


***CR 2022/50 - American Pacific Borates Limited -
exchange of shares for shares in 5E Advanced
Materials, Inc.***

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Status: **legally binding**

Class Ruling

American Pacific Borates Limited – exchange of shares for shares in 5E Advanced Materials, Inc.

📌 Relying on this Ruling

This publication (excluding appendix) 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 sets out the income tax consequences for American Pacific Borates Limited (ABR) shareholders who disposed of their ABR shares to 5E Advanced Materials, Inc. (5E) under the scheme to which this Ruling relates (Share Exchange).
2. Full details of the Share Exchange are set out in paragraphs 18 to 31 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - were an ABR shareholder registered on the ABR share register at 7:00 pm AEDT on 2 March 2021 (Record Date)
 - held your ABR shares on capital account
 - were at the time either
 - a resident of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), or
 - not a resident of Australia within the meaning of subsection 6(1) of the ITAA 1936 and you held your shares in ABR (immediately before disposal) as ‘taxable Australian property’ (section 855-15).

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5. 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 18 to 31 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

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

Ruling

CGT event A1 happens on disposal of your American Pacific Borates Limited shares

7. CGT event A1 happened when you disposed of your ABR shares to 5E (section 104-10) under the Share Exchange.

8. The time at which CGT event A1 happened was 9 March 2022 (Implementation Date).

9. The capital proceeds in respect of CGT event A1 happening were the market value of the 5E shares you received as consideration for the disposal of the ABR shares (subsection 116-20(1)).

10. You made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of your ABR share were more than the cost base of that share (subsection 104-10(4)). The capital gain is the amount of that excess.

11. You made a capital loss from CGT event A1 happening if the capital proceeds from the disposal of your ABR share were less than the reduced cost base of that share (subsection 104-10(4)). The capital loss is the amount of that difference.

Division 615 roll-over may be available

12. You are able to choose the roll-over under section 615-5 in respect of the capital gains tax consequences that would otherwise have arisen on the disposal of your shares in ABR to 5E.

Division 615 roll-over available for residents

13. You are eligible to choose the roll-over under Division 615 if you were an Australian resident at the time you disposed of your ABR shares to 5E (paragraph 615-20(3)(a)).

Division 615 roll-over available for non-residents

14. You are eligible to choose the roll-over under Division 615 if you were a non-resident of Australia at the time you disposed of your ABR shares to 5E where:

- your ABR shares were 'taxable Australian property' immediately before the disposal (subparagraph 615-20(3)(b)(i)), and

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- your 5E shares were taxable Australian property immediately after the 'completion time' of the Share Exchange (subparagraph 615-20(3)(b)(ii)). See paragraph 41 of this Ruling as to when the completion time occurs and paragraph 42 of this Ruling as to what constitutes a 'share' in this context.

Consequences if you choose to obtain roll-over relief

15. If you choose to obtain roll-over relief under section 615-5:
- you are entitled to disregard any capital gain or capital loss resulting from the disposal of ABR shares in working out your net capital gain or capital loss for the relevant income year (section 615-40 and subsection 124-15(2))
 - you are taken to have acquired your 5E shares at the same time as you acquired your corresponding ABR shares for the purposes of Division 115 (table item 2 of subsection 115-30(1)), and
 - the first element of your cost base and reduced cost base of each 5E share received by you equals the total of the cost bases of your ABR shares (worked out on the Implementation Day) divided by the number of your 5E shares (section 615-40 and subsection 124-15(3)).

Consequences if you choose not to obtain roll-over relief

16. If you choose not to obtain roll-over relief under section 615-5:
- you are required to take into account any capital gain or capital loss resulting from the disposal of ABR shares in working out your net capital gain or net capital loss for the relevant income year (sections 102-5 and 102-10)
 - you are taken to have acquired your 5E shares on the Implementation Date for the purposes of Division 115 (table item 2 of section 109-10), and
 - the first element of the cost base and reduced cost base of the 5E shares you receive equals the market value of your ABR shares on the Implementation Date divided by the number of your 5E shares (subsections 110-25(2) and 110-55(2)).

No determination will be made under Part 45B of the ITAA 1936

17. The Commissioner will not determine under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the Share Exchange. No part of the capital benefit (being the 5E shares you receive under the Share Exchange) will be deemed by the Commissioner to be a dividend under those provisions.

Scheme

18. 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.

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Relevant facts

19. ABR was incorporated in Australia on 28 October 2016 and is a resident of Australia for income tax purposes. ABR was also a public company listed on the Australian Securities Exchange (ASX); however, ABR was delisted from the ASX as at the close of business on 9 March 2022.

20. 5E was a newly-formed company incorporated in Delaware, the United States of America (USA) (filing date 23 September 2021). While the initial issued share capital of 5E consisted of a single ordinary share issued to ABR for nominal consideration, as at the date of the Scheme Booklet, Holdco (now 5E) had authority to issue 180 million shares of voting common stock and 20 million shares of preferred stock. ABR owned all of the shares in Fort Cady Holdings Pty Ltd (FCH), a company incorporated in Australia on 3 March 2017 and a resident of Australia for income tax purposes.

21. FCH, in turn, owns all of the shares in Fort Cady (California) Corporation (FCCC), a company incorporated in the USA.

22. The ABR group operates a borate exploration and production business (Business). The assets of the Business relate to a mine in Southern California, USA, known as the Fort Cady Borate Mine Project (the 'Fort Cady Project') and rights in respect of certain borate and lithium projects located in Churchill County, Nevada, USA (the 'Salt Wells Projects'). The assets relating to the Fort Cady Project are legally owned by FCCC, whereas the assets relating to the Salt Wells Projects are legally owned by ABR.

23. As at the Record Date, ABR had:

- \$172,175,996 issued capital
- \$20,873,533 reserves, and
- \$50,214,715 accumulated losses.

24. As at the Record Date, ABR had 418,685,262 ordinary shares on issue. There were also 55.1 million ABR options on issue. These options are not subject to this Ruling.

25. ABR announced to the market on 9 March 2022 that pursuant to the Scheme, 41,869,315 shares of 'common stock' were issued, consisting of

- 11,768,288 5E Advance Materials shares quoted on the NASDAQ, and
- 30,106,027 shares held by CHESSE Depository Nominees Pty Ltd (as depository nominee) quoted on the ASX.

26. ABR also announced that there were 5.51 million options on issue pursuant to the Scheme.

The Share Exchange

27. On 1 October 2021, ABR announced a proposal to re-domicile to the USA via the acquisition of all its shares by 5E in exchange for shares in 5E (with each ABR shareholder to receive one 5E share for every 10 ABR shares held at the Record Date).

28. ABR announced to the market on 27 October 2021 that the First Court Hearing to approve the Scheme of Arrangement had occurred. The Scheme Booklet in respect of the Share Exchange (re-domiciliation) scheme was issued to ABR shareholders on 28 October 2021 and approved by the requisite majority of shareholders at the shareholders meeting on 3 December 2021 (Part 5.1 of the *Corporations Act 2001*).

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29. ABR applied to the Court on 25 February 2022 for Scheme Approval. The Scheme was approved with an Effective Date of 28 February 2022 (the date upon which the Scheme came into effect and bound ABR shareholders).

30. The Scheme provided for ABR shareholders to receive either 5E shares (tradeable on the NASDAQ) or Chess Depository Interests (CDIs) tradeable on the ASX. Shareholders who chose CDIs received 10 CDIs for each 5E share held by CHESSE Depository Nominees Pty Limited on their behalf; these shareholders are referred to as holding 5E CDIs.

Other relevant facts

31. Pursuant to subsection 615-30(1), section 615-65 applies to 5E in respect of the acquisition of all the shares in ABR.

Commissioner of Taxation

8 June 2022

 Status: **not legally binding**

Appendix – 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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CGT event A1 occurs

32. CGT event A1 happens where a taxpayer disposes of a CGT asset (subsection 104-10(1)). A taxpayer is taken to have disposed of a CGT asset when there is a change in the ownership of that asset (subsection 104-10(2)).

33. ABR shares constitute CGT assets (subsection 108-5(1)). As such, their disposal as a result of the Share Exchange Scheme gave rise to CGT event A1.

34. CGT event A1 occurred on the Implementation Date, being the date on which the ABR shares were disposed of (subsection 104-10(3)).

35. An ABR shareholder made a capital gain where the capital proceeds from the disposal of an ABR share were more than the cost base of that share (subsection 104-10(4)). The capital gain is the amount of the excess.

36. An ABR shareholder made a capital loss where the capital proceeds from the disposal of an ABR share were less than the reduced cost base of that share (subsection 104-10(4)). The capital loss is the amount of the shortfall.

37. The capital proceeds arising in connection with the disposal of an ABR share was the market value of the 5E share received in exchange (subsection 116-20(1)). The market value of a 5E share is worked out on the Implementation Date (paragraph 116-20(1)(b)).

Roll-over relief available under section 615-5 of Division 615

38. Section 615-5 allows a taxpayer to choose to obtain roll-over relief in respect of the gain (or loss) that would otherwise arise on the exchange of shares in one company (or units in a unit trust) for shares in another company, subject to certain conditions being satisfied.

39. The conditions that must be satisfied are:

- at least 2 (or more) entities (the exchanging members) must own all the shares in a company or units in a unit trust (the original entity) (ABR) (paragraphs 615-5(1)(a) and (b))
- under a scheme for reorganising the affairs of the original entity the exchanging members dispose of all their shares (or units) to a company (the interposed company) (5E) in exchange for shares in the interposed company (and nothing else) (paragraph 615-5(1)(c)), and
- the requirements in Subdivision 615-B are satisfied (paragraph 615-5(1)(d)).

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40. The requirements in Subdivision 615-B are as follows:

- the interposed company must own all the shares or units in the original entity immediately after the time (the completion time) all the exchanging members have disposed of their shares or units in the original entity (section 615-15)
- immediately after the completion time, each exchanging member must own
 - a whole number of shares in the interposed company (paragraph 615-20(1)(a)), and
 - a percentage of the shares in the interposed company (that were issued to all the exchanging members) that is equal to the percentage of the shares in the original entity that were owned by the member and disposed of under the scheme (paragraph 615-20(1)(b))
- the ratio of
 - the market value of each exchanging member's shares in the interposed company to the market value of the shares in the interposed company issued to all the exchanging member's (worked out immediately after the completion time)must equal the ratio of
 - the market value of that exchanging member's shares in the original entity that were disposed of under the scheme to the market value of all the shares in the original entity that were disposed of under the scheme (worked out immediately before the first disposal) (subsection 615-20(2))
- the shares issued in the interposed company must not be redeemable shares (subsection 615-25(1))
- each exchanging member who is issued shares in the interposed company must own the shares from the time they are issued until at least the completion time (subsection 615-25(2)), and
- immediately after the completion time
 - the exchanging members must own all the shares in the interposed company, or
 - entities other than the exchanging members must own no more than 5 shares in the interposed company and the market value of those shares is such that it is reasonable to treat the exchanging members as owning all the shares (subsection 615-25(3)).

41. For avoidance of doubt, the completion time was the time all ABR shares were disposed of under the Share Exchange Scheme (being 9 March 2022).

42. Under the Share Exchange Scheme, all the shares in ABR were sold to 5E with each exchanging ABR shareholder receiving one 5E share for every 10 ABR shares held at the Record Date (and nothing else). This condition was still met where CDIs (tradeable on the ASX) were issued over the 5E shares, as the CDI holder was absolutely and beneficially entitled to the underlying 5E share and therefore a CDI equates to a share in this context.

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43. Immediately after the completion time, 5E owned all shares in ABR and each exchanging ABR shareholder owned a whole number of shares in 5E (either beneficially as CDI holder or (if elected) as the owner and registered shareholder of NASDAQ quoted 5E shares) that was equal to the percentage of shares in ABR that were owned by the shareholder and disposed of under the scheme.

44. The ratio of the market value of each exchanging ABR shareholder's shares in 5E to the market value of all the shares in 5E issued to all exchanging ABR shareholders (worked out immediately after the completion time) was equal to the ratio of the market value of the shares held by the exchanging shareholder in ABR (and disposed of under the scheme) to the market value of all the shares in ABR that were disposed of under the scheme (worked out immediately before the first disposal).

Section 45B of the ITAA 1936 does not apply

45. Section 45B of the ITAA 1936 is an anti-avoidance provision aimed, among other things, at ensuring that amounts are treated as dividends for tax purposes where certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

46. Subsection 45B(2) of the ITAA 1936 provides that section 45B applies if:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936, and
- having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling a taxpayer to obtain the tax benefit.

47. With regard to the present scheme, the Commissioner does not conclude that the scheme was entered into or carried out for a more than incidental purpose of enabling any taxpayer to obtain a tax benefit in the manner described in paragraph 46 of this Ruling, and therefore section 45B of the ITAA 1936 does not apply.

Status: **not legally binding**

References

Related Rulings/Determinations:

CR 2022/51

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 45B
- ITAA 1936 45B(1)
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- ITAA 1936 45C
- ITAA 1997 102-5
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- ITAA 1997 Div 115
- ITAA 1997 115-30(1)
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- ITAA 1997 124-15(2)
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- ITAA 1997 Div 230
- ITAA 1997 Div 615
- ITAA 1997 Subdiv 615-B
- ITAA 1997 615-5
- ITAA 1997 615-5(1)(a)
- ITAA 1997 615-5(1)(b)
- ITAA 1997 615-5(1)(c)
- ITAA 1997 615-5(1)(d)
- ITAA 1997 615-15
- ITAA 1997 615-20(1)(a)
- ITAA 1997 615-20(1)(b)
- ITAA 1997 615-20(2)
- ITAA 1997 615-20(3)(a)
- ITAA 1997 615-20(3)(b)(i)
- ITAA 1997 615-20(3)(b)(ii)
- ITAA 1997 615-25(1)
- ITAA 1997 615-25(2)
- ITAA 1997 615-30(1)
- ITAA 1997 615-40
- ITAA 1997 615-65
- ITAA 1997 855-15
- Corporations Act 2001 Part 5.1

ATO references

NO: 1-REXRG0N
 ISSN: 2205-5517
 BSL: PGI
 ATOLaw topic: Income tax ~ Capital gains tax ~ CGT events ~ CGT event A1 - disposal of a CGT asset
 Income tax ~ Capital gains tax ~ Rollovers ~ Business restructures – Division 615

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