

CR 2017/13 - Income tax: return of capital: Alliance Resources Limited

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Class Ruling

Income tax: return of capital: Alliance 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

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 45A of the 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 ITAA 1997
- Division 855 of the ITAA 1997.

All legislative references are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the holders of ordinary shares in Alliance Resources Limited (Alliance) who:

- were registered on the Alliance share register on the Record Date being 23 November 2016
- were entitled to participate in the return of capital
- held their Alliance shares on capital account, that is, neither as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997)
- 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 Alliance 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 an 'Alliance 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 24 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled
- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 July 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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

8. The following description of the scheme is based on information provided by Alliance.

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

9. Alliance is an Australian resident company which was incorporated on 24 March 1994 and has been listed on the Australian Securities Exchange since 19 October 1994.

10. Alliance is the head company of a tax consolidated group that was formed on 1 July 2003. Alliance Craton Explorer Pty Ltd (ACE) is a wholly owned subsidiary of Alliance and has been a member of the tax consolidated group since formation.

11. On 30 August 2002, ACE entered into a joint venture agreement with its joint venture partner in relation to the Four Mile Uranium Project (Project) in South Australia.

12. On 14 July 2015, ACE entered into a Sale and Purchase Agreement with its joint venture partner to sell ACE's entire interest in the Project for \$73.975 million (the Sale). The Sale was completed on 18 September 2015.

13. Alliance funded its interest in the Project entirely from share capital. The \$73.975 million proceeds from the Sale were less than the share capital invested in the Project.

14. On 28 October 2015, Alliance returned share capital of \$50,060,853 to its shareholders as a result of the Sale.

Return of capital

15. On 16 September 2016, Alliance announced its intention to make another return of capital of \$0.02 per Alliance share held by shareholders on 23 November 2016 (Record Date), subject to shareholder approval.

16. Alliance shareholders approved the subsequent return of capital at the Annual General Meeting of Alliance held on 18 November 2016.

17. On 30 November 2016, the return of capital totalling \$8,343,475 was processed.

18. The return of capital:

- was debited in full against Alliance's share capital account
- was paid equally to each holder of an Alliance share who was registered on the Alliance share register on the Record Date

- did not result in the cancellation or variation of shares, and the number of shares held by shareholders did not change as a result of the return of capital
- did not result in fractional entitlements.

Financial and other information

19. Alliance has a single class share capital structure consisting of fully paid ordinary shares.

20. Alliance's 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.

21. As at the Record Date:

- Alliance's paid up share capital was \$55,841,095
- Alliance had 417,173,773 ordinary shares on issue
- Alliance had no current year profits, and had accumulated losses
- approximately 4.2% of Alliance's shares were held by foreign resident shareholders.

22. Alliance has not historically declared or paid any dividends to its shareholders. Alliance's franking account balance was nil when the return of capital was paid.

23. Alliance has not forecasted the declaration of a dividend to its shareholders in the foreseeable future based on its immediate business operations.

24. Alliance shares were not indirect Australian real property interests within the meaning given by section 855-25 of the ITAA 1997.

Ruling

Return of capital is not dividend

25. The return of capital to Alliance Shareholders was not a dividend as defined in subsection 6(1).

Capital gains tax

26. CGT event C2 happened when Alliance paid the return of capital to an Alliance Shareholder in respect of an Alliance share they owned at the Record Date but ceased to own before the return of capital was paid (section 104-25 of the ITAA 1997).

27. CGT event G1 happened when Alliance paid the return of capital to an Alliance Shareholder in respect of an Alliance share they owned at the Record Date and continued to own when the return of capital was paid (section 104-135 of the ITAA 1997).

28. Depending on an Alliance Shareholder's circumstances, both CGT event C2 and CGT event G1 may apply.

Anti-avoidance provisions will not apply

29. The Commissioner will not make a determination under sections 45A or 45B that section 45C applies to the return of capital.

Foreign resident shareholders

30. An Alliance Shareholder disregards a capital gain or capital loss from CGT event C2 if they were a foreign resident (or the trustee of a foreign trust for CGT purposes) just before the event and the right to receive the return of capital was not covered by item 3 or 5 of the table in section 855-15 of the ITAA 1997.

31. An Alliance Shareholder disregards a capital gain from CGT event G1 if they were a foreign resident (or the trustee of a foreign trust for CGT purposes) just before the event and the Alliance share was not covered by item 3 or 5 of the table in section 855-15 of the ITAA 1997.

Commissioner of Taxation

1 March 2017

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.*

Return of capital is not a dividend

32. 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.

33. As the return of capital was recorded as being wholly debited to Alliance's share capital account, the return of capital was not a dividend as defined in subsection 6(1).

Capital gains tax

CGT event C2 – section 104-25 of the ITAA 1997

34. The right to receive the payment of the return of capital was one of the rights inherent in an Alliance share owned by an Alliance Shareholder at the Record Date. If, after the Record Date but before the return of capital was paid, an Alliance Shareholder ceased to own some, or all, of their shares, the right to receive the payment of the return of capital in respect of each of the shares disposed would have been retained by the shareholder as a separate CGT asset.

35. For each right retained, CGT event C2 (section 104-25 of the ITAA 1997) happened when the return of capital was paid. The right to receive the payment (being an intangible CGT asset) ended by the right being discharged or satisfied when the payment was made.

36. An Alliance Shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right. An Alliance Shareholder will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right (subsection 104-25(3) of the ITAA 1997).

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

38. The cost base of an Alliance 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).

39. The cost base of the right does not include the cost base or reduced cost base of the share previously owned by the Alliance Shareholder that has been applied in working out a capital gain or capital loss made when the share was disposed.

40. The cost base of each right to receive the return of capital will be nil as Alliance Shareholders did not incur any costs to acquire each right.

41. As the right to receive the return of capital was inherent in the Alliance share during the time it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

42. A capital gain made when CGT event C2 happened may qualify as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the Alliance share was acquired at least 12 months before payment of the return of capital and the other conditions in Subdivision 115-A are satisfied.

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

43. CGT event G1 (section 104-135 of the ITAA 1997) happens when a company makes a payment to a shareholder in respect of a share they own (and neither CGT event A1 or C2 happens in relation to the share), and some or all of the payment (the non-assessable part) is neither a dividend nor an amount that is taken to be a dividend under section 47, and the payment is not included in your assessable income.

44. CGT event G1 happened when Alliance paid the return of capital to an Alliance Shareholder in respect of an Alliance share they owned at the Record Date of 23 November 2016 and continued to own when the return of capital was paid.

45. An Alliance Shareholder will make a capital gain if the return of capital is more than the cost base of their Alliance share. The amount of the capital gain is equal to that excess (subsection 104-135(3) of the ITAA 1997).

46. If an Alliance Shareholder makes a capital gain from CGT event G1 happening, the cost base and reduced cost base of the Alliance share is reduced to nil. An Alliance Shareholder cannot make a capital loss from CGT event G1 happening (subsection 104-135(3) of the ITAA 1997).

47. If the return of capital is equal to or less than the cost base of the Alliance share, the cost base and reduced cost base of the Alliance share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

48. A capital gain made when CGT event G1 happened may qualify as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the Alliance share was acquired at least 12 months before the payment of the return of capital and the other conditions in Subdivision 115-A are satisfied.

Anti-avoidance provisions will not apply

49. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend.

Section 45A

50. Section 45A applies where capital benefits are streamed to some shareholders (the advantaged shareholders), who would derive a greater benefit from the capital benefits than other shareholders (the disadvantaged shareholders) and it is reasonable to assume these disadvantaged shareholders have received, or are likely to receive, dividends.

51. A reference to the 'provision of a capital benefit to a shareholder in a company', as defined in section 45A(3), includes the distribution to the shareholder of share capital (45A(3)(b)).

52. The return of share capital by Alliance to its shareholders constituted the provision of a capital benefit. However, as Alliance made a pro-rata return of capital to all shareholders that held shares on the Record Date, there was no streaming of capital benefits to some shareholders and not to others because the capital benefits were received by both advantaged shareholders and disadvantaged shareholders contrary to paragraph 45A(1)(a).

53. Therefore, section 45A does not apply to the return of capital. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the return of capital.

Section 45B

54. Section 45B applies where certain capital payments, including a return of capital, 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))¹

¹ Here, the 'relevant taxpayer' is an Alliance Shareholder.

- 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 the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Scheme and tax benefit

55. The return of capital to Alliance Shareholders was a scheme within the meaning given by subsection 995-1(1) of the ITAA 1997. The Commissioner is also satisfied that at least some Alliance Shareholders obtained a tax benefit within the meaning of subsection 45B(9) as a result of receiving the return of capital.

Relevant circumstances

56. Subsection 45B(8) lists the relevant circumstances of the scheme which the Commissioner must have regard to when determining whether or not the requisite purpose exists.

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

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

Foreign resident shareholders

59. Under section 855-10 of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident or the trustee of a foreign trust for CGT purposes just before a CGT event happens, and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

60. The term 'taxable Australian property' covers five categories of CGT assets and is defined in the table in section 855-15 of the ITAA 1997.

61. Items 1, 2 and 4 of the table in section 855-15 of the ITAA 1997 do not apply to a right to receive the return of capital or an Alliance share.

62. Accordingly:

- an Alliance Shareholder will disregard a capital gain or capital loss from CGT event C2 if they were a foreign resident or the trustee of a foreign trust for CGT purposes just before the CGT event happened and the right to receive the return of capital was not covered by item 3 or 5 of the table in section 855-15 of the ITAA 1997
- an Alliance Shareholder will disregard a capital gain from CGT event G1 if they were a foreign resident or the trustee of a foreign trust for CGT purposes just before the CGT event happened and the Alliance share was not covered by item 3 or 5 of the table in section 855-15 of the ITAA 1997.

Appendix 2 – Detailed contents list

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References

- Previous draft:*
- ITAA 1997
- Not previously issued as a draft
- ITAA 1997 104-25
 - ITAA 1997 104-25(3)
- Related Rulings/Determinations:*
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- Legislative references:*
- ITAA 1936
 - ITAA 1936 6(1)
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Other references:

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