

CR 2015/40 - Income tax: demerger of South32 by BHP Billiton Limited

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Class Ruling

Income tax: demerger of South32 by BHP Billiton 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 provisions

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 44 of the ITAA 1936
- section 45 of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45BA of the ITAA 1936
- section 45C of the ITAA 1936
- section 109-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Division 110 of the ITAA 1997

- section 115-30 of the ITAA 1997
- section 118-20 of the ITAA 1997, and
- Division 125 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of BHP Billiton Ltd (BHP) who:

- (a) participated in the scheme that is the subject of this Ruling
- (b) were residents of Australia as defined in subsection 6(1) of the ITAA 1936 on 24 May 2015
- (c) owned ordinary shares in BHP (BHP shares) at 20 May 2015 (the Record Date) and held those shares on capital account at the time of the scheme, and
- (d) 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 BHP 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 person belonging to this class of entities is referred to as a 'BHP 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 8 to 33 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.

Date of effect

7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

8. The following description of the scheme is based on information provided by the applicant.

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

Background

9. On 24 May 2015, BHP carried out a demerger of all the shares in its wholly owned subsidiary, South32 Limited (South32). The demerger, which was announced by the BHP Board on 19 August 2014, gave effect to a proposal to spin-out a portfolio of assets that were considered quality assets but were no longer core assets of the BHP Billiton Group business. These assets comprised the BHP Billiton Group's aluminium and manganese assets, Cannington, Cerro Matoso, the group's South African assets and Illawarra Coal (non-portfolio assets). The shareholders in the BHP Billiton Group approved the demerger of South32 from BHP at the general meetings on 6 May 2015.

Relevant Entities

BHP

10. BHP is an Australian resident public company listed on the Australian Securities Exchange (ASX) and the head company of an Australian income tax consolidated group for the purposes of Part 3-90 of the ITAA 1997.

11. BHP is party to a dual listed company arrangement (DLC Arrangement) with BHP Billiton Plc (Plc). Under the DLC Arrangement, BHP and Plc agree to operate as if they were a single economic enterprise, while retaining their separate legal identities, tax residencies and stock exchange listings.

12. Immediately before the demerger, BHP had on issue:
- 3,211,691,105 fully paid ordinary BHP shares
 - One special voting share that is a 'dual listed company voting share' for the purposes of subsection 125-60(3) of the ITAA 1997, and
 - A number of rights and options issued under BHP employee share schemes (ESS interests), representing less than 3% of the total value of ownership interests in BHP.

Plc

13. Plc is a United Kingdom tax resident public company with a primary listing on the London Stock Exchange (LSE) and a secondary listing on the Johannesburg Stock Exchange in South Africa.

South32

14. Immediately prior to the demerger, South32 was a wholly owned subsidiary of BHP and a member of the BHP income tax consolidated group. At that time, BHP owned all of the 3,211,691,105 fully paid ordinary shares issued by South32.

BHP Billiton Group

15. The BHP Billiton Group includes BHP, Plc, and subsidiary entities held by BHP and Plc.

Pre-demerger transactions

16. Prior to the demerger, BHP undertook certain transactions to facilitate the demerger including internal restructuring to transfer to South32, either directly or indirectly, the BHP Billiton Group's non-portfolio assets.

The demerger of South32

17. The demerger of South32 occurred on 24 May 2015 (the Implementation Date) when BHP transferred all the South32 shares on issue to BHP shareholders.

18. The demerger of South32 was effected by way of BHP making an in specie distribution of the shares in South32 to BHP shareholders (the BHP distribution).

19. BHP shareholders received one South32 share for each BHP share held on 20 May 2015 (the Record Date).

Subsequent transactions

20. Following the demerger of South32, South32 issued sufficient shares to the Plc group such that the total number of shares held by Plc in South32 equalled the total number of ordinary shares held in Plc.

21. Plc subsequently made an in specie distribution to Plc shareholders of one share in South32 for each ordinary share held in Plc.

Sale facility

22. A sale facility was made available for 'ineligible overseas shareholders' and 'eligible small shareholders' to enable their South32 shares to be sold by BHP via a sales agent on the ASX. The net proceeds from the sales will be remitted to the ineligible overseas shareholders and eligible small shareholders.

23. Ineligible overseas shareholders were BHP shareholders whose registered address was shown in the BHP share register on the Record Date as being in a jurisdiction outside of Australia, the United Kingdom, South Africa, the United States, Canada, Alderney, Chile, France, Guernsey, Hong Kong, Ireland, Isle of Man, Jersey, Lesotho, Malaysia, Namibia, New Zealand, Singapore and Swaziland.

24. Eligible small shareholders were BHP shareholders whose registered address was shown in the BHP share register on the Record Date as being in Australia, the United Kingdom, South Africa, Canada, Alderney, Chile, Guernsey, Ireland, Isle of Man, Jersey, Lesotho, Malaysia, Namibia, New Zealand and Swaziland, who were not acting for the account or benefit of persons in the United States, who held 10,000 BHP shares or less as at the Record Date and that elected to participate in the sale facility.

The demerger distribution

25. BHP accounted for the BHP distribution pursuant to which South32 shares were transferred to BHP shareholders by debiting the value of the BHP distribution to BHP's retained earnings.

26. The value of the BHP distribution amount of \$7,226,304,986 was worked out by reference to the volume weighted average price of the South32 shares, \$2.25, as traded on the ASX over the five trading days from when deferred settlement trading commenced on 18 May 2015.

Reasons for the demerger

27. BHP believed that a number of advantages accrued to its shareholders as a result of the demerger, including:

- a simplification of the BHP Billiton Group's businesses
- as a stand-alone listed company, South32 will be able to develop a tailored strategy suitable for its scale and asset suite
- South32 will have the flexibility to redeploy capital into value maximising opportunities with greater flexibility than it currently does within the constraints of the BHP Billiton Group's strategy, and
- the South32 assets and operations will benefit from having its senior management and Board's 100% focus and priority. Those assets and operations would not otherwise obtain sufficient attention and funding compared to assets and operations that remain within the BHP Billiton Group following the demerger.

Other matters

28. South32 shares commenced trading on the ASX on 18 May 2015 on a deferred settlement basis.

29. BHP's ESS interests have been issued in accordance with Division 83A of the ITAA 1997 and are interests to which either Subdivision 83A-B and subsections 83A-35(3)-(9) inclusive or Subdivision 83A-C of the ITAA 1997 applies.

30. Subsections 44(3) and 44(4) of the ITAA 1936 will apply to the demerger distribution as BHP did not make an election under subsection 44(2) of the ITAA 1936.

31. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by South32 and its subsidiaries were used directly or indirectly in one or more businesses carried on by South32 or its subsidiaries.

32. For the year ended 30 June 2014, BHP disclosed contributed equity of US\$898 million and retained earnings of US\$45,914 million.

33. BHP has shareholders who are not residents of Australia as defined in subsection 6(1) of the ITAA 1936.

Ruling

CGT consequences

Demerger roll-over relief

34. A demerger, as described under section 125-70 of the ITAA 1997, happened under the scheme and a CGT event happened in relation to each of the BHP shares owned by BHP shareholders.

35. Therefore, BHP shareholders can choose demerger roll-over relief under subsection 125-55(1) of the ITAA 1997 for their Pre-CGT and Post-CGT BHP shares.

South32 shares received by BHP shareholder that holds Pre-CGT BHP shares

36. BHP shareholders who choose demerger rollover relief for their shares acquired before 20 September 1985 (Pre-CGT BHP shares) are taken to have acquired the corresponding South32 shares under the demerger before 20 September 1985 (subsections 125-55(1) and 125-80(5) and 125-80(6) of the ITAA 1997).

37. For BHP shareholders who own Pre-CGT BHP shares and do not choose demerger rollover relief:

- none of the corresponding South32 shares acquired under the demerger are taken to be Pre-CGT shares
- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-5 of the ITAA 1997), and
- the first element of the cost base and reduced cost base of those South32 shares is calculated in accordance with the rules in Division 110 of the ITAA 1997.

South32 shares received by BHP shareholder that holds Post-CGT BHP shares

38. For BHP shareholders who choose demerger rollover relief for their shares acquired after 19 September 1985 (Post-CGT BHP shares):

- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-5 of the ITAA 1997)
- any capital gain or any capital loss made in respect of the CGT event that happened to their BHP shares under the demerger is disregarded (subsection 125-80(1) of the ITAA 1997), and

- the sum of the cost bases and reduced cost bases of original Post-CGT BHP shares is required to be allocated across all of the original BHP shares and the corresponding South32 shares on a reasonable basis (subsection 125-80(2) of the ITAA 1997). See paragraphs 63 to 64 below for more details.

39. For BHP shareholders who do not choose demerger rollover relief for their Post-CGT BHP shares:

- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-5 of the ITAA 1997)
- the BHP shareholders may make a capital gain or a capital loss in respect of the CGT event that happened to their BHP shares under the demerger. However, any capital gain made will be reduced to nil by the CGT anti-overlap rule (section 118-20 of the ITAA 1997), and
- the sum of the cost bases and reduced cost bases of Post-CGT BHP shares is required to be allocated across original Post-CGT BHP shares and corresponding South32 shares in the manner described in paragraphs 63 to 64 of this Ruling (subsections 125-85(1), 125-85(2) and 125-80(2) of the ITAA 1997).

Acquisition date of the South32 shares for the purposes of the CGT discount

40. For the purpose of determining eligibility for a discount capital gain, the South32 shares received by BHP shareholders in relation to Post-CGT BHP shares are taken to have been acquired on the same date the corresponding BHP shares were acquired (item 2 of the table in subsection 115-30(1) of the ITAA 1997). This will be the case irrespective of whether demerger rollover relief is chosen or not.

41. For South32 shares acquired in relation to Pre-CGT BHP shares under the demerger where demerger roll-over relief is not chosen, the acquisition date of these South32 shares is the Implementation Date (24 May 2015) for the purposes of the CGT discount.

Dividend consequences

42. The BHP distribution constitutes both a demerger allocation and a dividend (subsection 6(1) of the ITAA 1936). As no part of the demerger allocation was debited to BHP's share capital account, the distribution is entirely a demerger dividend (subsection 6(1) of the ITAA 1936).

43. The demerger dividend is treated as if it had not been paid out of profits (subsections 44(3) of the ITAA 1936). The demerger dividend is not assessable income or exempt income of BHP shareholders (subsections 44(4) of the ITAA 1936).

Dividend withholding tax

44. The demerger dividend made to non-resident BHP shareholders will not be subject to dividend withholding tax (subsection 128B(3D) of the ITAA 1936).

Section 45 of the ITAA 1936

45. Section 45 of the ITAA 1936 will not apply to the South32 shares received by BHP shareholders under the demerger.

Section 45A of the ITAA 1936

46. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in respect of the capital benefit provided to BHP shareholders under the demerger.

Section 45B of the ITAA 1936

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

Commissioner of Taxation

10 June 2015

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.*

Demerger roll-over relief

48. Demerger roll-over relief enables a shareholder to choose to disregard a capital gain made as a result of a CGT event that happens to their shares in the original company when a CGT event happens in relation to a share under a demerger.

49. The demerger roll-over provisions in Division 125 of the ITAA 1997 contain a number of conditions for eligibility to choose demerger roll-over relief. Each of the following conditions must be present for a demerger to qualify for roll-over relief:

- (a) a shareholder owns a share in a company
- (b) the company is the head entity of a demerger group
- (c) a demerger happens to the demerger group, and
- (d) under the demerger, a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity and nothing else.

50. Under the scheme to which this Ruling relates, the conditions for demerger roll-over relief under Division 125 of the ITAA 1997 are satisfied.

Employee share schemes (ESS)

51. One of the conditions for a demerger happening to a demerger group is the 'proportion' test contained in subsection 125-70(2) of the ITAA 1997. Subsection 125-70(2) requires that each owner of original interests in the head entity must:

- acquire, under the demerger, the same proportion, of new interests in the demerged entity as the original owner owned in the head entity just before the demerger, and
- just after the demerger, have the same proportionate total market value of ownership interests in the head entity and demerged entity as the original owner owned in the head entity just before the demerger.

52. The ESS interests issued under BHP's various employee incentive plans are ownership interests for the purposes of the proportion test. However, section 125-75 of the ITAA 1997 provides that certain ESS interests may be disregarded when applying the proportion test where those interests (taking into account either or both of their number and value) represents not more than 3% of the total ownership interests in the entity at the relevant time (subsections 125-75(1)-(3) of the ITAA 1997).

53. BHP's ESS interests represent less than 3% of the value of the total ownership interests in BHP. Therefore, BHP's ESS interests are disregarded for the purposes of the proportion test.

Special voting share

54. BHP is party to the DLC Arrangement with a special voting share on issue.

55. Pursuant to subsection 125-60(2) of the ITAA 1997, the special voting share will not be an ownership interest for the purposes of 'ownership interests' in subsection 125-60(1) of the ITAA 1997, as the special voting share is a 'dual listed company voting share' for the purposes of subsection 125-60(3) of the ITAA 1997 and there are not more than 5 of these shares on issue.

56. Accordingly, the special voting share is disregarded for the purposes of the proportion test.

A demerger happens to a demerger group

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

- there was a restructuring of the BHP demerger group (paragraph 125-70(1)(a) of the ITAA 1997)
- under the restructuring, BHP disposed of at least 80% of its total ownership interests in South32 to BHP shareholders (subparagraph 125-70(1)(b)(i) of the ITAA 1997), and
- under the restructure:
 - a CGT event happened in relation to the BHP shares held by the BHP shareholders and the BHP shareholders acquired new South32 shares and nothing else (subparagraph 125-70(1)(c)(i) of the ITAA 1997)
 - the South32 shares were acquired by BHP shareholders because of their ownership of interests in BHP (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(i) of the ITAA 1997)

- paragraph 125-70(1)(g) of the ITAA 1997 will be satisfied since neither BHP nor South32 is a trust that is a superannuation fund
- each BHP shareholder acquired South32 shares in the same proportion as they owned BHP shares just before the demerger (paragraph 125-70(2)(a) of the ITAA 1997)
- each BHP shareholder owned, just after the demerger, the same proportionate total market value of BHP and South32 shares as they owned in BHP just before the demerger (paragraph 125-70(2)(b) of the ITAA 1997), and
- subsections 125-70(4) and (5) of the ITAA 1997 have no application.

South32 shares received by BHP shareholder that holds Pre-CGT BHP shares

58. BHP shareholders that acquired their BHP shares before 20 September 1985 (Pre-CGT BHP shares) will continue to hold their BHP shares as Pre-CGT shares.

59. BHP shareholders who choose demerger rollover relief for their Pre-CGT BHP shares are taken to have acquired the corresponding South32 shares under the demerger before 20 September 1985 (subsections 125-55(1) and 125-80(5) of the ITAA 1997).

60. For BHP shareholders who do not choose demerger rollover relief for their Pre-CGT shares:

- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-10 of the ITAA 1997), and
- the first element of the cost base and reduced cost base of those South32 shares is calculated in accordance with the rules in Division 110 of the ITAA 1997.

South32 shares received by BHP shareholder that holds Post-CGT BHP shares

61. For BHP shareholders who choose demerger rollover relief for Post-CGT BHP shares:

- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-5 of the ITAA 1997)

- any capital gain or any capital loss made in respect of the CGT event that happened to their BHP shares under the demerger is disregarded (subsection 125-80(1) of the ITAA 1997), and
- the cost base and reduced cost base of each original Post-CGT BHP share is required to be allocated across that BHP share and the corresponding South32 share on a reasonable basis (subsection 125-80(2) of the ITAA 1997).

62. For BHP shareholders who do not choose demerger rollover relief for their Post-CGT BHP shares:

- those South32 shares were acquired on the Implementation Date (24 May 2015) (section 109-5 of the ITAA 1997)
- the BHP shareholders may make a capital gain or a capital loss in respect of the CGT event that happened to their BHP shares under the demerger. However, any capital gain made will be reduced to nil by the CGT anti-overlap rule (section 118-20 of the ITAA 1997), and
- the sum of the cost bases and reduced cost bases of original Post-CGT BHP shares is required to be allocated across original Post-CGT BHP shares and the corresponding South32 shares on a reasonable basis (section 125-85 and subsection 125-80(2) of the ITAA 1997).

63. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and (3) of the ITAA 1997, the Commissioner accepts the volume weighted average prices of the South32 shares, \$2.25, and of the BHP shares, \$29.44, as traded on the ASX on a deferred settlement basis over the first five trading days after 18 May 2015, as a reasonable approximation of the relative market value of those shares.

64. Based on the volume weighted average prices calculated in paragraph 63 above, 7.1% of the shareholder's original cost base and reduced cost base for the BHP shares becomes the first element of the cost base and reduced cost base of South32 shares, and 92.9% becomes the first element of the cost base and reduced cost base of the BHP shares; section 125-85 and subsections 125-80(2) and (3) of the ITAA 1997.

Acquisition date of the South32 shares for the purposes of the CGT discount

65. For the purpose of determining eligibility for a discount capital gain, the South32 shares received by BHP shareholders in relation to Post-CGT BHP shares are taken to have been acquired on the same date the original BHP shares were acquired (Item 2 of the table in subsection 115-30(1) of the ITAA 1997). For Post-CGT BHP shares, this will be the case irrespective of whether demerger rollover relief is chosen or not.

66. For South32 shares acquired in relation to Pre-CGT BHP shares under the demerger where demerger roll-over relief is not chosen, the acquisition date of these South32 shares is the Implementation Date (24 May 2015) for the purposes of the CGT discount.

67. South32 shares received by BHP shareholders which are taken to be Pre-CGT shares (due to choosing demerger rollover relief) will not be subject to capital gains tax.

Demerger dividend

68. A 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include a distribution made by a company, other than a distribution debited against an amount standing to the credit of the share capital account of that company pursuant to paragraph (d) of the definition.

69. No part of the BHP distribution will be debited to BHP's share capital account. Therefore, the entire value of the BHP distribution will constitute a 'dividend'.

70. The BHP distribution also constitutes a 'demerger allocation' as defined in subsection 6(1) of the ITAA 1936.

71. As the entire BHP distribution constitutes both a 'dividend' and a 'demerger allocation', the entire BHP distribution constitutes a 'demerger dividend' as defined in subsection 6(1) of the ITAA 1936.

72. The requirement of subsection 44(5) of the ITAA 1936 was satisfied as just after the demerger, at least 50% of the market value of CGT assets owned by South32 and its subsidiaries were used directly or indirectly in one or more businesses carried on by South32 and its subsidiaries.

73. The demerger dividend is not assessable income or exempt income pursuant to subsection 44(4) of the ITAA 1936 as:

- BHP did not make an election under subsection 44(2) of the ITAA 1936, and
- subsection 44(5) of the ITAA 1936 is satisfied.

Section 45 of the ITAA 1936

74. Section 45 of the ITAA 1936 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that the shares are received by some but not all shareholders and shareholders who do not receive shares instead receive minimally franked dividends. Minimally franked dividends are dividends which are franked to less than 10%.

75. All BHP shareholders received one South32 share for each BHP share owned. A sales agent received South32 shares on behalf of ineligible overseas shareholders and eligible small shareholders. The net proceeds from the sale facility for these shareholders were or will be remitted to these shareholders in consideration for the sale of the South32 shares on their behalf.

76. Therefore, section 45 of the ITAA 1936 will not apply to the South32 shares received by BHP shareholders under the demerger.

Section 45A of the ITAA 1936

77. Section 45A of the ITAA 1936 applies in circumstances where a company streams capital benefits to certain shareholders who derive a greater benefit from the receipt of capital benefits (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

78. Having regard to the circumstances of the scheme, section 45A of the ITAA 1936 will not apply to any part of a benefit provided to BHP shareholders and the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies.

Section 45B of the ITAA 1936

79. The purpose of section 45B of the ITAA 1936 as set out in subsection 45B(1) of the ITAA 1936 is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if:

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

80. Subsection 45B(2) of the ITAA 1936 provides that the section applies if:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company
- (b) under the scheme, the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936, and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling the taxpayer to obtain the tax benefit.

81. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite conclusion as to purpose for paragraph 45B(2)(c) of enabling BHP shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

82. The conclusion as to purpose in relation to the demerger benefit is made with regard to factors set out in subsection 45B(8) of the ITAA 1936 and takes into account a range of matters including the reasons for the demerger which are set out at paragraph 27, BHP's high retained earnings compared to its relatively low share capital and the presence of non-resident shareholders. As the demerger benefit entirely constitutes a demerger dividend, there is no provision of a capital benefit for the purposes of section 45B of the ITAA 1936 (subsection 45B(6) of the ITAA 1936).

83. Accordingly, the Commissioner will not make a determination under paragraphs 45B(3)(a) or 45B(3)(b) of the ITAA 1936 that either section 45BA or section 45C of the ITAA 1936 applies.

Appendix 2 – Detailed contents list

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