


CR 2017/46 - Income tax: TNG Limited - Demerger of Todd River Resources Limited

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Class Ruling

Income tax: TNG Limited – Demerger of Todd River 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.

Summary – 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 44 of the ITAA 1936
- section 45B of the ITAA 1936
- section 45BA of the ITAA 1936
- section 45C of the ITAA 1936
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 115-30 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 stated.

Class of entities

3. The class of entities to which this Ruling applies is shareholders of TNG Limited (TNG) who:

- were listed on the share register of TNG on 15 March 2017 (Record Date) for the demerger of ordinary shares in Todd River Resources Limited (TRR)
- held their ordinary shares in TNG on capital account at the time of the demerger, that is, the shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on TNG shares.

(**Note:** Division 230 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 'TNG 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 27 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

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 the applicant and the *Notice of Extraordinary General Meeting* dated 20 September 2016 and the TRR prospectus dated 1 February 2017 and varied by the supplementary prospectus dated 10 February 2017.

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. The scheme that is the subject of this Ruling involves the demerger of TRR and its subsidiary Todd River Metals Pty Ltd (TRM) by TNG. TNG announced the proposed demerger on 25 July 2016.

TNG

10. TNG is an Australian resident company, incorporated on 15 September 1970. It is listed on the Australian Securities Exchange (ASX).

11. TNG is an Australian minerals exploration company which, immediately before the demerger, held a portfolio of base metal assets in the Northern Territory (the NT base metal assets) and interests in other projects, including a Vanadium project.

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

- 804,514,214 fully paid ordinary shares
- 25,870,437 listed options, and
- 17,000,000 unlisted options to acquire ordinary shares in TNG.

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

14. TNG's share register, as at 30 June 2016 shows that no company has a more than 20% ownership of TNG.

TRR

15. TRR is an Australian resident company, incorporated on 24 June 2014. Immediately before the demerger, TRR had 65,000,100 ordinary shares on issue and was 53.85% owned by TNG.

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

17. TRR owns all the issued shares in TRM. The NT base metals assets are held by TRM.

Shareholder meeting

18. At the shareholders' meeting held on 29 November 2016, TNG shareholders approved:

- the sale of the NT base metal assets to TRR
- a reduction of capital, without cancelling any shares, by an amount equal to the market value of 28,000,100 TRR shares with effect as at 5.00pm (WST) on the Record Date, and
- the reduction be satisfied by an in specie distribution of TRR shares, to TNG shareholders registered on the Record Date on a pro rata basis.

Pre-demerger transactions

19. The following transactions were undertaken by TNG and TRR, prior to the demerger:

- TNG obtained shareholder approval for the sale of the NT base metal assets to TRR and a reduction of capital by way of an in specie distribution of 28,000,100 TRR shares to TNG shareholders
- TNG transferred the NT base metal assets from its wholly owned subsidiaries (Enigma Mining Limited and Tennant Creek Gold (NT) Pty Ltd) to its wholly owned subsidiary, TRM
- TRR undertook an IPO which raised \$6,000,000 to fund the ongoing exploration and development of the NT base metal assets, and
- TRR was admitted to the Official List of the ASX.

The demerger of TRR

20. On 23 March 2017 (Demerger Date), TNG demerged TRR by making a capital reduction to TNG shareholders by way of an in specie distribution to TNG shareholders of 1 TRR share for every 28.73 TNG shares they held on the Record Date.
21. No TNG shares were cancelled under the demerger. TNG shareholders continued to hold the same number and proportion of TNG shares as they held before the demerger.
22. TNG held 7,000,000 shares (20% of the ownership interests) in TRR after the demerger.
23. TNG shareholders acquired shares in TRR and nothing else.

Accounting for the demerger

24. TNG accounted for the distribution of TRR shares under the demerger by debiting its share capital account by the capital reduction amount of \$3,453,421.
25. The difference between the market value of the NT base metal assets held by TRR (\$5,600,020) and the capital reduction amount (\$3,453,421) was the debit to the transaction reserve (\$2,146,599) which was not sourced from TNG's share capital account.

Reasons for the demerger

26. TNG's reasons for the demerger were as follows:
- to allow TNG to concentrate on the development of its flagship asset, the Vanadium project at Mount Peake
 - to separate the NT base metal assets from TNG's Vanadium project
 - in order to allow TRR to establish its own board and management team to focus on the development of the NT base metal assets, to increase the visibility and transparency of those assets, and
 - to enable TNG and TRR to achieve funding profiles more attuned to the stages and developments of their respective assets.

Other matters

27. This Ruling is made on the following basis:
- all TNG shares were acquired or are taken to have been acquired on or after 20 September 1985 for Australian income tax purposes

- for the purposes of the principal asset test (section 855-30), just before the demerger, at least 50% (by market value) of the capital gains tax (CGT) assets owned by TNG and its subsidiaries will consist of taxable Australian real property
- just after the demerger, at least 50% of the market value of the CGT assets owned by TRR and its demerger subsidiaries were used in carrying on a business by those entities
- TNG will not make an election 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
- TNG advises that the 25,870,437 listed options and the 17,000,000 unlisted options on issue in TNG, just before the demerger, comprise less than 6% of the total ownership interests on issue (see section 125-75, exceptions to subsection 125-70(2)), and
- TNG's share capital account is not tainted (within the meaning of Division 197).

Ruling

CGT consequences – Australian resident TNG shareholders

CGT event G1

28. CGT event G1 happened when TNG made the payment of the capital reduction amount which was satisfied by the in specie distribution of TRR shares (section 104-135).

Capital gain

29. A TNG shareholder made a capital gain when CGT event G1 happened if the capital reduction amount of \$0.0043 for each TNG share exceeds the cost base of that TNG share. The capital gain is equal to the amount of the excess and the cost base and reduced cost base of the TNG share is reduced to nil (subsection 104-135(3)). No capital loss can be made from CGT event G1 (Note 1 to subsection 104-135(3)).

Demerger roll-over

30. TNG shareholders can choose to obtain demerger roll-over (subsection 125-55(1)).

Consequences of choosing demerger roll-over

31. If a TNG shareholder chooses demerger roll-over, any capital gain made when CGT event G1 happens to their TNG shares under the demerger is disregarded (subsection 125-80(1)).

32. A TNG shareholder who chooses demerger roll-over must also recalculate the first element of the cost base and reduced cost base of their TNG shares, and calculate the first element of the cost base and reduced cost base of their new TRR shares acquired under the demerger in the manner described in paragraphs 55 to 57 below (subsection 125-80(2)).

Consequences of not choosing demerger roll-over

33. A TNG shareholder who does not choose demerger roll-over:

- is not entitled to disregard any capital gain made when CGT event G1 happened under the demerger to their TNG Shares, and
- must make adjustments to the cost bases and reduced cost bases of their TNG shares and TRR shares in the manner described in paragraphs 55 to 57 below (subsections 125-85(1), 125-85(2) and 125-80(2)).

Acquisition date of the TRR shares

34. For CGT purposes, a TNG shareholder acquired their TRR shares on the Demerger Date, 23 March 2017 (subsection 109-5(2)).

35. However, for the purposes of determining eligibility to a discount capital gain, the TRR shares acquired by a TNG shareholder as a result of the demerger are taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding TNG shares (Item 2 of the table in subsection 115-30(1)). This is the case whether or not the shareholder chooses demerger roll-over.

CGT consequences – foreign resident TNG shareholders***CGT event G1***

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

Capital gain

37. A foreign resident TNG shareholder made a capital gain when CGT event G1 happened if the capital reduction amount of \$0.0043 for each TNG share exceeds the cost base of that TNG 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

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

Foreign resident TNG shareholders whose TNG shares were not taxable Australian property

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

- the TNG share has been used at any time in carrying on a business through a permanent establishment in Australia (Item 3 of the table in section 855-15), or
- the TNG share is covered by subsection 104-165(3) (Item 5 of the table in section 855-15).

Cost base and reduced cost base of TNG and TRR shares

40. A foreign resident TNG shareholder must recalculate the first element of the cost base and reduced cost base of their TNG shares and calculate the first element of the cost base and reduced cost base of new TRR shares they acquired under the demerger (subsections 125-85(1) and (2)).

Dividend consequences – all TNG shareholders

41. No part of the demerger distribution to TNG shareholders will be assessable income of a TNG shareholder under subsection 44(1) of the ITAA 1936.

Sections 45B, 45BA and 45C of the ITAA 1936

42. 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 TNG shareholders under the demerger.

43. 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 TNG shareholders under the demerger.

Commissioner of Taxation

26 July 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.*

CGT event G1

44. CGT event G1 (section 104-135) happens when:

- a company makes a payment (which may include providing property) to a shareholder in respect of a share they own in the company
- some or all of the payment (the non-assessable part) is not a dividend nor an amount that is taken to be a dividend under section 47 of the ITAA 1936, and
- the payment is not included in the shareholder's assessable income.

45. Under the demerger, TNG made a payment to its shareholders in the form of an in specie distribution of 28,000,100 TRR shares held by TNG. \$3,453,421 of the in specie distribution was debited to the share capital account (that is, \$2,146,599 is not a dividend and is not included in the assessable income of TNG shareholders).

46. Accordingly, CGT event G1 happened in relation to each TNG share owned by a TNG shareholder on the Demerger Date, 23 March 2017, when TNG made the payment of the capital reduction amount which was satisfied by the in specie distribution of TRR shares.

47. A TNG shareholder will make a capital gain when CGT event G1 happened if the capital reduction amount of \$0.0043 per TNG share exceeds the cost base of that share. The capital gain is equal to the amount of the excess and the cost base and reduced cost base of the TNG share is reduced to nil (subsection 104-135(3)). No capital loss can be made when CGT event G1 happens.

Demerger roll-over

48. TNG shareholders may obtain demerger roll-over where the requirements of section 125-70 and subsection 125-55(1) are satisfied.

49. A shareholder in a company may at the time of a demerger choose to obtain a demerger roll-over if:

- the shareholder owns a share in the company (the original interest)
- the company is the head entity of a demerger group
- a demerger happens to the demerger group, and

- under the demerger, a CGT event happens to the original interest and the shareholder acquires a new or replacement interest (the new interest) in the demerged entity (subsection 125-55(1)).

50. A demerger happened to the TNG demerger group because:

- there was a restructuring of the TNG demerger group (paragraph 125-70(1)(a))
- under the restructuring, TNG disposed of at least 80% of its total ownership interests in TRR to TNG shareholders (subparagraph 125-70(1)(b)(i)), and
- under the restructure:
 - a CGT event happened in relation to the TNG shares held by the TNG shareholders and the TNG shareholders acquired new TRR shares and nothing else (subparagraph 125-70(1)(c)(i))
 - the TRR shares were acquired by TNG shareholders because of their ownership of interests in TNG (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(i))
 - neither TNG nor TRR is a trust that is a superannuation fund (paragraph 125-70(1)(g))
 - each TNG shareholder acquired TRR shares in the same proportion as they owned TNG shares just before the demerger (paragraph 125-70(2)(a))
 - each TNG shareholder owned, just after the demerger, the same proportionate total market value of TNG and TRR shares as they owned in TNG just before the demerger (paragraph 125-70(2)(b)), and
 - subsections 125-70(4) and (5) do not apply.

51. The requirements of a demerger and the conditions for choosing demerger roll-over were satisfied in respect of the demerger (section 125-70 and subsection 125-55(1)). Accordingly, TNG shareholders are entitled to obtain demerger roll-over in Division 125 for the demerger.

52. If a TNG shareholder chooses demerger roll-over, they may disregard any capital gain made when CGT event G1 happened to their TNG shares under the demerger (subsection 125-80(1)).

53. If a TNG shareholder does not choose demerger roll-over, they cannot disregard any capital gain made when CGT event G1 happened under the demerger.

54. Whether or not a TNG shareholder chooses the demerger roll-over, they must recalculate the cost base and reduced cost base of their TNG shares and calculate the cost base and reduced cost base of their new TRR shares in the same way (subsections 125-80(2), 125-80(3) and 125-85(2)).

55. The first element of the cost base and reduced cost base of each TNG share and the corresponding TRR share received under the demerger is worked out as follows:

- the sum of the cost bases of each TNG share just before the demerger, and
- apportioning that sum between the TNG shares and the TRR shares acquired under the demerger.

56. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and (3), the Commissioner accepts the 5 day post-demerger VWAP of the TRR shares, (\$0.234), and of the TNG shares, (\$0.148), as a reasonable approximation of the relative market value of those shares.

57. Based on the VWAP calculated in paragraph 56 above, (5.2%) of the shareholder's original cost base and reduced cost base for the TNG shares becomes the first element of the cost base and reduced cost base of TRR shares, and (94.8%) becomes the first element of the cost base and reduced cost base of the TNG shares (section 125-85 and subsections 125-80(2) and (3)).

58. Any capital gain realised by a foreign resident on TNG shares that are not taxable Australian property is disregarded for Australian income tax purposes (section 855-10).

59. Based on the scheme described in this Ruling, a TNG share will be taxable Australian property of a foreign resident TNG shareholder at the time of the demerger if:

- the TNG 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 TNG share is covered by subsection 104-165(3) (Item 5 of the table in section 855-15).

60. A foreign resident TNG shareholder who cannot disregard any capital gain realised on the demerger of TRR can choose to obtain demerger roll-over under Division 125 if their TRR shares are taxable Australian property immediately after the demerger.

61. Regardless of whether a foreign resident TNG shareholder can choose demerger roll-over, they must recalculate the cost base and reduced cost base of their TNG shares and calculate the cost base and reduced cost base of their new TRR shares (section 125-85(1) and (2)).

Dividend consequences***Distribution debited to the share capital account is not a dividend***

62. 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 shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from any Australian source (if the shareholder is a non-resident).

63. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) does not include any part of the distribution that is debited against an amount standing to the credit of the company's share capital account.

64. The term 'share capital account' is defined in section 975-300. An account is not a share capital account if it is tainted (subsection 975-300(3)). TNG has confirmed that its share capital was not tainted immediately before the demerger.

65. The demerger distribution to TNG shareholders of TRR shares has been recorded partly as a debit to TNG's share capital account (\$3,453,421). Accordingly, the extent to which the demerger distribution was debited to the share capital account is not a dividend as defined in subsection 6(1) of the ITAA 1936. Therefore, it will not be included in the assessable income of TNG shareholders under subsection 44(1) of the ITAA 1936.

Balance of the distribution is a demerger dividend

66. The balance of the demerger distribution to TNG shareholders (i.e. the extent to which the demerger distribution exceeds the amount debited to the share capital account of TNG) is a dividend as defined in subsection 6(1) of the ITAA 1936. However, any such dividend will be a demerger dividend as defined in subsection 6(1) of the ITAA 1936.

67. The demerger dividend will not be included in the assessable income of TNG shareholders under subsection 44(1) of the ITAA 1936 as a result of the operation of subsections 44(3) and 44(4) of the ITAA 1936.

Sections 45B, 45BA and 45C of the ITAA 1936

68. Section 45B of the ITAA 1936 applies where certain payments, allocations and distributions are made to shareholders in substitution for dividends. In the event of demergers, section 45B also applies where the components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger.

69. In broad terms, there needs to be a scheme in which, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into the scheme, 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.

70. The in specie distribution of TRR shares to TNG shareholders under the demerger is the provision of a demerger benefit and, to the extent the value of TRR shares was debited to TNG's share capital account, is also the provision of a capital benefit (paragraphs 45B(2)(a), 45B(4)(a) and 45B(5)(a) of the ITAA 1936).

71. As the provision of TRR shares will generally result in a lesser amount of tax payable to TNG shareholders than the amount that would be payable if the provision of those shares was instead an assessable dividend, TNG shareholders will obtain a tax benefit (paragraph 45B(2)(b) and subsection 45B(9) of the ITAA 1936).

72. The relevant circumstances of the scheme which the Commissioner is required to have regard in determining whether or not the requisite purpose exists are set out in subsection 45B(8) of the ITAA 1936.

73. Having regard to the relevant circumstances, the Commissioner considers that the requisite purpose of enabling one or more TNG shareholders or other taxpayers to obtain a tax benefit did not exist.

74. Accordingly, 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 TNG shareholders under the demerger of TRR shares, and
- 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 TNG shareholders under the demerger of TRR shares.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 44(2)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 44(5)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
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- ITAA 1997 125-80(1)
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