


CR 2013/12 - Income tax: capital gains tax: special dividend and capital proceeds from sale of Norton Gold Fields Limited shares pursuant to off market takeover

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Class Ruling

Income tax: capital gains tax: special dividend and capital proceeds from sale of Norton Gold Fields Limited shares pursuant to off market takeover

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	35
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	39
Appendix 2:	
Detailed contents list	49

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 the Ruling are:
- Section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
 - Section 116-20 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders in Norton Gold Fields Limited (NGF) who:

- accepted the offer made by Jinyu (H.K.) International Mining Company Limited to acquire their NGF shares, and

- received the Special Dividend, and
- are Australian residents who hold their NGF shares on capital account, or are non-residents subject to Australian Capital Gains Tax (CGT), and
- are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their NGF shares.

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

In this Ruling, a shareholder belonging to this class of entities is referred to as a 'participating NGF shareholder'.

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 9 to 34 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 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

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

- Class Ruling application from PricewaterhouseCoopers dated 9 October 2012;
- Bidder's Statement dated 18 July 2012;
- Target Statement dated 18 July 2012;
- Bid Implementation Deed dated 31 May 2012;
- Bridging Term Loan Facility Agreement dated 28 May 2012; and
- further information provided by the applicant dated 17 December 2012.

NGF

10. NGF is an Australian resident company listed on the Australian Securities Exchange. NGF is focused on the production, development and exploration of gold in Western Australia and Queensland.

11. As at 18 July 2012 the issued capital of NGF consisted of 849,580,265 ordinary fully paid shares and 12,000,000 options to subscribe for ordinary fully paid shares.

12. Prior to 3 April 2012, NGF's shareholders comprised a mix of institutional and retail investors.

Zijin

13. Zijin Mining Group Co., Ltd (Zijin) is a mining conglomerate based in China that is primarily engaged in gold production.

14. Zijin was incorporated in 2000 as a joint stock limited company, and is listed on the Hong Kong Stock Exchange and the Shanghai Stock Exchange.

15. Zijin, via its wholly-owned subsidiaries, owned approximately 16.98% of NGF shares prior to 3 April 2012.

Jinyu

16. Jinyu (H.K.) International Mining Company Limited (Jinyu) is a wholly-owned subsidiary of Zijin and is incorporated in Hong Kong.

The Offer

17. On 3 April 2012 NGF announced that it had received an unsolicited indicative takeover proposal from Zijin.

18. On 31 May 2012 NGF and Zijin jointly announced that they had signed a 'Bid Implementation Deed', pursuant to which Zijin (through a wholly-owned subsidiary) would make an off market takeover offer of \$0.25 cash per share for all NGF shares not then held by Zijin and its subsidiaries (the Offer).

19. The Offer was subsequently made by Jinyu, full details of which were contained in the Bidder's Statement dated 18 July 2012.

20. The Bidder's Statement and the Bid Implementation Deed both provided that NGF was permitted to announce and declare a one-off special dividend.

21. The Offer was subject to a number of conditions. One condition required that Jinyu and its related bodies corporate obtain at least 50.1% of all NGF shares at the conclusion of the Offer period.

22. The Offer triggered a 'change of control' provision in NGF's existing secured debt facility (secured note facility) which required NGF to repay the entire secured note facility (including a 5% redemption premium).

23. To repay the secured note facility NGF drew down existing cash reserves and Jinyu provided NGF with a \$38 million unsecured loan facility. The sole purpose of this loan facility as set out in the Bridging Term Loan Facility Agreement was to partially fund repayment of the existing secured note facility.

24. The Offer closed on 20 August 2012, resulting in the Zijin group (via its wholly owned subsidiaries) holding an ownership interest of approximately 89.15% in NGF (including a 16.98% interest held before the Offer).

The Special Dividend

25. On 31 May 2012 NGF announced that NGF shareholders at the Special Dividend Record Date would be entitled to receive an unfranked special dividend of \$0.02 per share (the Special Dividend) which NGF proposed to declare and pay, with no reduction in the \$0.25 per share offer price. The Special Dividend would be:

- declared and announced once the Offer became unconditional and all of the loan notes under NGF's existing secured note facility had been redeemed; and
- paid to shareholders not later than 3 weeks after the date on which the last of the events above occurred.

26. The Special Dividend was a means for NGF to distribute profits resulting from NGF's strong performance and profitability which had accrued to its shareholders in the 2011/2012 financial year.

27. In the absence of, and prior to, the Offer, NGF was restricted from paying dividends to shareholders by covenants imposed under the existing secured note facility. The requirement for Norton to repay its existing secured note facility as a result of the Zijin acquisition provided NGF with an opportunity to distribute earnings to shareholders.

28. On 2 August 2012 NGF announced that Jinyu had received acceptances for its off-market takeover offer such that the Zijin group had a relevant interest of 48.29% in NGF and had declared the Offer free of all defeating conditions.

29. On 3 August 2012 NGF announced and declared the unfranked Special Dividend of \$0.02 per share.

30. NGF shareholders, including the Zijin group, who held NGF shares on the Special Dividend Record Date of 15 August 2012, received the unfranked Special Dividend of \$0.02 per NGF share on the Special Dividend Payment Date of 24 August 2012. The total Special Dividend amount paid to NGF shareholders was \$17,231,605.

31. The Special Dividend payment was funded from NGF's existing cash reserves.

32. The Special Dividend was debited entirely to NGF's 'Dividend paid (retained earnings)' account and NGF did not debit the Special Dividend to its share capital account.

33. The Special Dividend was not contracted or a mandatory condition of the Offer and was paid to all eligible NGF shareholders regardless of whether they accepted or rejected the Offer.

34. The Special Dividend did not reduce the \$0.25 cash proceeds paid under the Offer.

Ruling

CGT event A1

35. CGT event A1 happened when participating NGF shareholders disposed of their NGF shares pursuant to the Scheme (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

36. A participating NGF shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a NGF share exceeded its cost base. A participating NGF shareholder made a capital loss if those proceeds were less than the NGF share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

37. The capital proceeds received by a participating NGF shareholder was the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

38. The capital proceeds from the disposal of each NGF share pursuant to the Scheme was \$0.25 cash per NGF share. This amount does not include the Special Dividend of \$0.02 cash per NGF share.

Commissioner of Taxation

20 February 2013

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

CGT event A1

39. CGT event A1 happens if there is a change in the ownership of a CGT asset from one entity to another (section 104-10 of the ITAA 1997). This event happens when a contract for the disposal of the asset is entered into, or if there is no contract, when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997).

40. CGT event A1 happened when a participating NGF shareholder disposed of each of their NGF shares to Jinyu pursuant to the Scheme.

41. A participating NGF shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of a NGF share exceeded its cost base. A participating NGF shareholder made a capital loss if those capital proceeds were less than the NGF share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

42. The capital proceeds from the Scheme was the money received or entitled to be received in respect of the disposal of shares in NGF by a participating NGF shareholder (subsection 116-20(1) of the ITAA 1997).

43. A participating NGF shareholder was entitled to receive \$0.25 cash per NGF share in respect of the disposal of their NGF shares.

44. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' from an event merely because it is received in association with the event.

45. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4 *Income tax: capital gains: when a dividend will be included in the capital proceeds from a disposal of shares that happens under a contract or a scheme of arrangement* states at paragraph 9 that:

9. A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

46. In this case, the payment of the Special Dividend occurred independently of the Scheme. This was primarily reflected in the following attributes:

- the cash offer of \$0.25 per NGF share was not reduced by the amount of the Special Dividend;
- the \$0.02 Special Dividend was not contracted or a mandatory condition of the Offer;
- the Special Dividend was paid to all eligible NGF shareholders regardless of whether they accepted or rejected the Offer; and
- the Special Dividend was funded from existing cash reserves and not by funds provided by Jinyu or Zijin.

47. TR 2010/4 states at paragraph 23 that:

A dividend declared and paid independently of the contract for the sale of shares is not capital proceeds from the disposal of shares in respect of CGT event A1 happening merely because payment of the dividend:

- is contingent on the sale proceeding; or
- contemporaneous with the disposal of the shares under the contract.

48. Although the declaration and payment of the Special Dividend of \$0.02 cash per NGF share was contingent on the Scheme proceeding, it is considered that the Special Dividend did not form part of the capital proceeds received or entitled to be received by a participating NGF shareholder in respect of the disposal of NGF shares.

Appendix 2 – Detailed contents list

49. 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	4
Date of effect	8
Scheme	9
NGF	10
Zijin	13
Jinyu	16
The Offer	17
The Special Dividend	25
Ruling	35
Appendix 1 – Explanation	39
CGT event A1	39
Capital proceeds	42
Appendix 2 – Detailed contents list	49

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2010/4

Subject references:

- arrangement
- CGT assets
- CGT capital proceeds
- distributions
- dividend income
- ordinary shares

- takeovers & mergers

Legislative references:

- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 116-20(1)
- TAA 1953
- Copyright Act 1968

ATO references

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