution is one of the rights inherent in a BFM share at the Record Date. If, after the Record Date but before the time of the in specie distribution of Thor CDIs, a BFM shareholder ceased to own some, or all, of their BFM shares, the right to receive the distribution in respect of each of the shares disposed of was retained by the BFM shareholder and is considered to be a separate CGT asset.

59. CGT event C2, in section 104-25 of the ITAA 1997, happened when the in specie distribution of Thor CDIs was made and the right of the BFM shareholder to receive that distribution ended.

60. The BFM shareholder will make a capital gain if the capital proceeds from the ending of the right were more than the cost of the right. The capital gain is equal to the amount of the excess. The BFM shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

61. In working out the capital gain or capital loss made when CGT event C2 happens, the capital proceeds are the market value of the Thor CDIs received under the in specie distribution at the time of the distribution (subsection 116-20(1) of the ITAA 1997).

62. The cost base of the right of the BFM shareholder to receive the Thor CDIs is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). As no amount will have been paid for the right by the BFM shareholder, the cost base of the right is likely to be nil. Therefore, for a BFM shareholder, a capital gain equal to the market value of the Thor CDIs at the time of the in specie distribution is likely to arise.

63. As the right to receive the Thor CDIs from BFM was inherent in the BFM share during the time that it was owned, the right is considered to have been acquired at the time when the BFM share was acquired (section 109-5 of the ITAA 1997). Consequently, if the BFM share was originally acquired by the former BFM shareholder at least 12 months before the in specie distribution, a capital gain made when CGT event C2 happens will be a discount capital gain (subsection 115-25(1) of the ITAA 1997) provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

### ***Cost base and time of acquisition of the Thor CDIs***

64. The first element of the cost base and reduced cost base of the Thor CDIs acquired by a BFM shareholder is the market value of the Thor CDIs at the time of the in specie distribution by BFM (subsection 112-20(1) of the ITAA 1997).

65. Under section 109-5 of the ITAA 1997, the BFM shareholder acquired their Thor CDIs at the time when the in specie distribution by BFM happened.

### **Foreign resident shareholders**

66. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, the entity is a foreign resident, or is the trustee of a foreign trust for CGT purposes; and
- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

67. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997, which sets out 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) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

68. A foreign resident, or the trustee of a foreign resident trust for CGT purposes, cannot disregard a capital gain or capital loss made when a CGT event G1 happened to their BFM share under subsection 855-10(1) if:

- (a) their BFM share was an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997), or
- (b) their BFM share had been used at any time by them in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- (c) their BFM share was covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

69. A foreign resident, or trustee of a foreign resident trust for CGT purposes, cannot disregard a capital gain or capital loss made when a CGT event C2 happened to their right to receive Thor CDIs if:

- (a) the right had been used at any time by them in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- (b) the right was covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

## **Appendix 2 – Detailed contents list**

70. 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
- capital gains tax
- capital reductions
- CGT event C1-C3 – end of a CGT asset
- CGT event G1-G3 – shares
- share capital

*Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(5)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
- ITAA 1936 45B(8)(b)
- ITAA 1936 45B(8)(e)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1997 103-5
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 Div 112
- ITAA 1997 112-20(1)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 975-300
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NO: 1-6D3DI5U

ISSN: 1445-2014

ATOlaw topic: Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 - end of a CGT asset  
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events G1 to G3 - shares

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