


CR 2010/39 - Income tax: proposed return of capital: Ramelius Resources Limited

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Class Ruling

Income tax: proposed return of capital: Ramelius Resources Limited

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ⓘ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 45A of the ITAA 1936;
 - section 45B of the ITAA 1936;
 - section 45C of the ITAA 1936;
 - section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 104-135 of the ITAA 1997; and
 - section 855-10 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of Ramelius Resources Limited (RMS) who:

- (a) are registered on the RMS share register on the Record Date, being the date for determining entitlements under the proposed return of capital as described in paragraphs 10 to 23 of this Ruling;
- (b) hold their RMS shares on capital account; and
- (c) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their RMS shares.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 23 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Rulings

9. CR 2007/79 Income tax: return of capital: Ramelius Resources Limited.

Scheme

10. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- application for Class Ruling dated 25 May 2010 lodged by Kennedy & Co (the Applicant) on behalf of RMS; and
- correspondence from the Applicant dated 25 June 2010 and 19 July 2010.

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

11. RMS is a gold and minerals exploration and mining company, which listed on the Australian Securities Exchange on 31 March 2003.

12. RMS shareholders are a mix of individuals, companies, superannuation funds and foreign residents.

13. RMS has advised that, as at 30 April 2010, there were 188 non-resident shareholders holding shares which represented 3.2% of the issued capital.

14. On 30 April 2010, RMS had 291,342,923 ordinary shares on issue.

15. RMS proposes to make a return of capital of approximately \$14.6 million by way of an equal reduction of 5 cents per ordinary share.

16. The proposed return of capital is being made pursuant to RMS's capital management program and is a result of excess capital from past equity issues and the sale of its interests in Dioro Exploration NL.

17. The proposed return of capital was approved at a General Meeting held on 30 June 2010.

18. The directors of RMS believe that the return of capital will not prejudice the company's ability to meet its obligations or implement its business plans.

19. The proposed return of capital is to be funded using cash reserves and will be debited against RMS's share capital account.

20. As a result of the proposed return of capital there will be no change in either the number of ordinary shares held by each RMS shareholder or the proportionate interest of each shareholder in RMS.

21. RMS currently does not have an established dividend policy. A dividend of 0.5 cents per share was paid on 3 August 2007.

22. RMS does not anticipate paying a dividend during the year ending 30 June 2011.

23. RMS has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

Ruling

Distribution is not a dividend

24. The proposed return of share capital will not be a dividend as defined in subsection 6(1).

The application of sections 45A, 45B and 45C

25. The Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) that section 45C applies to the proposed return of capital.

Capital gains tax

26. CGT event G1 will happen when RMS pays the return of capital to a RMS shareholder in respect of a RMS share they own at the time of the payment (section 104-135 of the ITAA 1997).

27. CGT event C2 will happen when RMS pays the return of capital to a RMS shareholder in respect of a RMS share they owned at the Record Date but which they ceased to own before the time of the payment (section 104-25 of the ITAA 1997).

Foreign resident shareholders

28. A foreign resident RMS shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happens if their shares in RMS are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

29. A foreign resident RMS shareholder who is paid the return of capital disregards any capital gain or capital loss made when CGT event C2 happens if the right to the payment is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Commissioner of Taxation11 August 2010

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.*

Distribution is not a dividend

30. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

31. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) specifically excludes a distribution from the definition of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the share capital account of the company.

32. 'Share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

33. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies, is transferred to the account and the account is not already tainted.

34. The return of capital will be debited against RMS's share capital account. There have been no transfers into RMS's share capital account as defined in section 975-300 of the ITAA 1997.

35. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the proposed return of capital will not constitute a dividend.

Anti-avoidance provisions

36. Sections 45A and 45B are two anti-avoidance provisions, which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend.

Streaming of dividends and capital benefits – section 45A

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

38. RMS will provide its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b) and the capital benefit will be provided to all of the shareholders in direct proportion to their individual share holding. As all shareholders benefit equally from the proposed return of capital, there is no 'streaming' of capital benefits to some shareholders and not to others.

39. Accordingly, section 45A does not apply to the proposed return of capital and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the return of capital to the shareholders of RMS.

Schemes to provide capital benefits in substitution for dividends – section 45B

40. Section 45B applies where certain payments are made to shareholders in substitution for dividends.

41. Subsection 45B(2) sets out the conditions under which the Commissioner will make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

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

Each of these conditions is considered in paragraphs 42 to 54 of this Ruling.

Scheme

42. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme plan or proposal.

43. A return of share capital would constitute a scheme for the purposes of paragraph 45B(2)(a), because the return of capital will provide shareholders with a capital benefit.

Tax benefit

44. A taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) of the ITAA 1936 if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936,

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

45. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax under section 128B of the ITAA 1936. Therefore, RMS shareholders will obtain tax benefits from the proposed return of capital.

Relevant circumstances

46. Under paragraph 45B(2)(c) the Commissioner is required to consider the 'relevant circumstances' set out under subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

47. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

48. The purpose which causes section 45B of the ITAA 1936 to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of RMS. The Commissioner cannot at this stage ascertain the purposes of RMS' numerous shareholders, all of whom were eligible to vote on the proposed return of capital under section 256C of the *Corporations Act 2001* and all of whom will participate in the proposed return of capital to be paid. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the proposal.

49. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, because the proposed return of capital will be made to all shareholders of RMS, regardless of individual shareholder circumstances, paragraphs 45B(8)(c) to (h) do not incline for or against a conclusion as to the purpose. The circumstances covered by paragraphs 45B(8)(i) and (j), pertaining to the provision of ownership interests and demerger respectively, are not relevant. The relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

50. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or an associate (within the meaning of section 318) of the company. In this case, the source of the proposed capital return is from past equity issues in respect of the acquisition of, and due to the subsequent sale of, RMS's interests in Dioro Exploration NL., some of which is considered to be excess to current and future investment requirements. No part of the return is attributable to specific profits, realised or unrealised, of RMS.

51. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. RMS paid one dividend of \$0.05 per share in August 2007 and there is no intention to pay a dividend in 2011. Accordingly the company's pattern of distributions does not suggest that the proposed return of capital is made in substitution for a dividend.

52. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

53. RMS has demonstrated that the scheme seeks to return an amount of capital raised during a takeover attempt and from the conversion of options. The return will release capital which RMS has stated is excess to its current needs. The practical implications of the scheme are consistent with it being, in form and substance, a return of capital.

54. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or any part, of the proposed return of capital.

Application of section 45C

55. As the Commissioner will not make a determination under subsections 45A(2) or subsection 45B(3) of the ITAA 1936 in relation to the scheme as described, section 45C of the ITAA 1936 will not deem any part of the proposed return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or of the ITAA 1997.

CGT event G1 – section 104-135

56. CGT event G1 (section 104-135 of the ITAA 1997) will happen when RMS pays the proposed return of capital in respect of a share that a RMS shareholder owns at the time of the payment and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, nor an amount that is taken to be a dividend under section 47 of the ITAA 1936.

57. If the proposed return of capital amount is equal to or less than the cost base of the RMS share at the time of the payment, the cost base and reduced cost base of that RMS share will be reduced (but not below nil) by the amount of the proposed return of capital (subsection 104-135(4) of the ITAA 1997).

58. A RMS shareholder will make a capital gain if the return of capital amount is more than the cost base of their RMS share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

59. If a RMS shareholder makes a capital gain, the cost base and reduced cost base of the RMS shares are reduced to nil (subsection 104-135(3) of the ITAA 1997).

60. If the RMS share was acquired by the shareholder at least 12 months before the payment of the proposed return of capital, a capital gain made when CGT event G1 happens may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

61. A RMS shareholder cannot make a capital loss when CGT event G1 happens.

CGT event C2 – section 104-25

62. The right to receive the proposed return of capital is one of the rights inherent in the RMS share at the Record Date. If, after the Record Date but before the payment date of the proposed return of capital, a RMS shareholder ceases to own some, or all, of their shares in RMS, the right to receive the return of capital is retained by the shareholder and is considered to be a separate CGT asset.

63. CGT event C2 in section 104-25 of the ITAA 1997 will happen when the proposed return of capital is paid and the right to receive that payment ends.

64. A RMS shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right (subsection 104-25(3) of the ITAA 1997). The capital proceeds will be the amount of the proposed return of capital from RMS.

65. The cost base of the RMS shareholder's right to receive the proposed return of capital is worked out in accordance with Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). As the RMS shareholder will have paid nothing for the right, the cost base of the right is likely to be nil. Therefore, the RMS shareholder will generally make a capital gain equal to the amount of the proposed return of capital.

66. As the right to receive the proposed return of capital amount was inherent in the RMS share during the time that it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

67. Consequently, if the RMS share to which the payment relates was originally acquired by the former RMS shareholder at least 12 months before the payment of the proposed return of capital, a capital gain made when CGT event C2 happens to the right may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

Foreign resident shareholders

68. A foreign resident disregards a capital gain or capital loss made from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997 and covers five categories of assets.

69. Broadly, these categories are:

- taxable Australian real property which is held directly;
- indirect Australian real property interests which are not covered by item 5 of the table in section 855-15 of the ITAA 1997;
- CGT assets used in carrying on a business through a permanent establishment in Australia, and which are covered by item 1, 2 or 5 of the table in section 855-15 of the ITAA 1997;
- options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table in section 855-15 of the ITAA 1997; and
- CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

70. A foreign resident RMS shareholder who receives payment of the proposed return of capital, and makes a capital gain when CGT event G1 happens to their RMS share, disregards the capital gain if the RMS share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

71. A foreign resident RMS shareholder who has a right to the payment of the proposed return of capital disregards any capital gain or capital loss made when CGT event C2 happens to that right if the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Previous Rulings/Determinations:

CR 2007/79

Subject references:

- capital benefit
- capital gains tax
- capital reductions
- dividend substitution
- dividend income
- return of capital on shares
- share capital

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
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- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1936 128B
- ITAA 1936 Pt IVA
- ITAA 1936 177A(1)
- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(ii)
- ITAA 1936 177D(b)(iii)
- ITAA 1936 177D(b)(iv)
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- ITAA 1936 177D(b)(vi)
- ITAA 1936 177D(b)(vii)
- ITAA 1936 177D(b)(viii)
- ITAA 1936 318
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1(1)
- Corporations Act 2001 256C
- TAA 1953
- Copyright Act 1968

ATO references

NO: 1-24DXQU4

ISSN: 1445-2014

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G2 – shares