CR 2011/63 - Income tax: scrip for scrip roll over: acquisition of South Australian Coal Limited by White Energy Mining Pty Limited

Class Ruling

Income tax: scrip for scrip roll-over: acquisition of South Australian Coal Limited by White Energy Mining Pty Limited

Contents Para

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 45 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 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 104-155 of the ITAA 1997;

- Subdivision 109-A of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-25 of the ITAA 1997;
- section 112-30 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997; and
- section 134-1 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies consists of entities who were ordinary shareholders of South Australian Coal Limited (SAC) at the time of the scheme, and who:

(a) held their SAC shares on capital account at the time of this scheme;

(b) accepted the Share Alternative offer made by White Energy Mining Pty Limited (the Bidder) to acquire their SAC shares or had their shares compulsorily acquired pursuant to Part 6A.1 of the *Corporations Act 2001* (Corporations Act);

(c) were 'residents of Australia' within the meaning of that expression in subsection 6(1) of the ITAA 1936;

(d) were not a 'temporary resident' of Australia within the meaning of section 995-1;

(e) were not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M; and

(f) were not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their SAC 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 55 of this Ruling and the takeover bid was not carried out in contravention of the provisions mentioned in paragraphs 612(a) to 612(g) of the Corporations Act.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling or the takeover bid was carried out in contravention of the provisions mentioned in paragraphs 612(a) to 612(g) of the Corporations Act, 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.

7. The market value of White Energy Performance Shares and White Energy Subscription Rights as described in paragraph 98 in Appendix 1 to this Ruling has been accepted by the Commissioner on the basis of information provided by the applicant for the purpose of this Ruling to the extent that no information or other evidence arises which would have a material impact on the value of these interests.

Date of effect

9. This Ruling applies from 1 July 2009 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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).

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:

- Class Ruling application dated 16 June 2010;
- Takeover Bid Implementation Agreement dated 18 April 2010 (the Implementation Agreement);
- Amending Deed dated 7 June 2010 (effective from 18 April 2010);
- White Energy Company Limited Bidder's Statement dated 7 June 2010 (Bidder's Statement);
- SAC Target's Statement dated 15 June 2010 (Target's Statement); and
- correspondence with the applicant between 11 June 2010 and 6 June 2011.

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

Overview

11. The scheme that is the subject of this Ruling was the acquisition by the Bidder of 100% of the issued shares in SAC.

SAC

12. SAC was, at all relevant times, an unlisted Australian resident public company.

13. SAC is a single asset company. Its principal asset is Exploration Licence EL 4534 (formerly EL 3386) (with its associated Retention Leases RL 100 and RL 104) within the Woomera Prohibited Area in South Australia. EL 4534 is a coal and mineral exploration area which is 100% owned by SAC (the Tenement Area).

14. As at the date of the Target's Statement, the company had 196,625,038 ordinary shares on issue. These shares in SAC were the only securities that SAC had on issue.

15. SAC shares were widely held and the company had 6,032 shareholders.

16. SAC did not have any subsidiaries.

17. SAC did not hold any shares in White Energy Company Limited (White Energy).

White Energy

18. White Energy is an Australian resident company which was incorporated in October 1995 and listed on the Australian Stock Exchange (ASX) on 23 July 1999.

19. White Energy shares are widely held and the company had 5,169 ordinary shareholders as at 21 September 2010 (according to its 2010 Annual Report).

20. As at the date of the Bidder's Statement, White Energy issued securities comprised of:

- 236,366,184 White Energy Ordinary Shares;
- 14,650,001 White Energy Options; and
- 180 White Energy Convertible Notes.

21. White Energy did not hold any shares in SAC before the takeover.

The Bidder

22. The Bidder was a wholly owned subsidiary of White Energy, which was incorporated specifically for the purposes of the 100% acquisition of SAC.

23. As at the date of the Bidder's Statement and takeover offer:

- the Bidder's voting power in SAC was 0%; and
- the Bidder did not have a relevant interest in any SAC shares.

The Takeover

24. On 19 April 2010, both White Energy and SAC announced that White Energy had agreed with SAC to make an off-market bid to acquire all of the issued shares in SAC (the Offer).

25. Those announcements were made in accordance with the Implementation Agreement.

26. The Implementation Agreement set out the bid terms initially agreed including, subject to one change, the consideration to be offered for the SAC shares.

27. On 7 June 2010, White Energy and SAC executed an Amending Deed, with effect from the date the Implementation Agreement was initially executed, to implement changes made to the consideration to be provided in respect of the takeover bid.

28. The Bidder issued its Bidder's Statement on 7 June 2010 to SAC offering to purchase all of the issued shares in SAC on the terms set out in the Bidder's Statement.

29. On 15 June 2010, SAC issued its Target's Statement in response to the Offer by the Bidder to acquire all of the issued shares in SAC.

30. The initial offer period was open for acceptance during the period commencing on the date of the Offer (15 June 2010) and ending on the closing date (being 21 July 2010, unless extended or withdrawn by the Bidder).

31. On 13 July 2010, the offer period was extended to 28 July 2010.

32. On 29 July 2010, White Energy announced that it had received acceptances totalling over 97% in respect of the Offer by the Bidder for all of the ordinary shares in SAC. As a consequence, the Bidder intended to move to compulsorily acquire all remaining SAC shares.

The Offer

33. Under the Offer, the consideration payable consisted of either the Share Alternative or the Cash Alternative.

34. SAC shareholders could only accept the Offer in respect of all of their SAC shares (except where they held SAC shares as trustee or nominee for, or otherwise on account of, another person. In which case, they could only accept the Offer in respect of all of the shares in relation to each parcel of SAC shares held).

35. SAC shareholders could elect to receive either (or a combination of) the Share Alternative or the Cash Alternative.

36. The Offer was subject to a number of conditions including a 'Minimum acceptance condition'. That condition stipulated that at the end of the Offer period, White Energy had a relevant interest in at least 90% of the shares in SAC.

37. The Bidder was entitled to compulsorily acquire any outstanding SAC shares for which it had not received acceptances on the same terms as the Offer, if during or at the end of the Offer period, the Bidder (taken together with its associates) had a relevant interest in at least 90% (by number) of SAC shares.

Cash Alternative

38. The consideration payable to all SAC shareholders under the Cash Alternative was $0.1996 for each SAC share (Cash Alternative) and was limited to a maximum aggregate cash consideration payable to all SAC shareholders of $10 million.

Share Alternative

39. The consideration payable to all SAC shareholders under the Share Alternative was:

- 0.07985 White Energy Ordinary Shares;
- 0.08646 White Energy 2010 Performance Shares;
- 0.08646 White Energy 2011 Performance Shares; and
- 0.2034 White Energy Subscription Rights

for each SAC Share (Share Alternative).

40. The terms and conditions of the White Energy Ordinary Shares, White Energy Performance Shares (which refers to White Energy 2010 and 2011 Performance Shares) and White Energy Subscription Rights were set out in sections 3.6 to 3.8 and 12.2 and Attachments 4 and 5 of the Bidder's Statement.

White Energy Performance Shares

41. Under the terms of the Offer, the White Energy Performance Shares will consolidate depending on the amount of coal resources proven in SAC's Tenement Area and immediately afterwards convert into White Energy Ordinary Shares on a 1:1 basis.

42. According to the terms of White Energy 2010 Performance Shares, White Energy 2010 Performance Shares consolidated and converted into White Energy Ordinary Shares on 31 March 2011 in accordance with the formula described in Attachment 4 of the Bidder's Statement.

43. White Energy 2011 Performance Shares will consolidate and convert into White Energy Ordinary Shares after coal resources are assessed as at 31 December 2011.

44. If consolidation of White Energy 2011 Performance Shares would result in a SAC shareholder's aggregate holding being less than one White Energy 2011 Performance Share, the SAC shareholder's entire holding of White Energy 2011 Performance Shares will be consolidated into one White Energy 2011 Performance Share.

45. The consolidation and conversion of White Energy Performance Shares does not constitute redemption, cancellation or buy-back of White Energy Performance Shares or an issue, allotment or creation of a new White Energy Ordinary Shares.

White Energy Subscription Rights

46. Under the terms of the Offer, a White Energy Subscription Right entitled the holder to subscribe for one White Energy Ordinary Share at a subscription price of $2.50 per share.

47. White Energy Subscription Rights could not be transferred or accepted by another person (except as required by law).

Ineligible foreign shareholders

48. An 'Ineligible Foreign Shareholder' is defined in both the Bidder's Statement and the Target's Statement.

49. SAC shareholders who were Ineligible Foreign Shareholders could accept the Offer and elect to receive the Share Alternative for some or all of their SAC shares. However, they were not entitled to receive the Share Alternative as consideration for their SAC shares pursuant to the Offer.

50. Under the Offer, to the extent that Ineligible Foreign Shareholders receive the Share Alternative, the White Energy Ordinary Shares, White Energy Performance Shares and White Energy Subscription Rights that would otherwise have been received by the Ineligible Foreign Shareholders were provided to a nominee approved by the Australian Securities and Investments Commission who will sell those shares and rights in accordance with section 619(3) of the Corporations Act and distribute to each Ineligible Foreign Shareholder their proportion of the proceeds of the sale (net of expenses).

Other matters

51. The Bidder has advised that the takeover bid for SAC shares by the Bidder was not carried out in contravention of the provisions mentioned in paragraphs 612(a) to 612(g) of the Corporations Act.

52. There were no 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of those expressions in section 124-783.

53. For the purposes of subsections 124-780(4) and 124-780(5), no original interest holder in SAC was, just before the relevant arrangement started, a member of a linked group which included SAC and White Energy.

54. At all relevant times, SAC has access to its Tenement Area to carry out exploration operations.

55. All of the shares in SAC were acquired on or after 30 October 2009.

Ruling

CGT Event A1 happened on disposal of SAC shares

56. CGT Event A1 happened as a result of the disposal by a SAC shareholder of their SAC shares to the Bidder under the scheme described in this Ruling (subsections 104-10(1) and 104-10(2)).

57. Where a SAC shareholder accepted the Offer, CGT event A1 happened on the day the SAC shareholder entered into the contract to dispose of their SAC shares to the Bidder (paragraph 104-10(3)(a)).

58. Where a SAC shareholder did not accept the Offer, and had their shares compulsorily acquired by the Bidder, CGT event A1 happened when the Bidder became the owner of the relevant SAC shares (subsection 104-10(6)).

Capital gain or capital loss

59. A SAC shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of a SAC share exceeded its cost base. The capital gain is the amount of the excess (subsection 104-10(4)). A SAC shareholder made a capital loss if the capital proceeds were less than the reduced cost base of the SAC share. The capital loss is the amount of the difference (subsection 104-10(4)).

Capital proceeds

60. The capital proceeds for the disposal of each SAC share is the sum of that part of the total market value of a White Energy Ordinary Share, White Energy 2010 and 2011 Performance Share and White Energy Subscription Right received (worked out as at the time that CGT event A1 happened to the SAC shareholder) as is reasonably attributable to the disposal of the SAC share (subsection 116-20(1)).

61. In working out the market value of the part of a White Energy Ordinary Share that is reasonably attributable to the disposal of each SAC share the Commissioner accepts the following formula:

$$\text{Market value of White Energy Ordinary share} \times \frac{\text{Total number of White Energy Ordinary shares received}}{\text{Total number of SAC shares exchanged}}$$

62. This formula can be used to work out the market value of the part of a White Energy 2010 Performance Share, a White Energy 2011 Performance Share and a White Energy Subscription Right that is reasonably attributable to the disposal of each SAC share to the extent that ‘White Energy Ordinary Share’ in the formula is respectively substituted by the relevant interest.

Availability of scrip for scrip roll-over if a capital gain is made

Capital gain referable to White Energy Shares

63. Subject to the qualification in paragraph 64 of this Ruling, a SAC shareholder who received the Share Alternative and made a capital gain from the disposal of their SAC shares to the Bidder may choose partial scrip for scrip roll-over (section 124-790).

64. Scrip for scrip roll-over cannot be chosen if any capital gain the SAC shareholder might make from the replacement White Energy Ordinary Shares and White Energy 2010 and 2011 Performance Shares would be disregarded, except because of a roll-over (subsection 124-795(2)).

65. If scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of the replacement White Energy Ordinary Shares and White Energy Performance Shares is disregarded.

66. If scrip for scrip roll-over is not, or cannot, be chosen, the capital gain made from the disposal of SAC shares is not disregarded.

Capital gain referable to White Energy Subscription Rights

67. The part of the capital gain that is referable to the receipt of White Energy Subscription Rights is not disregarded. This is because the White Energy Subscription Rights received are ineligible proceeds for which roll-over is not available (subsection 124-790(1)).

68. The part of the capital gain on a SAC share that is referable to the receipt of a White Energy Subscription Right is the difference between the market value of the White Energy Subscription Right (worked out as at the time that CGT event A1 happened to the SAC shareholder) and the part of the cost base of the SAC share that is reasonably attributable to the receipt of the White Energy Subscription Right (subsections 104-10(4), 116-20(1) and 124-790(2)).

69. In working out the part of the cost base of a SAC share that is reasonably attributable to the receipt of White Energy Subscription Right, the Commissioner accepts the following method:

$$\text{Cost base of the SAC share at the time of the CGT event} \times \frac{\text{That part of the market value of the White Energy Subscription Rights received}}{\text{Market value of the Share Alternative}}$$

where:

(1) Share Alternative is as described in paragraph 39 of this Ruling.

(2) The market value of the Share Alternative is the sum of the market value of each component of the Share Alternative (worked out as at the time CGT event A1 happened to the SAC shareholder) that is reasonably attributable to the disposal of the SAC share.

Cost base of White Energy Shares and Subscription Rights

If scrip for scrip roll-over is chosen

70. Where partial scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each replacement White Energy Ordinary Share and White Energy Performance Share is worked out by reasonably attributing to it, the sum of the parts of the cost bases of the SAC shares exchanged for the relevant replacement share under the scheme (subsections 124-785(2) and 124-785(4)). However, the cost base of the SAC shares must first be reduced by so much of it that is reasonably attributable to the White Energy Subscription Rights (subsection 124-785(3)).

71. The Commissioner considers that the apportionment will be reasonable if a SAC shareholder calculates the new cost base and reduced cost base of each White Energy Ordinary Share and White Energy Performance Share in accordance with the market value of that interest relative to the total market value of all of the Share Alternative.

72. The Commissioner accepts that the cost base and the reduced cost base of the White Energy Ordinary Shares can be worked out using the following method:

$$\text{Cost base of the SAC share at the time of the CGT event} \times \frac{\text{That part of the market value of the White Energy Ordinary Shares received}}{\text{Market value of the Share Alternative}}$$

73. This formula can be used to work out the cost base and reduced cost base of the White Energy 2010 and 2011 Performance Shares to the extent that 'the market value of the White Energy Ordinary Shares received' in the formula is respectively replaced by 'the market value of the White Energy 2010 Performance Shares received' and 'the market value of the White Energy 2011 Performance Shares received'.

If scrip for scrip roll-over is not, or cannot be chosen

74. Where scrip for scrip roll-over is not, or cannot, be chosen, the first element of the cost base and reduced cost base of each White Energy Ordinary Share and White Energy Performance Share received is equal to the market value of the part of the SAC shares given in exchange for the respective White Energy Ordinary Share and White Energy Performance Share (subsections 110-25(2), 110-55(2) and 112-30(1)), determined at the time of acquisition.

75. Scrip for scrip roll-over cannot be chosen for that part of the SAC shares for which White Energy Subscription Rights were received. The first element of the cost base and reduced cost base of each White Energy Subscription Right is equal to the market value of the part of the SAC shares given in exchange for the White Energy Subscription Right, determined at the time of acquisition.

76. The Commissioner accepts the following method for working out the market value of the relevant part of the SAC shares given in exchange for White Energy Ordinary Shares:

$$\text{Market value of SAC Shares exchanged} \times \frac{\text{That part of the market value of the White Energy Ordinary Shares received}}{\text{Market value of the Share Alternative}}$$

77. This formula can be used to work out the market value of the relevant part of the SAC shares given in exchange for White Energy 2010 Performance Shares, White Energy 2011 Performance Shares and White Energy Subscription Rights to the extent that 'the market value of the White Energy Ordinary Shares received' in the formula is respectively replaced by the market value of the relevant interest.

78. The Commissioner accepts that the market value of a SAC share as at the time that CGT event A1 happened to the SAC shareholder is equal to the sum of that part of the total market value of a White Energy Ordinary Share, White Energy 2010 Performance Share, White Energy 2011 Performance Share and White Energy Subscription Right (see paragraph 98 in Appendix 1 to this Ruling) that is reasonably attributable to the disposal of the SAC share, worked out as at the time of the CGT event.

Acquisition date of White Energy Shares and Subscription Rights

79. SAC shareholders acquired their White Energy Ordinary Shares, White Energy Performance Shares and White Energy Subscription Rights:

- if they accepted the Offer to dispose of their SAC shares – on the date when they entered into the contract; or

- if their SAC shares were acquired by the Bidder by way of compulsory acquisition – when those shares or subscription rights are issued or allotted (item 2 in the table in section 109-10).

80. However, for the purposes of applying the CGT discount to any later disposal of their White Energy Ordinary Shares, SAC shareholders who choose scrip for scrip roll-over under the Offer are taken to have acquired their White Energy Ordinary Shares and White Energy Performance Shares on the date they acquired the corresponding SAC shares (item 2 in the table in subsection 115-30(1)).

Consolidation of White Energy Performance Shares

81. The consolidation of White Energy 2010 and 2011 Performance Shares will not result in a CGT event happening (Taxation Determination TD 2000/10). Each element of the cost base and reduced cost base of the new consolidated Performance Shares (at the time of consolidation) is the sum of the corresponding elements of the original shares that are consolidated to form the new share (subsection 112-25(4)).

82. The consolidated Performance Shares have the same date of acquisition as the original Performance Shares to which they relate.

Conversion of White Energy Performance Shares

83. CGT event H2 in section 104-155 will happen because of the conversion of a White Energy Performance Share into a White Energy Ordinary Share. However, no shareholder will make a capital gain or capital loss when CGT event H2 happens.

84. Each White Energy Ordinary Share converted from a White Energy Performance Share retains the cost base (and reduced cost base) of the White Energy Performance Share converted.

85. Each White Energy Ordinary Share converted from the White Energy Performance Share will be taken to have been acquired when the corresponding White Energy Performance Share was acquired.

Exercise of White Energy Subscription Rights

86. Where White Energy Subscription Rights are exercised, CGT event C2 will happen (subsection 104-25(1)). However, any capital gain or capital loss that arises on the exercise of the Subscription Right is disregarded (subsection 134-1(4)).

87. The first element of the cost base and reduced cost base of each White Energy Ordinary Share obtained on exercise of a White Energy Subscription Right will be the cost base of the White Energy Subscription Right plus the $2.50 the shareholder paid to exercise the Subscription Right (subsection 134-1(1)).

88. The acquisition date of White Energy Ordinary Shares is the date of exercise of the White Energy Subscription Rights.

Expiry of White Energy Subscription Rights

89. If the White Energy Subscription Right expires, the expiry will constitute the ending of an intangible CGT asset and CGT event C2 will happen (subsection 104-25(1)). The SAC shareholder will make a capital loss on the expiry of the White Energy Subscription Right as they will receive no capital proceeds in respect of this event (subsections 104-25(2), 104-25(3) and 116-30(3)).

90. The amount of capital loss made by a SAC shareholder on the expiry of a White Energy Subscription Right will be equal to the reduced cost base of the White Energy Subscription Right.

Application of sections 45, 45A, 45B and 45C of the ITAA 1936

91. Section 45 of the ITAA 1936 does not apply in respect of the scheme as White Energy did not provide shares to some of its shareholders while paying minimally franked dividends to some of its other shareholders.

92. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefits provided by White Energy to SAC shareholders under the scheme.

93. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the capital benefits provided by White Energy to SAC shareholders under the scheme.

Commissioner of Taxation
29 June 2011

Appendix 1 – Explanation

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.

Scrip for scrip roll-over

94. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

95. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

96. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over under an arrangement. The main conditions and exceptions that are relevant to the circumstances of the takeover of SAC are:

(a) shares are exchanged for shares in another company;

(b) the exchange occurs as part of a single arrangement;

(c) conditions for roll-over are satisfied;

(d) further conditions are not applicable or are satisfied; and

(e) exceptions to obtaining scrip for scrip roll-over are not applicable.

97. Under the scheme, all of the conditions for roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision in this regard. Therefore, no further explanation of the application of those tax laws is warranted other than the following matters relating to the determination of market value.

98. On the basis of information provided, the Commissioner considers it reasonable to accept in this particular case that:

- the market value of a White Energy Ordinary Share received is:
  - (a) the closing price on the ASX of a White Energy Share on the date that CGT event A1 happened to the SAC shareholder, provided that the closing price did not vary by more than 5% from either the minimum or maximum traded price over the course of the day; or
  - (b) if the closing price did vary by more than 5%, the volume-weighted average price (VWAP) for the White Energy Ordinary shares over that day.

  (Refer to paragraph 131 in Appendix 2 of this Ruling for details of the relevant closing price or VWAP of a White Energy share)
- the market value of a White Energy 2010 Performance Share received is equal to 17.3068% of the market value of a White Energy Ordinary Share on the date the Offer was accepted or the Bidder became the owner of the SAC share if it was compulsorily acquired by the Bidder.
- the market value of a White Energy 2011 Performance Share received is equal to 15.9715% of the market value of a White Energy Ordinary Share on the date the Offer was accepted or the Bidder became the owner of the SAC share if it was compulsorily acquired by the Bidder.
- the market value of a White Energy Subscription Right received is the difference between the market value of a White Energy Ordinary Share on the date the Offer is accepted (or the Bidder became the owner of the SAC share if it was compulsorily acquired by the Bidder) and the $2.50 subscription price.

Consolidation of White Energy Performance Shares

99. Taxation Determination TD 2000/10 provides that no CGT event happens for capital gains tax purposes if a company converts its shares into a larger or smaller number of shares in accordance with section 254H of the Corporations Act in that:

(a) the original shares are not cancelled or redeemed in terms of the Corporations Act;

(b) there is no change in the total amount allocated to the share capital account of the company; and

(c) the proportion of equity owned by each shareholder in the share capital account is maintained.

100. The consolidation of White Energy Performance Shares satisfies the conditions mentioned in TD 2000/10. Therefore, the consolidation will not result in a CGT event happening.

101. In accordance with TD 2000/10, the consolidated White Energy Performance Shares have the same date of acquisition as the original Performance Shares to which they relate.

102. Each element of the cost base and reduced cost base of the new consolidated White Energy Performance Shares (at the time of consolidation) is the sum of the corresponding elements of the original White Energy Performance Shares that are consolidated to form the new White Energy Performance Shares (subsection 112-25(4)).

Conversion of White Energy Performance Shares

103. White Energy Performance Shares are a class of ordinary shares in the share capital of White Energy. The conversion of a White Energy Performance Share into a White Energy Ordinary Share involves a variation of the rights that make up a White Energy Performance Share. The White Energy Performance Shares are not cancelled or redeemed on conversion.

104. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base. The variation in the rights attached to the White Energy Performance Shares is an act, transaction or event in relation to those shares. Therefore, the variation results in the occurrence of CGT event H2.

105. Under subsection 104-155(3), a shareholder will make a capital gain if the capital proceeds from the event are more than the incidental costs incurred in relation to the event. A shareholder will make a capital loss if those capital proceeds are less than the incidental costs.

106. The SAC shareholders will not receive or be entitled to receive money or other consideration in respect of the event happening. Further, the SAC shareholders will not incur any expenditure relating to the conversion of the White Energy Performance Shares.

107. Therefore, although CGT event H2 will happen in respect of the conversion of the White Energy Performance Shares, the SAC shareholders will not make a capital gain or capital loss because of the conversion.

Exercise of White Energy Subscription Rights

108. Each White Energy Subscription Right granted to a SAC shareholder under the Offer is an option for capital gains tax purposes. Where the White Energy Subscription Rights are exercised, CGT event C2 will happen (subsection 104-25(1)).

109. Subsection 134-1(4) provides that a capital gain or a capital loss the grantee (that is, the entity that exercises the option) makes from exercising the option is disregarded. Therefore, any capital gain or capital loss that arises on the exercise of the White Energy Subscription Right is disregarded.

110. The first element of the cost base and reduced cost base of the White Energy Ordinary Share obtained on exercise of the White Energy Subscription Right will be the cost base of the White Energy Subscription Right plus the $2.50 the shareholder paid to exercise the Subscription Right (item 1 of the table in subsection 134-1(1)).

111. The acquisition date of White Energy Ordinary Shares is the date of exercise of the White Energy Subscription Rights.

Expiry of White Energy Subscription Rights

112. A White Energy Subscription Right is an intangible asset that falls within the definition of a CGT asset in section 108-5.

113. Therefore, if the White Energy Subscription Right expires, the expiry will constitute the ending of an intangible CGT asset and CGT event C2 will happen (subsection 104-25(1)).

114. The SAC shareholder will make a capital loss on the expiry of the White Energy Subscription Right as they will receive no capital proceeds in respect of this event (subsections 104-25(2), 104-25(3) and 116-30(3)).

115. The amount of capital loss made by a SAC shareholder on the expiry of a White Energy Subscription Right will be equal to the reduced cost base of the White Energy Subscription Right.

Application of sections 45, 45A, 45B and 45C of the ITAA 1936

Section 45 of the ITAA 1936

116. Section 45 of the ITAA 1936 applies in respect of a company that, whether in the same year of income or in different years of income, streams the provision of shares (other than shares to which subsection 6BA(5) of the ITAA 1936 applies) and the payment of minimally franked dividends to its shareholders in such a way that:

(a) the shares are received by some shareholders but not all shareholders; and

(b) some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

117. A minimally franked dividend is defined in subsection 45(3) of the ITAA 1936 as one that is not franked or franked to less than 10%, in accordance with section 202-5 or 208-60 of the ITAA 1997.

118. With respect to the scheme, the requirements of section 45 of the ITAA 1936 are not met for the following reasons:

- White Energy did not provide some of its existing shareholders with bonus shares. The provision of shares was to SAC shareholders in that capacity, and not to White Energy shareholders as such;
- Although the consolidation and conversion of White Energy Performance Shares to White Energy Ordinary Shares can occur after SAC shareholders became White Energy shareholders, this is a right that attaches to certain components of the Share Alternative for the takeover Offer and did not involve the provision of bonus shares; and
- neither the Share Alternative, the Cash Alternative nor the consolidation and conversion of White Energy Performance Shares involves the provision of a minimally franked dividend to existing White Energy shareholders.

119. Consequently, it cannot be concluded that White Energy is providing some of its shareholders with shares while paying minimally franked dividends to at least some of its other shareholders.

Section 45A of the ITAA 1936

120. Section 45A of the ITAA 1936 applies in respect of a company that whether in the same year of income or in different years of income, directs the payment of capital benefits and the payment of dividends to its shareholders in such a manner, that:

(a) capital benefits are, or apart from the operation of the provision would be received by certain shareholders (the advantaged shareholders) who would in the year of income in which the capital benefits are provided, derive a greater benefit from the receipt of capital benefits than other shareholders (paragraph 45A(1)(a) of the ITAA 1936); and

(b) it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends (paragraph 45A(1)(b) of the ITAA 1936).

121. Under the scheme, the consideration provided by White Energy to SAC shareholders in exchange for their SAC shares is in the form of either the Share Alternative or the Cash Alternative. Under the Share Alternative SAC shareholders are provided with a capital benefit, in the form of ownership interests in White Energy. It is by this means that SAC shareholders became shareholders in White Energy. The consolidation and conversion of White Energy Performance Shares into White Energy Ordinary Shares is a right attaching to White Energy Performance Shares, which forms part of the Share Alternative. The Commissioner accepts, on this fact pattern, that the provision of White Energy shares to SAC shareholders in exchange for their SAC shares does not constitute capital streaming.

122. In any event, the requirement in paragraph 45A(1)(b) of the ITAA 1936 is not satisfied as none of the Share Alternative, the Cash Alternative, or the consolidation and conversion of White Energy Performance Shares involves the receipt of a dividend by existing White Energy shareholders. As it cannot be concluded that some shareholders (the advantaged shareholders) receive capital benefits while other shareholders (the disadvantaged shareholders) receive dividends, section 45A of the ITAA 1936 does not apply.

Sections 45B of the ITAA 1936

123. Section 45B of the ITAA 1936 applies if certain capital benefits are provided to shareholders in substitution for dividends. Broadly this provision applies if:

(a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936); and

(b) 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) of the ITAA 1936); and

(c) having regard to the relevant circumstances of the scheme, it would 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 a taxpayer (the **relevant taxpayer**) to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

124. The Share Alternative constitutes a scheme for the provision of a capital benefit as defined in paragraph 45B(5)(a) of the ITAA 1936, as it comprises the provision of shares in White Energy to SAC shareholders.

125. However, the Cash Alternative does not constitute a scheme for the provision of a capital benefit as defined in subsection 45B(5) of the ITAA 1936. Therefore, the application of section 45B of the ITAA 1936 need only be considered in the context of the Share Alternative.

126. Had the capital benefit notionally been a dividend, SAC shareholders (as the relevant taxpayers) would have been liable to pay tax on the distribution at their relevant rate of tax. In the absence of a surplus in its franking account, White Energy would not be expected to be able to frank such a dividend. Most (if not all) of the SAC shares acquired by White Energy in exchange for White Energy shares were acquired by SAC shareholders on 30 October 2009 as part of the demerger of SAC from another entity at a cost lower than the consideration offered by White Energy for each SAC share. In the absence of scrip for scrip roll-over under Subdivision 124-M of the ITAA 1997, the disposal of the SAC shares would result in an assessable capital gain to SAC shareholders. Accordingly, the receipt of a capital benefit instead of a dividend would result in SAC shareholders obtaining a tax benefit (as defined in subsection 45B(9) of the ITAA 1936) under the scheme.

127. As the threshold requirements in paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 have been met by SAC shareholders electing to receive the Share Alternative, it is necessary to consider the remaining requirement in paragraph 45B(2)(c) of the ITAA 1936. In doing so, it is also helpful to consider the relevant policy underlying the provision in determining if the circumstances of the scheme were within the contemplation of the provisions.

128. Section 45B of the ITAA 1936 is a specific anti-avoidance measure the purpose of which is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if certain payments, allocations and distributions are made in substitution for dividends.

129. Having considered the relevant circumstances of the scheme it cannot be concluded that the scheme is one contemplated by the provisions or one that possesses a more than incidental purpose of enabling the relevant taxpayer to obtain a tax benefit.

130. Consequently, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in respect of the capital benefits provided by White Energy to SAC shareholders.

Appendix 2 – Relevant closing price or VWAP of a White Energy share on the ASX

131. The following is a list of the relevant closing price or VWAP(*) of a White Energy Ordinary Share on the ASX during the offer period and on the date of compulsory acquisition. This information has been provided to the Commissioner by SAC. As such the Commissioner does not guarantee its accuracy.

Date	Relevant closing price or VWAP (*) of a WEC share on the ASX
15-June-2010	3.68
16-June-2010	3.73
17-June-2010	3.77
18-June-2010	3.73
21-June-2010	3.67
22-June-2010	3.54
23-June-2010	3.40
24-June-2010	3.40
25-June-2010	3.34
28-June-2010	3.24
29-June-2010	3.15
30-June-2010	3.12
01-July-2010	3.06
02-July-2010	2.98
05-July-2010	3.11
06-July-2010	3.09
07-July-2010	3.09
08-July-2010	3.10
09-July-2010	3.10
12-July-2010	3.30*
13-July-2010	3.13
14-July-2010	3.15
15-July-2010	3.20
16-July-2010	3.09
19-July-2010	3.00
20-July-2010	2.97
21-July-2010	3.02
22-July-2010	3.10
23-July-2010	3.35
26-July-2010	3.35
27-July-2010	3.32
28-July-2010	3.30
9-September-2010 (Date of compulsory acquisition)	3.77

Appendix 3 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2000/10; TR 2006/10

Subject references:

- Arrangement
- Capital gains
- Capital losses
- CGT capital proceeds
- CGT cost base
- CGT event A1-disposal of a CGT asset
- CGT events
- CGT events C1-C3 – end of a CGT asset
- CGT events D1-D3 – bringing into existence a CGT asset
- CGT events H1-H2 – special capital receipts
- CGT reduced cost base
- CGT roll-over relief
- Common stakeholders
- Conversion of securities
- Disposal of shares
- Dividend streaming arrangements
- Forfeiture of rights & entitlements
- Market value cost base
- Ordinary shares
- Partial rollover
- Rights to capital distributions
- Rights to dividends
- Schemes of arrangement
- Scrip for scrip roll-over
- Share consolidations & splits
- Shareholders
- Significant stakeholders
- Time of CGT event
- Variation of rights

Legislative references:

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- ITAA 1936 6BA(5)
- ITAA 1936 45
- ITAA 1936 45(3)
- ITAA 1936 45A
- ITAA 1936 45A(1)(a)
- ITAA 1936 45A(1)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(5)(a)
- ITAA 1936 45C
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- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)(a)
- ITAA 1997 104-10(4)
- ITAA 1997 104-10(6)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
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- ITAA 1997 104-25(3)
- ITAA 1997 104-155
- ITAA 1997 104-155(1)
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- ITAA 1997 Subdiv 109-A
- ITAA 1997 109-10
- ITAA 1997 110-25
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- ITAA 1997 110-55
- ITAA 1997 110-55(2)
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- ITAA 1997 112-25(4)
- ITAA 1997 112-30
- ITAA 1997 112-30(1)
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 116-30
- ITAA 1997 116-30(3)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780(4)
- ITAA 1997 124-780(5)
- ITAA 1997 124-783
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(3)
- ITAA 1997 124-785(4)
- ITAA 1997 124-790
- ITAA 1997 124-790(1)
- ITAA 1997 124-790(2)
- ITAA 1997 124-795(2)
- ITAA 1997 134-1
- ITAA 1997 134-1(1)
- ITAA 1997 134-1(4)
- ITAA 1997 202-5
- ITAA 1997 208-60
- ITAA 1997 Div 230
- ITAA 1997 995-1

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- Corporations Act 2001 612(f)
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