


CR 2022/31 - Swick Mining Services Ltd - in specie distribution of Orexplora Technologies Limited shares

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Class Ruling

Swick Mining Services Ltd – in specie distribution of Orexplorer Technologies Limited shares

❶ Relying on this Ruling

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling is about the in specie distribution of shares in Orexplorer Technologies Limited (Orexplorer) issued to shareholders of Swick Mining Services Ltd (Swick) on 7 January 2022 (Implementation Date).
2. This Ruling sets out the income tax consequences of the return of capital amount which formed part of the in specie distribution. This Ruling does not address the income tax consequences of the dividend amount which also formed part of the in specie distribution.
3. Full details of this scheme are set out in paragraphs 24 to 56 of this Ruling.
4. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling), unless otherwise indicated.

Who this Ruling applies to

5. This Ruling applies to you if you:
 - held shares in Swick on 30 December 2021 (Record Date), and

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- held your shares on capital account; that is, you did not hold your Swick Shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).

6. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 24 to 56 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

7. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Demerger relief not available

8. Demerger relief (being demerger roll-over pursuant to Division 125 and demerger dividend treatment under subsections 44(3) and (4)) is not available as the scheme does not satisfy the requirements of a demerger under section 125-70.

Return of capital not a dividend

9. The return of capital amount of 3.72381718 cents per Swick share you received as part of the in specie distribution of shares in Orexplere is not a dividend as defined in subsection 6(1).

Return of capital not assessable as ordinary income

10. The return of capital amount you received as part of the in specie distribution of shares in Orexplere is not assessable as ordinary income under section 6-5.

Sections 45B and 45C do not apply

11. The Commissioner will not make a determination under paragraph 45B(3)(b) that section 45C applies to the whole, or any part, of the return of capital you received as part of the in specie distribution of shares in Orexplere.

Capital gains tax consequences

CGT event G1

12. CGT event G1 happened to you when Swick made the return of capital in respect of each Swick share you owned on the Record Date and continued to own on the Implementation Date (section 104-135).

13. You made a capital gain when CGT event G1 happened if the return of capital amount of 3.72381718 cents per Swick share you received was more than the cost base of your Swick share. The capital gain is equal to the difference, and the cost base and reduced cost base of your Swick shares are reduced to nil (subsection 104-135(3)).

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14. You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

15. If the return of capital amount of 3.72381718 cents per Swick share you received was not more than the cost base of your Swick share, each of the cost base and reduced cost base of your Swick shares is reduced by the amount of the return of capital (but not below nil) (subsection 104-135(4)).

CGT event C2

16. CGT event C2 happened to you if you held Swick shares at the Record Date but disposed of them prior to the Implementation Date (section 104-25). This event happened when Swick made the in specie distribution of an Orexplore share to you in satisfaction of your right to receive the Orexplore share.

17. You received capital proceeds of 13.58 cents in satisfaction of the right to receive an Orexplore share (paragraph 116-20(1)(a)).

18. You made a capital gain when CGT event C2 happened equal to the amount of the capital proceeds as you did not pay, or were not required to pay, for the right to receive an Orexplore share (subsection 104-25(3)).

19. Your capital gain is reduced by the dividend amount of 2.41 cents (0.80363108 cents per Swick share), which formed part of the proceeds you received in satisfaction of your right to receive the Orexplore share (section 118-20).

Discount capital gain

20. You can treat a capital gain made when CGT event G1 or CGT event C2 happened in respect of the return of capital as a discount capital gain if you acquired your Swick share at least 12 months before the Implementation Date (subsection 115-25(1)), provided the other conditions in Subdivision 115-A are satisfied.

Cost base and reduced cost base of Orexplore Technologies Limited share

21. The first element of the cost base and reduced cost base of each Orexplore share you received is 13.58 cents, which the Commissioner accepts as being the market value of each Orexplore share¹ (subsections 110-25(2) and 110-55(2)).

22. You are taken to have acquired the Orexplore share on the Implementation Date (Table Event number A1 (case 1) in subsection 109-5(2)).

Foreign-resident shareholders

23. If you were a foreign resident or the trustee of a foreign trust for CGT purposes as defined in subsection 995-1(1), you disregard any capital gain made from CGT event G1 or any capital gain made from CGT event C2 under subsection 855-10(1) as a Swick share

¹ Calculated based on a five-day volume-weighted average price of an Orexplore share on the first five days of trading.

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or your right to receive the Orexpl ore share is not an 'indirect Australian real property interest' (table item 2 of section 855-15), provided that:

- you did not use your Swick share or right at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- your Swick share or right was not covered by subsection 104-165(3) about individuals who defer capital gains upon ceasing to be an Australian resident (table item 5 of section 855-15).

Scheme

24. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Background

25. Swick is an Australian-resident public company incorporated in Australia. Shares in Swick were listed on the Australian Securities Exchange (ASX) on 1 November 2006.

26. Swick specialised in providing underground and surface mineral drilling services to the resource and mining industry in Australia and overseas.

27. In 2013, Swick acquired a minority stake in Orexpl ore AB, a Swedish incorporated entity, and has since undertaken progressive investment to fund its product development focused on the digital transformation of the mining industry. In 2017, Swick acquired the remaining minority interests to hold 100% of Orexpl ore AB.

28. In 2018, Orexpl ore Australia Pty Ltd was incorporated.

29. On 30 July 2020, Swick announced, following a strategic review, that a separation of the drilling business and the Orexpl ore business would deliver the greatest return to shareholders and allow each business to pursue their respective strategies.

30. On 29 October 2020, Swick also incorporated Orexpl ore, an Australian resident company and a wholly-owned subsidiary of Swick.

31. On 5 February 2021, Swick announced that the separation of Orexpl ore would be deferred to allow greater time to seed the commercialisation pathway with initial commercial projects.

32. On 21 June 2021, Swick announced it would recommence the separation of Orexpl ore.

33. On 22 November 2021, Swick released the Notice of Meeting to Swick shareholders for a general meeting to approve:

- the sale of the Orexpl ore business to Orexpl ore (to transfer all the shares in Orexpl ore Australia Pty Ltd and Orexpl ore AB to Orexpl ore and facilitate the separation of Orexpl ore), and
- the reduction of capital and in specie distribution of Orexpl ore shares.

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In specie distribution

34. On 22 December 2021, Swick shareholders approved the sale of the Orexlore business to Orexlore, and the reduction of capital and in specie distribution of Orexlore shares at the general meeting.

35. On 7 January 2022, Swick implemented the in specie distribution of 93,914,196 Orexlore shares to Swick shareholders. Swick shareholders received one Orexlore share for every three Swick shares held on the Scheme Record Date. Fractions were rounded up to the next whole number.

36. The in specie distribution received by shareholders for each Orexlore share comprised two elements:

- a return of capital of 3.72381718 cents per Swick share, and
- a fully franked dividend of 0.80363108 cents per Swick share.

37. The total return of capital amount of \$10,491,506 was debited against Swick's share capital account.

38. The balance of the in specie distribution was debited against Swick's retained earnings.

39. As at the Implementation Date, the value of an Orexlore share received by a Swick shareholder and the sale agent (in the case of an Ineligible shareholder) was determined to be 13.58 cents calculated on a five-day volume-weighted average price of an Orexlore share on the first five days of trading.

40. The following is a summary of the key dates for the in specie distribution:

Date	Event
22 November 2021	Orexlore lodged prospectus with Australian Securities and Investments Commission
1 December 2021	Orexlore opened the priority offer
22 December 2021	General meeting to approve the in specie distribution of Orexlore shares
22 December 2021	Orexlore closed the priority offer
30 December 2021	Record Date
7 January 2022	In specie distribution to shareholders of Orexlore shares (Implementation Date)
7 January 2022	Dispatch of holding statements for in specie distribution
19 January 2022	Orexlore admitted to the official list of the ASX
21 January 2022	Orexlore shares commenced trading on ASX

41. Swick issued distribution statements to its shareholders on or around 23 February 2022.

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Ineligible shareholders

42. Swick shareholders with a registered address outside Australia, or in Australia but have not declared their tax file number, tax file number exemption or Australian business number to the Swick Share Registry, were ineligible to receive the in specie distribution of Orexlore shares.

43. The Orexlore shares which Ineligible shareholders were otherwise entitled to were transferred to the sale agent on the Record Date and sold on their behalf when Orexlore was admitted to the ASX and a market for Orexlore shares established. The net proceeds were then paid to the Ineligible shareholders.

Priority offer

44. On 22 November 2021, Swick also announced that Orexlore will undertake a priority offer to raise between \$1 million and \$2.5 million of additional equity. The Orexlore Prospectus was lodged on the same date with details regarding the priority offer.

45. The priority offer was only open to eligible Swick shareholders on the share register as at 9.00am (AWST) on 1 December 2021 and was priced at 25 cents per Orexlore share.

46. The priority offer was voluntary, and shareholders had the right, but not the obligation, to participate.

47. The priority offer was for a minimum subscription of \$2,000 per Swick shareholder.

48. Swick also contributed an additional seed-funding payment to Orexlore of \$12 million at completion of the in specie distribution.

49. On the Implementation Date, Swick also announced that Orexlore had successfully raised \$2,437,500 at 25 cents per share under the priority offer.

Capital structure of Swick Mining Services Ltd

50. As at 7 January 2022, Swick's share capital account balance was \$92,165,558.

51. Just prior to the in specie distribution of Orexlore shares, Swick had 281,740,622 ordinary shares on issue.

52. Swick's share capital account (as defined in section 975-300) was not tainted for the purpose of section 197-50.

Other matters

53. Swick's shareholder profile included a mix of shareholder types. A small percentage of Swick shares were held by non-residents.

54. Warrants on issue to a number of Orexlore employees were cancelled prior to the in specie distribution.

55. Swick also entered into a separate Scheme Implementation Agreement (SIA) on 22 October 2021 by way of a scheme of arrangement. Under the SIA, Swick had an equity value of \$99.3 million, not including the value of Orexlore. The implementation of the SIA was subject to certain conditions which included the approval by Swick shareholders of the separation of Orexlore by way of the in specie distribution.

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56. The market value of the assets of Swick that are taxable Australian real property is less than the market value of Swick's other assets for the purposes of section 855-30.

Commissioner of Taxation

30 March 2022

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Appendix 1 – Explanation

❶ *This Explanation 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.*

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Demerger relief not available

57. Demerger relief (being demerger roll-over under Division 125 and demerger dividend treatment under subsections 44(3) and (4)) is not available as the scheme does not satisfy the requirements of a demerger under subsection 125-70(1). This is because the restructuring of the demerger group headed by Swick was taken to include a subsequent scheme of arrangement that resulted in the condition in paragraph 125-70(1)(c) and subsection 125-70(2) not being satisfied.

Return of capital is not a dividend

58. The term 'dividend' is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders but excludes a distribution debited against an amount standing to the credit of the company's share capital account.

59. As the return of capital was debited to Swick's untainted share capital account, it is not a dividend.

60. As the return of capital is not a dividend, as defined in subsection 6(1), no part of the return of capital is included in your assessable income under subsection 44(1).

Sections 45B and 45C do not apply

61. Section 45B is an anti-avoidance provision which applies where, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8), a company provided certain capital payments to its shareholders for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

62. Having regard to the relevant circumstances of the scheme, it cannot be concluded that it was entered into or carried out for a more than incidental purpose of enabling Swick shareholders to obtain a tax benefit. Accordingly, section 45B does not apply.

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Capital gains tax consequences

CGT event G1

63. Paragraphs 12 to 15 of this Ruling sufficiently explain the consequences where CGT event G1 happened to you. Therefore, no further explanation is required.

CGT event C2

64. CGT event C2 (section 104-25) happened to you, in respect of your right to receive the in specie distribution, when Swick made the in specie distribution of an Orexplere share for each three Swick shares that you owned on the Record Date and no longer owned on the Implementation Date. That is, CGT event C2 happened, and not CGT event G1, if you disposed of your Swick shares after the Record Date but before the Implementation Date.

65. The cost base of your right to receive the in specie distribution is worked out under Division 110 (modified by Division 112). As you did not pay, or were not required to pay for the right, the cost base of the right is nil. The cost base of the right does not include the cost base or reduced cost base of the Swick share you previously owned which was applied in working out a capital gain or capital loss when CGT event A1 happened when you disposed of your Swick share after the Record Date but before the Implementation Date (section 104-10).

66. You made a capital gain when CGT event C2 happened equal to the amount of the capital proceeds of 13.58 cents as you did not pay, or were not required to pay, for the right to receive an Orexplere share (subsection 104-25(3)).

67. Your capital gain is reduced to the extent that some part of the CGT event C2 capital gain is also included in your assessable income, is exempt income, or is non-assessable non-exempt income (section 118-20). Your capital gain is therefore reduced by the dividend amount of 2.41 cents (0.80363108 cents per Swick share) which formed part of the proceeds you received in satisfaction of your right to receive the Orexplere share.

68. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your Swick share. Therefore, you can treat a capital gain made when CGT event C2 happened on the ending of the right as a discount capital gain under Subdivision 115-A if you acquired your Swick share at least 12 months before the Implementation Date (subsection 115-25(1)) provided the other conditions in Subdivision 115-A are satisfied.

Foreign-resident shareholders

69. A capital gain from a CGT event G1 or a CGT event C2 is disregarded if:

- just before the CGT event happened, you are a foreign resident, or the trustee of a foreign trust for capital gains tax purposes, and
- the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

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70. The term 'taxable Australian property' is defined in the table in section 855-15. Your Swick share or right to receive an Orexlore share was not an 'indirect Australian real property interest' (table item 2 in section 855-15). Therefore, your Swick share or right will constitute taxable Australian property if:

- you used your Swick share or right at any time in carrying on a business through a permanent establishment in Australia (table item 3 in section 855-15), or
- your Swick share or right was covered by subsection 104-165(3) about individuals who defer capital gains upon ceasing to be an Australian resident (table item 5 in section 855-15).

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71. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	subsection 44(3)
<i>Income Tax Assessment Act 1936</i>	subsection 44(4)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(3)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(8)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1997</i>	section 6-5
<i>Income Tax Assessment Act 1997</i>	subsection 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-25
<i>Income Tax Assessment Act 1997</i>	subsection 104-25(3)
<i>Income Tax Assessment Act 1997</i>	section 104-135
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(3)
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	Subdivision 109-A
<i>Income Tax Assessment Act 1997</i>	subsection 109-5(2)
<i>Income Tax Assessment Act 1997</i>	Division 110
<i>Income Tax Assessment Act 1997</i>	subsection 110-25(2)
<i>Income Tax Assessment Act 1997</i>	subsection 110-55(2)
<i>Income Tax Assessment Act 1997</i>	Division 112
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 116-20(1)(a)
<i>Income Tax Assessment Act 1997</i>	section 118-20
<i>Income Tax Assessment Act 1997</i>	Division 125
<i>Income Tax Assessment Act 1997</i>	section 125-70
<i>Income Tax Assessment Act 1997</i>	subsection 125-70(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 125-70(1)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 125-70(2)
<i>Income Tax Assessment Act 1997</i>	section 197-50
<i>Income Tax Assessment Act 1997</i>	Division 230

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<i>Income Tax Assessment Act 1997</i>	subsection 855-10(1)
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 855-30
<i>Income Tax Assessment Act 1997</i>	section 975-300
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

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References

Legislative references:

- TAA 1953

ATO references

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Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45B

Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45C

Income tax ~~ Capital management ~~ Returning capital ~~ Share capital return

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