


CR 2012/54 - Income tax: scheme of arrangement - merger of Gloucester Coal Limited and Yancoal Australia Limited

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Class Ruling

Income tax: scheme of arrangement — merger of Gloucester Coal Limited and Yancoal Australia Limited

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Scheme	10
Ruling	30
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	49
Appendix 2:	
<i>Detailed contents list</i>	55

1 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 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 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-55(2) of the ITAA 1997;
- section 112-30 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- Subdivision 115-C of the ITAA 1997;
- section 115-30 of the ITAA 1997;

- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;
- section 124-780 of the ITAA 1997;
- section 124-785 of the ITAA 1997; and
- paragraph 124-795(2)(a) of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies are Gloucester Coal Limited (Gloucester) Shareholders who:

- participate in the Scheme and receive the Scheme Consideration for the disposal of their Gloucester Shares to Yancoal Australia Limited (Yancoal);
- acquired their Gloucester Shares on, or after, 20 September 1985;
- held their shares on capital account;
- are 'Australian residents' (within the meaning of subsection 995-1(1) of the ITAA 1997); and
- were not a 'temporary resident' of Australia within the meaning of subsection 995-1(1) of the ITAA 1997.

4. For the purposes of this Ruling, an 'eligible Gloucester Shareholder' is a holder of Gloucester Shares at the Scheme Record Date and that shareholder is not an 'Excluded Shareholder' as defined in the Explanatory Booklet.

5. This Ruling does not apply to Gloucester Shareholders who are subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to the gains and losses on their Gloucester Shares.

(Note: Division 230 of the ITAA 1997 will not generally apply to the financial arrangements of individuals, unless they have made an election for those rules to apply to them.)

Qualifications

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 10 to 29 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 from 27 June 2012 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 Minter Ellison Lawyers (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 23 February 2012 lodged by the Applicant on behalf of Gloucester;
- Merger Proposal Deed dated 22 December 2011;
- Amendment Deed – Merger Proposal Deed dated 6 March 2012;
- Explanatory Booklet: For a scheme of arrangement in relation to the proposed merger of Gloucester Coal Ltd and Yancoal Australia Limited dated 30 April 2012; and
- correspondence from the Applicant providing further particulars.

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. In this Ruling, unless otherwise indicated, capitalised terms take on the same meanings as in the documents listed in the previous paragraph.

Relevant entities

Gloucester

12. Gloucester is a public company that has been listed on the Australian Securities Exchange (ASX) since June 1985. As at 30 June 2011, Gloucester had an approximate market capitalisation of \$1.4 billion.

13. Gloucester's principal business activity is the mining, marketing and sale of coking and thermal coal.

14. As at the Scheme Record Date of 4 July 2012, Gloucester had 218,727,665 ordinary shares on issue and had no other class of shares or options over any Gloucester Shares on issue.

Yancoal

15. Yancoal is an Australian resident listed public company. Its principal business activity is coal mining and the exportation of coal to Asia. Yancoal operates a number of coal mines located in New South Wales and Queensland.

16. Prior to the Effective Date of the Scheme, Yancoal was a wholly-owned subsidiary of Yanzhou Coal Mining Company Limited which is listed on the Hong Kong Stock Exchange, Shanghai Stock Exchange and New York Stock Exchange.

Disposal of Gloucester Shares

Scheme of arrangement

17. On 23 December 2011, Gloucester announced that it had entered into a Merger Proposal Deed under which it was proposed that Yancoal would acquire all of the shares in Gloucester (the Scheme).

18. A Scheme Meeting of Gloucester Shareholders approving the Scheme was held on 4 June 2012. The Scheme was effected under Part 5.1 of the *Corporations Act 2001*.

19. The Implementation Date of the Scheme was 6 July 2012. As a result of the Scheme, Gloucester became a wholly owned subsidiary of Yancoal, and Gloucester Shares were delisted from the ASX.

Scheme consideration

20. In consideration for the transfer of their Gloucester Shares to Yancoal, those eligible Gloucester Shareholders, other than Foreign Scheme Shareholders, who held Gloucester Shares on the Scheme Record Date of 4 July 2012, received shares in Yancoal.

21. An eligible Gloucester Shareholder (other than a Foreign Scheme Shareholder) received either of the following for each Gloucester Share they held at the Scheme Record Date:

- one Yancoal Share and one fully paid contingent value rights share (CVR Share) in the capital of Yancoal issued under the CVR Terms of Issue; or
- one Yancoal Share if a Scrip Election was made.

22. CVR Shares are listed on the ASX and will have an End Date of 18 months from the Issue Date of the CVR Shares, unless an Early Lapse Notice is taken to be issued or Yancoal issues a Lapse Notice at its discretion.

Foreign Scheme Shareholders

23. A Foreign Scheme Shareholder is an eligible Gloucester Shareholder whose address in the Gloucester Share Register is a place outside Australia and its external territories, New Zealand or any of the other jurisdictions listed in paragraph 12.5(f) of the Explanatory Booklet.

24. Foreign Scheme Shareholders (excluding Gloucester's controlling shareholder), were ineligible to receive Yancoal Shares and CVR Shares. The Yancoal Shares and CVR Shares to which Foreign Scheme Shareholders would otherwise be entitled were issued to a sale agent who sold those shares on-market and remitted the net sale proceeds to the Foreign Scheme Shareholders.

Other Matters

25. Prior to the Effective Date of the Scheme, a Special Dividend and Capital Return were paid by Gloucester to Gloucester Shareholders on 25 June 2012.

26. Just before the Effective Date of the Scheme, both Gloucester and Yancoal had at least 300 members and did not have a concentrated ownership of the nature described in section 124-810 of the ITAA 1997.

27. For the purposes of subsections 124-780(4) and 124-780(5) of the ITAA 1997, just before the Effective Date of the Scheme no original interest holder in Gloucester was a member of a linked group that included Yancoal.

28. There were no 'significant stakeholders' or 'common stakeholders' in relation to the Scheme within the meaning of those expressions in section 124-783 of the ITAA 1997.

29. All entities were dealing at arm's length.

Ruling

Disposal of Gloucester Shares

Capital gains tax (CGT) event A1

30. CGT event A1 happened when eligible Gloucester Shareholders disposed of their Gloucester Shares to Yancoal (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

31. The time of the CGT event was when the Gloucester Share was transferred to Yancoal on the Implementation Date of 6 July 2012 (paragraph 104-10(3)(b) of the ITAA 1997).

Capital gain or capital loss

32. An eligible Gloucester Shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of each Gloucester Share exceeded its cost base. An eligible Gloucester Shareholder made a capital loss if the capital proceeds were less than the reduced cost base of the Gloucester Share (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

33. Where an eligible Gloucester Shareholder received a CVR Share, the capital proceeds from the disposal of each Gloucester Share is the market value, worked out at the time CGT event A1 happened, of:

- the CVR Share; and
- the Yancoal Share received in exchange for the Gloucester Share (paragraph 116-20(1)(b) of the ITAA 1997).

34. Where an eligible Gloucester Shareholder elected not to receive a CVR Share, the capital proceeds from the disposal of each Gloucester Share is the market value, worked out at the time CGT event A1 happened, of the Yancoal Share received in exchange for the Gloucester Share (paragraph 116-20(1)(b) of the ITAA 1997).

35. The capital proceeds do not include the Gloucester Special Dividend as it is considered, having regard to all of the circumstances of the Scheme, that this dividend was not paid in respect of the CGT event happening (subsection 116-20(1) of the ITAA 1997).

Scrip for scrip roll-over

36. Subject to the qualification in the following paragraph, an eligible Gloucester Shareholder who made a capital gain from the disposal of a Gloucester Share to Yancoal is eligible to choose scrip for scrip roll-over (section 124-780 and subsection 124-785(1) of the ITAA 1997).

37. Scrip for scrip roll-over cannot be chosen if any capital gain an eligible Gloucester Shareholder makes from their Yancoal Shares or CVR Shares is disregarded (except because of a roll-over) (paragraph 124-795(2)(a) of the ITAA 1997).

38. The only capital proceeds received by an eligible Gloucester Shareholder were shares in Yancoal, being either ordinary shares or CVR Shares. Therefore, if an eligible Gloucester Shareholder chooses scrip for scrip roll-over, the capital gain they make upon the disposal of a Gloucester Share to Yancoal is disregarded (subsection 124-785(1) of the ITAA 1997).

Discount capital gain

39. An eligible Gloucester Shareholder who makes a capital gain where roll-over is not chosen, or cannot be chosen, may treat the capital gain as a 'discount capital gain' provided that the conditions in Subdivision 115-A of the ITAA 1997 and, if applicable, Subdivision 115-C of the ITAA 1997 are satisfied.

Cost base of Yancoal Shares

40. The method for calculating an eligible Gloucester Shareholder's cost base and reduced cost base of the Yancoal Shares and the CVR Shares depends on whether the eligible Gloucester Shareholder chooses scrip for scrip roll-over.

– If scrip for scrip roll-over is chosen

41. Where scrip for scrip roll-over is chosen and the eligible Gloucester Shareholder elected not to receive CVR Shares, the first element of the cost base and reduced cost base of each Yancoal Share is the cost base and reduced cost base of the relevant Gloucester Share that is exchanged for the Yancoal Share (subsections 124-785(2) and 124-785(4) of the ITAA 1997).

42. Where scrip for scrip roll-over is chosen and the eligible Gloucester Shareholder receives both Yancoal Shares and CVR Shares, the first element of the cost base and reduced cost base of each Yancoal Share and CVR Share is worked out by reasonably attributing to each share a proportion of the cost base and reduced cost base respectively, of the corresponding Gloucester Share (subsections 124-785(2) and 124-785(4) of the ITAA 1997).

43. The Commissioner accepts that the cost base of the Yancoal Shares and the CVR Shares can be worked out using the following method:

$$\text{Cost base (or reduced cost base) in Yancoal Shares} = G \times \frac{A}{A + B}$$

$$\text{Cost base (or reduced cost base) in CVR Shares} = G \times \frac{B}{A + B}$$

Where:

G is the cost base (or reduced cost base) of the Gloucester Shares exchanged under the Scheme;

A is the market value of the Yancoal Shares received; and

B is the market value of the CVR Shares received.

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

44. Where scrip for scrip roll-over is not chosen, or cannot be chosen, and the eligible Gloucester Shareholder elected not to receive CVR Shares, the first element of the eligible Gloucester Shareholder's cost base and reduced cost base of each Yancoal Share is equal to the market value of the Gloucester Share that is exchanged for the Yancoal Share. The market value of the Gloucester Share is worked out at the time of the acquisition of the Yancoal Share on the Implementation Date (subsections 110-25(2), 110-55(2) of the ITAA 1997 and section 112-30 of the ITAA 1997).

45. Where scrip for scrip roll-over is not chosen, or cannot be chosen, and the eligible Gloucester Shareholder received CVR Shares, the first element of the eligible Gloucester Shareholder's cost base and reduced cost base of each Yancoal Share and each CVR Share is worked out by reasonably attributing to each a proportion of the market value of the corresponding Gloucester Share (paragraph 110-25(2)(b) of the ITAA 1997 and subsections 110-55(2) and 112-30(1) of the ITAA 1997).

46. The Commissioner accepts that the cost base of the Yancoal Shares and the CVR Shares can be worked out using the following method:

$$\text{Cost base (or reduced cost base) in Yancoal Shares} = G \times \frac{A}{A + B}$$

$$\text{Cost base (or reduced cost base) in CVR Shares} = G \times \frac{B}{A + B}$$

Where:

G is the market value of the Gloucester Shares exchanged under the Scheme;

A is the market value of the Yancoal Shares received; and

B is the market value of the CVR Shares received.

Acquisition date of Yancoal Shares and CVR Shares

47. The acquisition date of the Yancoal Shares and the CVR Shares received in exchange for the Gloucester Shares is the date that the Yancoal Shares and the CVR Shares were issued to the eligible Gloucester Shareholder (item 2 of the table in section 109-10 of the ITAA 1997). That is, the Implementation Date of the Scheme of 6 July 2012.

48. However, for the purpose of determining whether a capital gain made from any later disposal of the Yancoal Shares and the CVR Shares is eligible to be treated as a 'discount capital gain', an eligible Gloucester Shareholder who chooses scrip for scrip roll-over is taken to have acquired their Yancoal Shares and their CVR Shares when they acquired the corresponding Gloucester Shares (item 2 of the table in subsection 115-30(1) of the ITAA 1997).

Commissioner of Taxation

18 July 2012

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.*

Availability of scrip for scrip roll-over

49. The tax consequences arising from the Scheme, and the relevant legislative provisions, are outlined in the Ruling part of this document.

50. The significant tax consequence that is the subject of this Ruling is the availability of scrip for scrip roll-over under Subdivision 124-M of the ITAA 1997. It 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.

51. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- (a) shares in a company 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.

52. Under the Scheme, the conditions for roll-over are satisfied and the Ruling section explains the Commissioner’s decision. Therefore, no further explanation is warranted.

Market value

53. The Commissioner accepts that the market value of the Yancoal Shares and CVR Shares on the Implementation Date of the Scheme may be determined based on the volume-weighted average price (VWAP) on the Implementation Date of 6 July 2012.

54. The Commissioner also accepts that, for an eligible Gloucester Shareholder that does not elect a scrip for scrip roll-over, the market value of the Gloucester Shares may be determined using the VWAP on the Effective Date of the Scheme of 27 June 2012, being the last day of trading in Gloucester Shares on the ASX before the Implementation Date of the Scheme.

Appendix 3 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	6
Date of effect	9
Scheme	10
Relevant entities	12
<i>Gloucester</i>	12
<i>Yancoal</i>	15
Disposal of Gloucester Shares	17
<i>Scheme of arrangement</i>	17
<i>Scheme consideration</i>	20
<i>Foreign Scheme Shareholders</i>	23
Other Matters	25
Ruling	30
Disposal of Gloucester Shares	30
<i>Capital gains tax (CGT) event A1</i>	30
<i>Capital gain or capital loss</i>	32
<i>Capital proceeds</i>	33
<i>Scrip for scrip rollover</i>	36
<i>Discount capital gain</i>	39
<i>Cost base of Yancoal Shares</i>	40
<i>– If scrip for scrip roll-over is chosen</i>	41
<i>– If scrip for scrip roll-over is not chosen, or cannot be chosen</i>	44
Acquisition date of Yancoal Shares and CVR Shares	47
Appendix 1 – Explanation	49
Availability of scrip for scrip roll-over	49
Market value	53
Appendix 2 – Detailed contents list	55

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- acquisition dates
- capital gains
- capital gains tax
- CGT capital proceeds
- CGT cost base
- CGT discount
- CGT event A1 - disposal of a CGT asset
- CGT roll-over relief
- disposal of assets
- disposal of shares
- exchange of shares
- scrip for scrip rollover

- ITAA 1997 109-10
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(b)
- ITAA 1997 110-55(2)
- ITAA 1997 112-30
- ITAA 1997 112-30(1)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 Subdiv 115-C
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)(b)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780
- ITAA 1997 124-780(4)
- ITAA 1997 124-780(5)
- ITAA 1997 124-783
- ITAA 1997 124-785(1)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-810
- ITAA 1997 Div 230
- ITAA 1997 995-1(1)
- *Copyright Act 1968*
- *Corporations Act 2001*
- *Taxation Administration Act 1953*

Legislative references:

- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)

ATO references

NO: 1-3QWUV9L

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ roll-overs - scrip for scrip