

CR 2007/77 - Income tax: capital gains: demerger of NuPower Resources Limited by Arafura Resources NL

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Class Ruling

Income tax: capital gains: demerger of NuPower Resources Limited by Arafura Resources NL

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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:
- section 44 of the *Income Tax Assessment Act 1936* (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); and
 - Division 125 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Arafura Resources NL (Arafura) and owners of options in Arafura who:
- (a) participate in the scheme that is the subject of this Ruling;
 - (b) own ordinary shares or options in Arafura and hold those shares or options on capital account at the time of the demerger; and
 - (c) are residents of Australia (as that term is defined in subsection 6(1) of the ITAA 1936) at the time of the scheme.
4. In this Ruling this class of entities is referred to as 'participating Arafura shareholders' and 'participating owners of Arafura options'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
6. 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 14 to 34 of this Ruling.
7. 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.
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Date of effect

9. This Ruling applies to the income year ended 30 June 2007. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

10. The 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 the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

12. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

13. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

14. The following description of the scheme is based on information provided by Ernst & Young (the applicant for this Ruling). The scheme that is the subject of this Ruling involves the demerger by Arafura of NuPower Resources Limited (NuPower).

Arafura and NuPower

Arafura

15. Arafura is an Australian resident company listed on the Australian Securities Exchange (ASX).

16. Arafura is a mineral resources company with principal interests in rare earths, uranium and gold in the Northern Territory. Arafura's business is the identification, exploration and development of tenements and licences which hold these mineral deposits.

17. Arafura's primary focus is currently on the development of its Nolan's Bore project with particular emphasis on rare earths and phosphate. It is also continuing to explore its tenements and licences for gold, nickel and uranium.

18. At the time of the demerger, Arafura had 118,509,824 ordinary shares on issue. It also had 21,881,159 options on issue, comprising:

- 17,181,159 ASX listed options; and
- 4,700,000 unlisted options.

19. There were no other ownership interests in Arafura just before the demerger.

20. At the time of the demerger, the unlisted options were qualifying rights within the meaning of section 139CD of the ITAA 1936. These unlisted options represent more than 3% of all ownership interests in Arafura.

21. At the time of the demerger, the listed options represented more than 10% of all ownership interests in Arafura.

NuPower

22. NuPower was incorporated on 14 August 2006 as an Australian resident company. Just prior to the demerger it was a wholly-owned subsidiary of Arafura, and Arafura and NuPower were members of a consolidated group for tax law purposes.

23. Under an asset sale and subscription agreement dated 12 January 2007, Arafura transferred \$8.8 million of cash and a number of mining tenements, tenement applications and tenement rights to NuPower. These assets relate principally to uranium exploration. As consideration (in part) for the transfer of those assets, NuPower agreed to issue ordinary shares to Arafura.

The demerger

24. At a General Meeting held on 16 February 2007, the Arafura shareholders agreed to a demerger by Arafura of NuPower. The Arafura shareholders passed resolutions approving:

- a capital reduction by way of an *in specie* distribution of NuPower ordinary shares; and
- a reduction in the exercise price of the Arafura options on issue.

25. The capital reduction resulted in Arafura distributing 90% of the ordinary shares it owned in NuPower to the Arafura shareholders. Arafura shareholders received one NuPower share for every three Arafura shares they held on the Record Date (being 26 February 2007). A total of 39,583,372 NuPower shares were distributed to the Arafura shareholders.

26. In addition, all Arafura option owners at Record Date received one option in NuPower for every three Arafura options they held. The exercise price of those NuPower options was set, and the exercise price of the existing Arafura options was adjusted, so as to reflect the circumstances of the demerger.

27. As a result of the demerger:

- Arafura shareholders owned ordinary shares in both Arafura and NuPower; and
- Arafura option owners owned options in both Arafura and NuPower.

28. Arafura accounted for the distribution of the ordinary shares in NuPower wholly as a return of share capital. This meant Arafura shareholders received a capital reduction amount of approximately \$0.068 for each of the Arafura shares they owned at Record Date.

29. The demerger allows Arafura and NuPower to separately pursue the rare earths (and exploration for other mineral resources) business and uranium business respectively. The demerger therefore allows each company to better pursue independently focused strategies that are consistent with its strengths and capabilities. Industry specific senior management will contribute to this by providing commercial decisions on operational issues as they specifically relate to the individual businesses.

30. NuPower was listed on the ASX on 16 March 2007.

Other matters

31. None of the participating Arafura shareholders acquired their shares in Arafura before 20 September 1985.

32. Arafura confirms that there have been no transfers to its share capital account (as defined in section 975-300 of the ITAA 1997) from any of its other accounts.

33. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by NuPower were used in the carrying on of a business.

34. Arafura did not elect under subsection 44(2) of the ITAA 1936 that subsections 44(3) and (4) of the ITAA 1936 not apply to the demerger dividend.

Ruling

CGT event

35. CGT event G1 (section 104-135 of the ITAA 1997) happened to each of the shares of the Arafura shareholders at the time of the capital reduction.

36. No CGT event happened in relation to Arafura options that were on issue at Record Date.

Demerger rollover relief

37. Arafura and its subsidiary NuPower were part of a demerger group under subsection 125-65(1) of the ITAA 1997.

38. A demerger, as described under section 125-70 of the ITAA 1997, happened to this demerger group under the scheme.

39. Participating Arafura shareholders are eligible to choose demerger rollover under subsection 125-55(1) of the ITAA 1997 for their Arafura shares. Participating owners of Arafura options are not eligible to choose demerger rollover under subsection 125-55(1) of the ITAA 1997 for their Arafura options.

Participating Arafura shareholders who choose demerger rollover

40. Participating Arafura shareholders who choose demerger rollover for their Arafura shares can disregard any capital gain made in respect of CGT event G1 that happened to their Arafura shares (subsection 125-80(1) of the ITAA 1997).

41. If a participating Arafura shareholder chooses demerger rollover for their Arafura shares, the first element of the cost base of each remaining Arafura share and corresponding NuPower share they received under the demerger is worked out by taking the sum of the cost bases of their Arafura shares (just before the demerger) and apportioning that sum over their remaining Arafura shares and new NuPower shares. The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Arafura shares and NuPower shares, or a reasonable approximation of those market values (subsections 125-80(2) and (3) of the ITAA 1997).

Participating Arafura shareholders who do not choose demerger rollover

42. Participating Arafura shareholders who do not choose demerger rollover:

- are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their Arafura shares under the demerger; and
- the first element of the cost base and reduced cost base of each Arafura share and the corresponding NuPower shares is calculated in the manner described in paragraph 41 of this Ruling (subsections 125-85(1) and (2) of the ITAA 1997).

Participating owners of Arafura options – cost base calculation

43. The first element of the cost base and reduced cost base of each option owned by a participating owner of Arafura options and the corresponding NuPower option received under the demerger is calculated in the manner described in paragraph 41 of this Ruling (subsections 125-90(1) and (2) of the ITAA 1997).

Acquisition date of the NuPower shares and options for the purposes of the CGT discount

44. For the purpose of accessing the CGT discount, the NuPower shares and options received by the participating Arafura shareholders and participating owners of Arafura options are taken to have been acquired on the date that the shareholder or owner of the option acquired the corresponding Arafura shares or options (subsection 115-30(1) of the ITAA 1997 (item 2)).

Demerger dividend

45. Any dividend arising under the demerger is a demerger dividend (subsection 6(1) of the ITAA 1936). As the capital reduction amount was debited to Arafura's share capital account it will not be a dividend, as defined in subsection 6(1) of the ITAA 1936.

46. The demerger dividend is neither assessable income nor exempt income of the participating Arafura shareholders (subsections 44(3) and (4) of the ITAA 1936).

Application of sections 45B, 45BA and 45C

47. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA applies to the whole or any part of any demerger benefit provided to participating Arafura shareholders under the demerger.

48. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C applies to the whole or any part of the capital benefit provided to participating Arafura shareholders under the demerger.

Commissioner of Taxation15 August 2007

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

49. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of their interest in the company and some or all of that payment is not a dividend or an amount that is taken to be a dividend under section 47 of the ITAA 1936 (non-assessable payment). The non-assessable payment can include the giving of property (subsection 104-135(1) of the ITAA 1997).

50. If CGT event G1 happens, a shareholder will make a capital gain if the non-assessable payment made by the company in relation to a share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

51. CGT event G1 happened upon the distribution by Arafura of the capital reduction amount (subsection 104-135(2) of the ITAA 1997) as this amount was neither a dividend nor an amount taken to be a dividend under section 47 of the ITAA 1936.

52. A capital gain arose to participating Arafura shareholders to the extent that the capital reduction amount of approximately \$0.068 per share exceeded the cost base of their Arafura shares at the time of the demerger. Participating Arafura shareholders who made a capital gain from the CGT event G1 that happened to their Arafura shares under the demerger of NuPower were entitled to choose demerger rollover (see paragraphs 55 to 65 below) in order to disregard that capital gain (section 125-55 and subsection 125-80(1) of the ITAA 1997).

Acquisition date of the NuPower shares and options for the purposes of the CGT discount

53. For the purpose of accessing the CGT discount, the NuPower shares and options received by the participating Arafura shareholders and participating owners of Arafura options are taken to have been acquired on the date that the shareholder or owner of the option acquired the corresponding Arafura shares or options (subsection 115-30(1) of the ITAA 1997 (item 2)).

54. For general CGT purposes, participating Arafura shareholders and participating owners of Arafura options acquire their NuPower shares and options when those shares and options are received under the demerger (section 109-10 of the ITAA 1997). This means, for example, that when calculating a capital gain on the subsequent disposal of these NuPower shares or options, indexation will not be included in the cost base of those shares or options.

Demerger rollover

55. Demerger rollover applies in relation Arafura shares under the present scheme because the following conditions are met.

Requirements for a demerger – Division 125

56. Subsection 125-55(1) of the ITAA 1997 provides that rollover may be chosen if, at the time of the scheme:

- a shareholder owns a share in a company – this requirement was satisfied as participating Arafura shareholders owned shares in Arafura;
- the company is the head entity of a demerger group – this requirement was satisfied as Arafura was the head company of a demerger group (refer to paragraphs 59 to 61 of this Ruling);
- a demerger happens to the demerger group – this requirement was satisfied as a demerger happened to the Arafura demerger group (refer to paragraphs 62 to 63 of this Ruling); and
- under the demerger a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity – this requirement was satisfied because CGT event G1 happened to the Arafura shares (refer to paragraph 49 to 52 of this Ruling) and participating Arafura shareholders received NuPower shares under the demerger.

57. Since the participating Arafura shareholders to whom this Ruling applies are Australian residents, the condition in subsection 125-55(2) of the ITAA 1997 is not relevant.

58. Therefore, participating Arafura shareholders may choose rollover for the demerger.

Arafura was the head entity of a demerger group

59. A demerger group comprises one head entity and at least one demerger subsidiary (subsection 125-65(1) of the ITAA 1997). The demerger group in this case included Arafura as head entity and NuPower as a demerger subsidiary (Arafura demerger group).

60. Arafura was the head entity because:

- no other member of the demerger group owned ownership interests in Arafura (subsection 125-65(3) of the ITAA 1997); and

- no other company or trust was capable of being a head entity of a demerger group of which Arafura could have been a demerger subsidiary (subsection 125-65(4) of the ITAA 1997).

61. NuPower was a demerger subsidiary of Arafura because Arafura owned ownership interests in NuPower that carried the right to:

- receive 100% of any distribution of income or capital of NuPower; and
- exercise 100% of the voting power in NuPower (subsection 125-65(6) of the ITAA 1997).

A demerger happens to a demerger group

62. A demerger happened (subsections 125-70(1), (2) and (3) of the ITAA 1997) to the Arafura demerger group because:

- there was a restructuring (paragraph 125-70(1)(a) of the ITAA 1997) under which Arafura disposed of at least 80% of its ownership interests in NuPower to the Arafura shareholders and NuPower issued NuPower options to the owners of Arafura options (subparagraph 125-70(1)(b)(iv) of the ITAA 1997);
- under the restructure:
 - CGT event G1 happened in relation to the Arafura shares and Arafura shareholders acquired new shares in NuPower and nothing else, and
 - no CGT event happened in relation to the Arafura options and owners of those options acquired NuPower options and nothing else (subparagraphs 125-70(1)(c)(i) and (ii) of the ITAA 1997),
- the NuPower shares and options were acquired by Arafura shareholders and owners of Arafura options respectively on the basis of their ownership of these interests in Arafura (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(i) of the ITAA 1997);
- paragraph 125-70(1)(g) of the ITAA 1997 will be satisfied since neither Arafura nor NuPower is a trust that is a superannuation fund;
- each Arafura shareholder and each owner of Arafura options acquired NuPower shares and NuPower options respectively, in the same proportion as they owned Arafura shares and options just before the demerger (paragraph 125-70(2)(a) of the ITAA 1997);

- each Arafura shareholder and owner of Arafura options owned, just after the demerger, the same proportionate total market value of Arafura and NuPower shares and options respectively as they owned in Arafura just before the demerger (paragraph 125-70(2)(b) of the ITAA 1997); and
- subsections 125-70(4) and (5) of the ITAA 1997 have no application.

63. The listed and unlisted options on issue in Arafura are ownership interests for the purposes of subsection 125-60(1) of the ITAA 1997 since they give the owner the entitlement to acquire a share in Arafura. They are not ignored in working out whether the proportion test in section 125-70(2) of the ITAA 1997 is satisfied since they represent more than 3% (in the case of the employee share scheme options) and more than 10% (in the case of adjusting instruments) of the total ownership interests in Arafura at the time of the demerger (subsections 125-75(3) and (4) of the ITAA 1997).

Choosing demerger rollover

64. Participating Arafura shareholders may therefore choose demerger rollover. The consequences of choosing demerger rollover or not making that choice are explained in paragraphs 40 to 42 of this Ruling.

65. Since no CGT event happened to the participating Arafura owners of options, demerger rollover is not available to those participating Arafura owners of options. Those owners will, however, be required to calculate the first element of the cost base and reduced cost base of their Arafura options and the NuPower options received under the demerger as explained in paragraph 43 of this Ruling.

Demerger dividend

66. Subsection 44(1) of the ITAA 1936 operates to include in a shareholder's assessable income any dividends, within the meaning of that term in subsection 6(1) of the ITAA 1936, paid to a shareholder out of company profits.

67. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 provides that a dividend excludes amounts debited against an amount standing to the credit of the share capital account of the company.

68. In the circumstances of this demerger, Arafura debited an amount of \$8,112,517 to its 'share capital account' (as that term is defined in subsection 6(1) of the ITAA 1936 and section 975-300 of the ITAA 1997). This amount is therefore not a dividend for the purposes of subsection 6(1) of the ITAA 1936 and is not assessable as a subsection 6(1) dividend under subsection 44(1) of the ITAA 1936.

69. Participating Arafura shareholders did, however, receive a dividend to the extent that the market value of the NuPower shares distributed under the demerger exceeded the amount debited against the share capital account (see Taxation Ruling TR 2003/8).

70. This dividend is neither assessable income nor exempt income (subsections 44(3) and (4) of the ITAA 1936) if:

- the dividend is a demerger dividend (as defined in subsection 6(1) of the ITAA 1936);
- the head entity does not elect that subsections 44(3) and (4) of the ITAA 1936 do not apply to the demerger dividend (subsection 44(2) of the ITAA 1936); and
- subsection 44(5) of the ITAA 1936 is satisfied.

71. In the present circumstances, each of the conditions in paragraph 70 of this Ruling is satisfied. Therefore, any dividend received by participating Arafura shareholders under the demerger is neither assessable income nor exempt income by operation of subsections 44(3) and (4) of the ITAA 1936.

Application of sections 45B, 45BA and 45C

72. Section 45B of the ITAA 1936 applies to ensure that relevant amounts are treated as dividends for taxation purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger, or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

73. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a demerger benefit or capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme a taxpayer, who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and

- 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 or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

74. Where the requirements of subsection 45B(2) of the ITAA 1936 are met, subsection 45B(3) of the ITAA 1936 empowers the Commissioner to make a determination that either section 45BA applies in relation to a demerger benefit or section 45C applies in relation to a capital benefit.

Scheme, demerger and capital benefit

75. The restructure that is the subject of this Ruling constitutes a 'scheme' within the broad meaning of that term (subsection 45B(10) of the ITAA 1936).

76. The provision of ownership interests to a shareholder under a demerger constitutes the shareholder being provided with a demerger benefit (subsection 45B(4) of the ITAA 1936) and a capital benefit (subsection 45B(5) of the ITAA 1936) to the extent that the demerger benefit is not a demerger dividend (subsection 45B(6) of the ITAA 1936).

77. In the present scheme, therefore, the provision of the NuPower shares constitutes the participating Arafura shareholders receiving a demerger benefit and a capital benefit.

Tax benefit

78. For most shareholders, the tax payable on the demerger benefit and the capital benefit is less than it would be if they had been an assessable dividend or a dividend respectively. This arises because the CGT and dividend concessions ensure that the demerger is largely free of tax for shareholders. As such, the provision of those benefits will constitute the participating Arafura shareholders obtaining a tax benefit (subsection 45B(9) of the ITAA 1936).

Purpose

79. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the participating Arafura shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present. In other words, having regard to the relevant circumstances of the scheme set out in subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the demerger entered into or carried out the scheme to obtain a tax benefit in the form of a demerger benefit or a capital benefit.

80. Those circumstances, particularly those enumerated in paragraph 177D(b) of the ITAA 1936 and incorporated by operation of paragraph 45B(8)(k) of the ITAA 1936, are concerned, inter alia, with the commercial or business effects of the demerger. Under the proposed scheme, it is apparent that a substantial purpose of the demerger is to achieve the separation of two distinct businesses for commercial purposes. Following their separation, each will operate independently with separate Boards and management who will focus on the specific commercial objectives of each business. This is consistent with the underlying object of the demerger's measure.

81. It is also apparent from the circumstances of the demerger that the capital and profit components of the demerger allocation are consistent with the commercial circumstances of the transaction. Having regard to the funding history of Arafura, it is clear that the share capital distributed under this demerger reflects that share capital invested in the NuPower business.

82. In addition, there is nothing in the other relevant circumstances of the demerger, including the known circumstances of the shareholders, to suggest that the favourable tax outcome of the demerger for the participating Arafura shareholders is anything more than the natural incident of the business restructure.

83. Therefore, the Commissioner will not make a determination under either paragraph 45B(3)(a) or (b) of the ITAA 1936 that sections 45BA or 45C of the ITAA 1936 applies to the scheme.

Appendix 2 – Detailed contents list

84. The following is a detailed contents list for this Ruling:

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