



CR 2016/49 - Income tax: demerger of Graphex Mining Limited by Indiana Resources Limited (formerly IMX Resources Limited)

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Class Ruling

Income tax: demerger of Graphex Mining Limited by Indiana Resources Limited (formerly IMX Resources Limited)

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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.

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 44(1) of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997)

- subsection 115-30(1) of the ITAA 1997
- Division 125 of the ITAA 1997, and
- Division 855 of the ITAA 1997.

All subsequent 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 holders of ordinary shares in Indiana Resources Limited (Indiana) who:

- (a) were listed on the share register of Indiana as at the Record Date (6 June 2016) for the demerger of ordinary shares in Graphex Mining Limited (Graphex)
 - (b) held their ordinary shares in Indiana on capital account¹ on the Record Date
 - (c) did not acquire any of their ordinary shares in Indiana before 20 September 1985, and
 - (d) are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their ordinary shares in Indiana.
- (**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, a person belonging to this class of entities is referred to as an 'Indiana shareholder'.

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 27 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.

¹ That is, they were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)).

Date of effect

8. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 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 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.

Indiana

10. Indiana is an Australian resident company. Indiana was incorporated on 19 April 1985, and its ordinary shares were listed on the Australian Securities Exchange (ASX) on 17 July 1986. Indiana changed its name from IMX Resources Limited on 7 June 2016.

11. Indiana is a mineral exploration and development company. Immediately before the demerger, Indiana had an interest in a graphite project located in Tanzania (the Chilalo Graphite Project) and other graphite assets located in Tanzania. After the demerger, Indiana continued to have an interest in Base and Precious Metal Assets located in Tanzania (nickel and gold projects).

12. Immediately before the demerger, Indiana had the following shares and options on issue:

- 1,566,831,636 ordinary shares, and
- 21,105,396 unlisted options to acquire ordinary shares in Indiana.

13. There were no other ownership interests (as defined in subsection 125-60(1)) in Indiana immediately before the demerger.

14. Indiana has not paid any dividends, issued bonus shares, or returned share capital to shareholders within the last ten years.

Graphex

15. Graphex is an Australian resident company. Graphex was incorporated on 21 January 2016, and immediately before the demerger was wholly owned by Indiana.

16. Immediately before the demerger, Graphex had 20,000,000 ordinary shares on issue.

17. There were no other ownership interests (as defined in subsection 125-60(1)) in Graphex immediately before the demerger.

18. After the demerger, Graphex completed an initial public offering (IPO) of new ordinary shares and had its ordinary shares listed on the ASX.

The demerger of Graphex ordinary shares

19. To effect the demerger by Indiana of Graphex ordinary shares, the shareholders of Indiana voted at a meeting on 20 April 2016 to approve an ordinary resolution under section 256C of the *Corporations Act 2001* to reduce the share capital of Indiana by \$3,290,800 (the capital reduction amount). This amount was debited to the share capital account of Indiana. The capital reduction amount equates to approximately 0.0021 cents per Indiana ordinary share.

20. The payment of the capital reduction amount was satisfied by an *in specie* distribution to the shareholders of Indiana of 16,454,000 ordinary shares in Graphex held by Indiana. The shares in Graphex were transferred to the shareholders of Indiana on a pro rata basis on 7 June 2016. The shareholders of Indiana received 1 Graphex ordinary share for approximately every 95 Indiana ordinary shares they held at the Record Date for the demerger (6 June 2016). As a result of the demerger, the shareholders of Indiana will own shares in both Indiana and Graphex.

Reasons for the demerger

21. By separating the Chilalo Graphite Project and the Base and Precious Metal Assets, the Board of Directors of Indiana intended to:

- Expose the value of the Chilalo Graphite Project
- Enhance the capacity to raise capital separately for the Chilalo Graphite Project and the Base and Precious Metal Assets
- Allow Indiana and Graphex to adopt a simplified corporate strategy, and
- Allow Indiana to focus on the Base and Precious Metal Assets, and Graphex to focus on the Chilalo Graphite Project.

Accounting treatment

22. Indiana, on a stand-alone basis, accounted for the capital reduction and the distribution of Graphex ordinary shares that effected the demerger with the following journal entry:

DR Share Capital	\$3,290,800	
CR Investment in Graphex		\$3,290,800

Other matters

23. No amounts have been transferred to the share capital account (as defined in section 975-300) of Indiana from any of its other accounts. Accordingly, Indiana's share capital account is not tainted (within the meaning of Division 197).

24. No Indiana ordinary shares were an indirect Australian real property interest (within the meaning given by section 855-25) at the time of the payment of the capital reduction amount (satisfied through the transfer of the Graphex ordinary shares) on 7 June 2016.

25. The Graphex ordinary shares acquired by foreign resident Indiana shareholders under the demerger were not taxable Australian property (within the meaning given by section 855-15) just after they acquired them.

26. Indiana did not elect under subsection 44(2) of the ITAA 1936 that subsections 44(3) and (4) of the ITAA 1936 will not apply to any demerger dividend.

27. Just after the demerger, at least 50% of the market value of the CGT assets owned by Graphex and its demerger subsidiaries were used in carrying on a business by those entities.

Ruling**Dividend consequences – all Indiana shareholders**

28. No part of the value of a Graphex ordinary share distributed to an Indiana shareholder will be assessable income of an Indiana shareholder under subsection 44(1) of the ITAA 1936.

29. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefits provided to Indiana shareholders under the demerger of Graphex ordinary shares.

30. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of the demerger benefit provided to Indiana shareholders under the demerger of Graphex ordinary shares.

31. 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 Indiana shareholders under the demerger of Graphex ordinary shares.

CGT consequences – Australian resident Indiana shareholders

CGT event G1

32. CGT event G1 in section 104-135 happened in respect of each Indiana ordinary share owned by an Australian resident Indiana shareholder at the time Indiana made the payment of the capital reduction amount (satisfied by distributing the Graphex ordinary shares). This is because Indiana made a payment (which can include giving property) to its shareholders in respect of the shares they owned in Indiana, some or all of the payment is not a dividend, and the payment is not included in the assessable income of shareholders (subsection 104-135(1)).

Capital gain

33. An Australian resident Indiana shareholder will make a capital gain from CGT event G1 happening if the capital reduction amount for each Indiana ordinary share (approximately 0.0021 cents) is more than the cost base of the Indiana ordinary share. The capital gain is equal to the amount of the excess. No capital loss can be made from CGT event G1 (subsection 104-135(3)).

Demerger roll-over

34. A demerger, as defined in section 125-70, happened to the Indiana demerger group (which included Indiana and Graphex) under the scheme that is the subject of this Ruling.

35. An Australian resident Indiana shareholder can choose to obtain demerger roll-over under Division 125.

Consequences of choosing demerger roll-over

36. An Australian resident Indiana shareholder who chooses demerger roll-over:

- will disregard a capital gain made when CGT event G1 happened under the demerger to their Indiana ordinary shares (subsection 125-80(1)), and
- must recalculate the first element of the cost base and reduced cost base of their Indiana ordinary shares, and calculate the first element of the cost base and

reduced cost base of the Graphex ordinary shares they acquired under the demerger (subsection 125-80(2)).

37. The first element of the cost base and reduced cost base of each Indiana ordinary share and Graphex ordinary share is worked out by:

- taking the total of the cost bases of the Indiana ordinary shares just before the demerger, and
- apportioning that total between the Indiana ordinary shares and the Graphex ordinary shares acquired under the demerger.

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

39. The Commissioner accepts that a reasonable apportionment is to:

- attribute 67.28% of the total of the cost bases of the Indiana ordinary shares just before the demerger to the Indiana ordinary shares, and
- attribute 32.72% of the total of the cost bases of the Indiana ordinary shares just before the demerger to the Graphex ordinary shares.

Consequences of not choosing demerger roll-over

40. An Australian resident Indiana shareholder who does not choose demerger roll-over:

- cannot disregard a capital gain made when CGT event G1 happened under the demerger to their Indiana ordinary shares, and
- must recalculate the first element of the cost base and reduced cost base of their Indiana ordinary shares, and calculate the first element of the cost base and reduced cost base of the Graphex ordinary shares they acquired under the demerger, in the same way as described in paragraphs 37 to 39 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the Graphex ordinary shares for the purpose of making a discount capital gain

41. For the purpose of determining eligibility to make a discount capital gain, a Graphex ordinary share acquired by an Australian resident Indiana shareholder under the demerger will be taken to

have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding Indiana ordinary shares (item 2 of the table in subsection 115-30(1)). This will be the case whether or not the Australian resident Indiana shareholder chooses demerger roll-over.

CGT consequences – foreign resident Indiana shareholders

CGT event G1

42. CGT event G1 in section 104-135 happened in respect of each Indiana ordinary share owned by a foreign resident Indiana shareholder at the time Indiana made the payment of the capital reduction amount (satisfied by distributing the Graphex ordinary shares).

Capital gain

43. A foreign resident Indiana shareholder will make a capital gain from CGT event G1 happening if the capital reduction amount for each Indiana ordinary share (approximately 0.0021 cents) is more than the cost base of the Indiana ordinary share. The capital gain is equal to the amount of the excess. No capital loss can be made from CGT event G1 (subsection 104-135(3)).

Demerger roll-over is not available

44. A foreign resident Indiana shareholder cannot choose to obtain demerger roll-over under Division 125 because the Graphex ordinary shares they acquired under the demerger were not taxable Australian property just after they acquired them (subsection 125-55(2)).

Foreign resident Indiana shareholders whose Indiana ordinary shares were not taxable Australian property

45. A foreign resident Indiana shareholder can disregard a capital gain made from CGT event G1 happening under the demerger in respect of an Indiana ordinary share, unless:

- the Indiana ordinary share has 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), or
- the Indiana ordinary share is covered by subsection 104-165(3) (item 5 of the table in section 855-15).

Cost base and reduced cost base of Indiana ordinary shares and Graphex ordinary shares

46. A foreign resident Indiana shareholder must recalculate the first element of the cost base and reduced cost base of their Indiana ordinary shares, and calculate the first element of the cost base and reduced cost base of the Graphex ordinary shares they acquired under the demerger, in the same way as described in paragraphs 37 to 39 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the Graphex ordinary shares for the purpose of making a discount capital gain

47. For the purpose of determining eligibility to make a discount capital gain, a Graphex ordinary share acquired by a foreign resident Indiana shareholder under the demerger will be taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding Indiana ordinary shares (item 2 of the table in subsection 115-30(1)). The discount percentage applied by foreign resident Indiana shareholders will be affected by sections 115-105 to 115-120.

Commissioner of Taxation**6 July 2016**

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.*

48. The income tax consequences and relevant legislative provisions concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

Dividend consequences

49. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, 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 an Australian resident) or out of profits derived by the company from sources in Australia (if the shareholder is a non-resident).

50. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936, and includes any distribution made by a company to any of its shareholders, whether in money or other property. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes a distribution by a company to its shareholders from being a dividend where the amount of the money paid or credited, or the amount of the value of the property is debited against an amount standing to the credit of the share capital account of the company.

51. The term 'share capital account' is defined in section 975-300 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.

52. Subsection 975-300(3) states that an account is not a share capital account if it is tainted.

53. The demerger of Graphex was implemented by Indiana distributing property (Graphex ordinary shares) to shareholders of Indiana. The amount of \$3,290,800 (approximately 0.0021 cents per Indiana ordinary share) was debited against an amount standing to the credit of Indiana's share capital account. As Indiana's share capital account is not tainted within the meaning of Division 197 of the ITAA 1997, this amount will not be a dividend as defined in subsection 6(1) of the ITAA 1936 and will not be assessable under subsection 44(1) of the ITAA 1936.

54. The amount (if any) by which the value of a Graphex ordinary share exceeds the amount debited to Indiana's share capital account will be a dividend as defined in subsection 6(1) of the ITAA 1936.² However, any such dividend will be a demerger dividend (as defined in subsection 6(1) of the ITAA 1936). This means it will not be included in the assessable income of an Indiana shareholder under subsection 44(1) of the ITAA 1936 as a result of the operation of subsections 44(3) and (4) of the ITAA 1936.

The application of sections 45A, 45B, 45BA and 45C

55. For section 45A of the ITAA 1936 to apply, a company must have streamed the provision of capital benefits to its shareholders.

56. The phrase 'provision of capital benefits' is defined in subsection 45A(3) of the ITAA 1936 and includes the distribution of share capital. The payment of share capital to Indiana shareholders (satisfied through the transfer of the Graphex ordinary shares) means Indiana shareholders were provided with capital benefits.

57. However, Indiana did not stream the provision of capital benefits because all Indiana shareholders on the Record Date participated in the return of capital based on the number of Indiana shares they held.

58. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefits provided to Indiana shareholders under the demerger of Graphex. As a result, no part of the capital benefits will be taken to be an unfranked dividend.

59. Section 45B of the ITAA 1936 applies where:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936)
- (b) under the scheme a taxpayer, who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936), and
- (c) 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 (other than an incidental purpose) of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

² See Taxation Ruling TR 2003/8.

60. The arrangement involving the distribution of Graphex ordinary shares to the shareholders of Indiana constitutes a scheme for the purposes of section 45B of the ITAA 1936.

61. The phrase 'provided with a demerger benefit' is defined in subsection 45B(4) of the ITAA 1936 and includes a company providing a person with ownership interests (such as shares) in that or another company. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936 and includes the provision of ownership interests (such as shares) in a company to a person. The distribution of Graphex ordinary shares to the shareholders of Indiana means that Indiana shareholders were provided with a demerger benefit and were provided with a capital benefit.

62. The Commissioner considers that at least some Indiana shareholders obtained a tax benefit (within the meaning given by subsection 45B(9) of the ITAA 1936) under the scheme.

63. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the relevant circumstances (as outlined in subsection 45B(8) of the ITAA 1936) of the scheme to determine whether it could be concluded that entities that entered into or carried out the scheme or any part of the scheme did so for a purpose (other than an incidental purpose) of enabling the relevant taxpayer (Indiana shareholders) to obtain a tax benefit. Having regard to the relevant circumstances as outlined in subsection 45B(8) of the ITAA 1936, the Commissioner has formed the view that such a purpose did not exist.

64. Accordingly, section 45B of the ITAA 1936 does not apply to the scheme, and the Commissioner will not make a determination:

- under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of the demerger benefit provided to Indiana shareholders under the demerger of Graphex
- 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 Indiana shareholders under the demerger of Graphex.

65. As a result, no part of the demerger benefit or capital benefit provided to Indiana shareholders will be taken to be an unfranked dividend.

CGT consequences – the demerger of Graphex ordinary shares

66. The demerger roll-over provisions in Division 125 contain a number of conditions for eligibility to choose the roll-over. The main conditions that are relevant to the demerger of Graphex ordinary shares by Indiana are:

- (a) an entity owns a share in a company (the original interest)
- (b) the company is the head entity of a demerger group
- (c) a demerger happens to the demerger group
- (d) under the demerger, a CGT event happens to the original interest and the entity acquires a new interest in the demerged entity (which must be a company) only because they own the original interest, and acquires nothing else, and
- (e) the entity owning the original interest must acquire, under the demerger, the same proportion of new interests in the demerged entity as they owned in the head entity just before the demerger.

67. The conditions for choosing demerger roll-over under Division 125 were satisfied in respect of the demerger of Graphex. Accordingly, the demerger concessions in Division 125 are available to Australian resident Indiana shareholders in respect of the demerger of Graphex. Foreign resident Indiana shareholders cannot choose to obtain demerger roll-over under Division 125 because the Graphex ordinary shares they acquired under the demerger were not taxable Australian property just after they acquired them (subsection 125-55(2)).

Appendix 2 – Detailed contents list

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References

<i>Previous draft:</i>	- ITAA 1997 104-135
Not previously issued as a draft	- ITAA 1997 104-135(1)
	- ITAA 1997 104-135(3)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 104-165(3)
TR 2003/8; TR 2006/10	- ITAA 1997 115-30(1)
	- ITAA 1997 115-105
<i>Legislative references:</i>	- ITAA 1997 115-110
- ITAA 1936	- ITAA 1997 115-115
- ITAA 1936 6(1)	- ITAA 1997 115-120
- ITAA 1936 44(1)	- ITAA 1997 Div 125
- ITAA 1936 44(2)	- ITAA 1997 125-55(2)
- ITAA 1936 44(3)	- ITAA 1997 125-60(1)
- ITAA 1936 44(4)	- ITAA 1997 125-70
- ITAA 1936 45A	- ITAA 1997 125-80(1)
- ITAA 1936 45A(2)	- ITAA 1997 125-80(2)
- ITAA 1936 45A(3)	- ITAA 1997 125-80(3)
- ITAA 1936 45B	- ITAA 1997 125-85(1)
- ITAA 1936 45B(2)(a)	- ITAA 1997 125-85(2)
- ITAA 1936 45B(2)(b)	- ITAA 1997 Div 197
- ITAA 1936 45B(2)(c)	- ITAA 1997 Div 230
- ITAA 1936 45B(3)(a)	- ITAA 1997 Div 855
- ITAA 1936 45B(3)(b)	- ITAA 1997 855-15
- ITAA 1936 45B(4)	- ITAA 1997 855-25
- ITAA 1936 45B(5)	- ITAA 1997 975-300
- ITAA 1936 45B(8)	- ITAA 1997 975-300(3)
- ITAA 1936 45B(9)	- ITAA 1997 977-50
- ITAA 1936 45BA	- ITAA 1997 995-1(1)
- ITAA 1936 45C	- TAA 1953
- ITAA 1997	- Corporations Act 2001 256C

ATO references

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