

CR 2003/18 - Income tax: Share-Buy-Back: Normandy NFM Ltd

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Class Ruling

Income tax: Share-Buy-Back: Normandy NFM Ltd

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Sections 159GZZZP and 159GZZZQ of Division 16K (Effect of off-market buy-back of Shares) of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - Section 45A (Streaming of Dividends and Capital) of the ITAA 1936;
 - Section 45B (Schemes to provide capital benefits) of the ITAA 1936;
 - Section 204-30 (Dividend Streaming) of the *Income Tax Assessment Act 1997* ('ITAA 1997'); and
 - Section 207-145 of the ITAA 1997 and section 160APHO of the ITAA 1936.

Class of persons

3. The class of persons to whom this Ruling applies is the ordinary shareholders of Normandy NFM Ltd ('NFM') who dispose

of shares under the NFM equal access off-market share buy-back ('Buy-back') announced on 28 November 2002 described in the Arrangement part of this Ruling.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 19 is carried out in accordance with the details of the arrangement provided in this Ruling.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies to the year ended 30 June 2003 unless and until it is withdrawn (see paragraph 11 of this Ruling). However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

9. This Class Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involved in the arrangement.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- (a) The Class Ruling Request dated 11 December 2002;
- (b) Letter dated 21 January 2003 from KPMG Melbourne amending the Class Ruling application; and
- (c) Letter dated 24 January 2003 from KPMG Melbourne amending the share buy-back capital and dividend components.

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

11. On 28 November 2002, NFM and Newmont Australia Limited ('NAL'), Australian resident companies, jointly announced a proposal that would allow NFM to become a wholly owned subsidiary of NAL.

12. NAL is the majority shareholder of NFM with an 85.85% shareholding in NFM and is a subsidiary of Newmont Mining Corporation (a USA corporation) ('NMC'). The minority shareholders are a mix of companies, trusts, partnerships, superannuation funds and individuals. In relation to the minority shareholders, it is estimated that non-residents hold 6.20% and residents hold 7.95% of the total shares in NFM.

13. The proposal, which will be implemented by a scheme of arrangement ('the Scheme'), allows minority NFM shareholders the choice of either having their shares acquired by NAL or NMC or participating in the Buy-back.

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14. Under the Scheme, NAL or NMC will acquire all shares in NFM held by minority shareholders, except those shares which are accepted under the Buy-back. The acquisition will occur via a scrip for scrip offer, under which NMC will offer 4.4 NMC Chess Depository Instruments ('CDIs') for each NFM share.

15. The Buy-back offer will be open to all NFM minority shareholders to purchase all of their ordinary shares for \$16.50 per share. NAL will not participate in the Buy-back offer. Implementation of the Buy-back and the scrip for scrip offer are interdependent.

16. The Buy-back is capped at 7 million shares, representing 9% of NFM's issued shares. If more than 7 million shares are offered into the Buy-back, a proportionate scale back will occur and the shares not bought back due to scale back will be acquired by NAL for 4.40 CDIs per NFM share.

17. The Buy-back will be funded by using approximately \$60 million of cash surplus to needs, with the balance being funded from external borrowings (approximately \$55m). The purchase price for the Buy-back is set at \$16.50 per share. For each share bought back the company proposes to debit \$6.60 per share to the share capital account (the capital component) and \$ 9.90 per share to retained earnings (dividend component).

18. The shareholders' funds on NFM's balance sheet as at 30 June 2002 were as follows:

	\$'000
Share Capital	79,304
Reserves	2,714
Retained profits	<u>171,008</u>
Total shareholders' funds	253,026

19. NFM has a franking account balance of approximately \$60.21 million representing a total of \$140.5m of fully franked dividends that could be paid.

Ruling

The Dividend Component

20. Participating shareholders will be taken to be paid a dividend out of the profits of NFM when the Buy-back occurs of \$9.90 for each share bought back ('the dividend component').

The Capital Component

21. Participating shareholders will be taken to have received \$6.60 as consideration in respect of the disposal of each of their NFM shares when the Buy-back occurs for the purposes of section 159GZZZQ of the ITAA 1936 (unless the shareholder is an Australian resident corporation to which subsections 159GZZZQ(8) and (9) apply). The treatment of this consideration amount for tax purposes will depend on whether the sale is on capital account (where the shares are held for investment) or on revenue account (where the shares are turned over in the course of business). In general, the relevant treatment should be as follows:

(a) *Shares held on capital account*

The amount by which the capital proceeds of \$6.60 exceeds the cost base of each share will be a capital gain to the shareholder. If the share's reduced cost base exceeds \$6.60 the difference will be a capital loss.

(b) *Shares held on revenue account*

The amount by which the consideration on disposal of \$6.60 exceeds the cost of each share will be included in the shareholder's assessable income. Correspondingly, if the cost exceeds \$6.60 the difference will be an allowable deduction.

Qualified person

22. For the purposes of Division 1A of Part IIIAA of the ITAA 1936 participating shareholders will be considered to satisfy the holding period rule under section 160APHO of the ITAA 1936 and therefore be qualified persons (as long as the related payments rule is also met) in relation to the dividend received under the Buy-back if:

- (a) the shares sold into the Buy-back were acquired on or before 13 October 2002; and
- (b) during the period when the shares or interest in the shares were held the shareholders did not have 'materially diminished risks of loss and opportunities for gain' (as defined in section APHM of the ITAA 1936) in relation to the shares for at least a continuous 45 day period.

The Anti-avoidance Provisions

23. The Commissioner will not make a determination pursuant to paragraph 204-30(3)(b) of the ITAA 1997 to deny the imputation benefits received in relation to the dividend component by participating shareholders pursuant to the proposed Buy-back.

24. The Commissioner will not make a determination (under sections 45A and 45B of the ITAA 1936) that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital component of the Buy-back price received by participating shareholders pursuant to the proposed Buy-back.

Explanations

The Dividend and Capital Components

25. The purchase price received by participating shareholders comprises two components:

- a dividend component; and
- a capital component.

The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ, having regard to how the company accounts for the off-market share buy-back as detailed below.

The Dividend Component

26. Section 159GZZZP provides that where the buy-back of a share is an off-market purchase the difference between the purchase price and the part (if any) of the purchase price which is debited to the share capital account of the company is taken to be a dividend paid by the company on the day the buy-back occurs. In this case the purchase price is \$16.50 per share and \$6.60 of this will be debited to the share capital account. Thus the dividend amount is \$9.90 per share. This amount will be fully franked.

27. For Australian resident individual shareholders the amount of the dividend will be included in their assessable income under subsection 44(1). The attaching franking credit will also be included in assessable income under section 207-20(1). As a result, resident individual shareholders will be entitled to a tax offset under section 207-20(2) to the amount of the attaching franking credit.

28. For Australian resident corporate shareholders the amount of the dividend will be included in their assessable income under subsection 44(1). The attaching franking credit will also be included

in assessable income under section 207-20(1). As a result, resident corporate shareholders will be entitled to a tax offset under section 207-20(2) to the amount of the attaching franking credit.

29. As the dividend component of the consideration received under the Buy-Back is fully franked, a non-resident shareholder will not be liable to Australian withholding tax on the dividend component (paragraph 128B(3)(ga)).

30. It should be noted that there are provisions which may deny a franking credit or tax offset in certain circumstances. For instance, paragraph 207-145(1)(a) of the ITAA 1997 requires that the shareholder be a 'qualified person for the purposes of Division 1A of Part IIIAA of the ITAA 1936' to obtain a franking credit or tax offset. Broadly speaking, to be a qualified person in relation to a dividend a taxpayer must satisfy both the holding period rule and the related payments rule. The holding period rule is discussed later in this Class Ruling.

31. There are also anti-avoidance provisions concerned with striking down arrangements which inappropriately provide imputation benefits to a relevant taxpayer, for instance section 204-30 of the ITAA 1997. These provisions allow the Commissioner to make a determination denying all or a part of a shareholder's entitlement to a franking credit, tax offset or other such benefits. In this case, no determination will be made to deny imputation benefits received by participating shareholders under the Buy-back. A discussion of section 204-30 appears later in this Class Ruling.

The Capital Component

32. The participating shareholders will be taken to have disposed of the shares accepted under the Buy-Back. The disposal may have different taxation implications for shareholders depending on how the shares are held; for instance:

- an investor holding their shares on capital account will be subject to the capital gains tax provisions; and
- a share trader holding their shares on revenue account will be subject to the ordinary income provisions.

It should be noted that share traders who have both an income tax and a capital gains tax liability will generally have the amount of the capital gain reduced under the anti-overlap provisions in section 118-20 of the ITAA 1997.

33. For the purposes of computing the amount of gain or loss (on capital or revenue account) in these cases, the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ.

34. The consideration determined under section 159GZZZQ is:
- the buy-back price; less
 - the reduction amount (within the meaning of subsection 159GZZZQ(4)).

Accordingly, for the purposes of calculating the profit or loss on disposal of the shares, under either the income or capital gains tax provisions, in most cases participating shareholders will be taken to have received \$6.60 per share as the consideration on disposal ('the Disposal Consideration').

35. However, it should be noted that where the participating shareholder is entitled to the inter-corporate dividend rebate under sections 46 or 46A in respect of the dividend component of the Buy-back price, an adjustment may be made to the Disposal Consideration. Under subsection 159GZZZQ(8), if that shareholder would incur a capital loss or a loss in respect of which he would be entitled to a deduction, the Disposal Consideration is increased by a 'rebtable amount' determined under subsection 159GZZZQ(9).

Qualified Person

36. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked dividend made by NFM only 'a qualified person in relation to the distribution for the purposes of Division 1A of Part IIIAA of the ITAA 1936' is entitled to a franking credit or tax offset. Broadly speaking, to be a qualified person in relation to the NFM dividend paid under the Buy-back, the participating shareholder must satisfy both the holding period rule and the related payments rule. This Class Ruling only addresses the holding period rule.

37. The holding period rule requires shareholders to hold the shares or the interest in the shares on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and day of disposal of the relevant shares are also not counted.

38. A shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares under subsection 160APHM(2). For example, a shareholder would have materially diminished risks of loss and opportunities for gain with respect to shares or an interest in shares if the shareholder has an option to sell the shares or the interest in shares to a person at a future time for a certain price.

39. In this case the Commissioner regards the announcement of the Buy-back offer as affecting whether shares bought back under the Buy-back are held at risk. This is because, from that time, the shareholder knows he or she can dispose of the shares for \$16.50 per share by participating in the Buy-back. Furthermore, although the Buy-back is subject to a limit of 7 million shares, the circumstances of this case indicate that this limit will not be significantly over-subscribed. In other words, if a shareholder chooses to participate in the Buy-back, he or she is assured of receiving \$16.50 per share for most, if not all, of the shares offered. Therefore, for the purposes of subsection 160APHO(3) participating shareholders will be taken to have 'materially diminished risks of loss and opportunities for gain' in respect of a share that is bought back under the Buy-back from the day of the announcement, being 28 November 2002.

40. There are 45 clear days between Sunday, 13 October 2002 and Thursday, 28 November 2002. Therefore, a shareholder who acquired shares on or before 13 October 2002 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days. A shareholder who acquired shares after 13 October 2002 that are subsequently bought back under the Buy-back is not a qualified person in relation to the dividend paid under the Buy-back for the purposes of Division 1A of Part IIIAA unless that shareholder meets an exception to the holding period rule.

The Anti-avoidance Provisions

Section 204-30 of the ITAA 1997

41. Section 204-30 applies where a company streams the payment of franked distributions to its shareholders in such a way that the imputation benefits attaching to the distribution are received by those shareholders who derive a greater benefit from them and other shareholders receive lesser imputation benefits, or no imputation benefits.

42. If section 204-30 applies the Commissioner is vested with a discretion, pursuant to subsection 204-30(3), whether or not to make a determination to debit the company's franking account pursuant to paragraph 204-30(3)(a), or that no imputation benefit is to arise in respect of the dividend to those shareholders who derive a greater benefit pursuant to paragraph 204-30(3)(c).

43. Having regard to the information provided by NFM, there exists, in relation to the shareholders of NFM, a group of shareholders that have a greater ability to use the franking credits under the terms of subsections 204-30(7) and (8), being the resident minority shareholders (called the favoured members). The non-resident

minority shareholders, who have a lesser ability to use the franking credits, are called the disadvantaged members.

44. Furthermore, the circumstances of the case indicate that streaming will occur because NFM has more franking credits than it is reasonably likely to use to frank ordinary distributions in the future (in light of the fact that NFM will become a 100% owned subsidiary of NMC, a non-resident company) and the terms of the Buy-back are expected to be more attractive to residents than non-residents (particularly in view of the alternative scrip for scrip offer). Accordingly, the conditions for application of section 204-30, as outlined in subsection 204-30(1), are satisfied in this case.

45. However, in regard to the discretion pursuant to subsection 204-30(3), it would be inappropriate, given the large and diverse shareholding of the company, to deny imputation benefits to the favoured members. Accordingly, the Commissioner will exercise his discretion in such a way that he will not make a determination under subsection 204-30(3)(b) that no imputation benefits are to arise in respect of the dividend component of the Buy-back paid to participating shareholders.

Section 45A and 45B

46. As discussed earlier, part of the proceeds received by a shareholder in return for participating in a buy-back will be taken not to be a dividend for the purposes of the Act. This part instead is treated as a distribution of share capital by the company to the shareholder.

47. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination under section 45C that all or part of the distribution of capital received by the shareholder under the Buy-back is treated as an unfranked and non-rebatable dividend. Accordingly, the application of these two provisions to the Buy-back must be considered.

48. Section 45A applies in circumstances where capital benefits are streamed to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

49. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) will be provided to the participating shareholders the circumstances of the Buy-back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A has no application to the proposed Buy-back.

50. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) Having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

51. In this case, whilst the conditions of paragraphs 45B(2)(a) and (b) are met, the requisite purpose of enabling the shareholder to obtain a tax benefit (by way of a capital distribution) is not present.

52. Having regard to the relevant circumstances of the scheme (set out in subsection 45B(5)), it is apparent that the inclusion of a capital element in the Buy-back price will be appropriate. Further, the capital component of the Buy-back cannot be said to be attributable to the profits of the company, nor do the pattern of distributions indicate that it is being paid in substitution for a dividend.

Detailed contents list

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Commissioner of Taxation

12 March 2003

<i>Previous draft:</i>	- ITAA 1936 45B(5)
Not previously released in draft form.	- ITAA 1936 45C
	- ITAA 1936 Div 1A Part IIIAA
<i>Related Rulings/Determinations:</i>	- ITAA 1997 APHM(2)
TR 92/1; TR 92/20; TR 97/16;	- ITAA 1997 APHO(3)
CR 2001/1	- ITAA 1997 160APHO
	- ITAA 1997 44(1)
<i>Subject references:</i>	- ITAA 1997 118-20
	- ITAA 1997 204-30
	- ITAA 1997 204-30(1)
<i>Legislative references:</i>	- ITAA 1997 204-30(3)
- TAA 1953 Part IVAAA	- ITAA 1997 204-30(3)(a)
- ITAA 1936 159GZZZP (16)	- ITAA 1997 204-30(3)(b)
- ITAA 1936 159GZZZQ (4)	- ITAA 1997 204-30(3)(c)
- ITAA 1936 159GZZZQ (8)	- ITAA 1997 204-30(7)
- ITAA 1936 159GZZZQ (9)	- ITAA 1997 204-30(8)
- ITAA 1936 159GZZZQ (16)	- ITAA 1997 207-20(1)
- ITAA 1936 45A	- ITAA 1997 207-20(2)
- ITAA 1936 45A(3)(b)	- ITAA 1997 207-145(1)(a)
- ITAA 1936 45B	- Copyright Act 1968
- ITAA 1936 45B(2)(a)	
- ITAA 1936 45B(2)(b)	
- ITAA 1936 45B(2)(c)	

ATO References

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