


CR 2017/11 - Income tax: Heron Resources Limited - demerger of Ardea Resources Limited

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Class Ruling

Income tax: Heron Resources Limited – demerger of Ardea Resources Limited

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 44 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 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 109-5 of the ITAA 1997
- section 115-30 of the ITAA 1997

- Division 125 of the ITAA 1997
- section 125-55 of the ITAA 1997
- section 125-65 of the ITAA 1997
- section 125-70 of the ITAA 1997
- section 125-80 of the ITAA 1997
- section 125-85 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are shareholders of Heron Resources Limited (**HRL**) who:

- were listed on the HRL share register on the 6 October 2016 (**Record Date**)
- held their ordinary shares on capital account on the Record Date, that is, the shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- were residents of Australia (as that term is defined in subsection 6(1) of the ITAA 1936) on the Record Date, and
- were not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their HRL shares.

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

In this Ruling, a person belonging to this class of entities is referred to as an 'HRL 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 37 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 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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 and the *Heron Resources Limited Notice of Extraordinary General Meeting* dated 29 August 2016 (**HRL EGM Notice**).

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

9. The scheme that is the subject of this Ruling involves the demerger of Ardea Resources Limited (**Ardea**) and its subsidiaries by HRL. The demerger took effect when the conditions for the transaction were satisfied, which was 31 January 2017 (**Demerger Date**).

HRL

10. HRL is a public company whose shares are listed on the Australian Securities Exchange (ASX) and the Toronto Stock Exchange (TSX). HRL has only one class of share with approximately 415 million ordinary fully paid shares on issue as at 1 September 2016.

11. In accordance with paragraph 125-60(1)(a), HRL employees who held unvested options (totalling 20.3 million) did not have an ownership interest in HRL. HRL employees holding vested options (totalling 3,234,621) did have an ownership interest in HRL. However, as this amounted to less than 3% of the total ownership interests in HRL just before the demerger, in accordance with subsection 125-75(1) they are disregarded in determining whether the requirements of subsection 125-70(2) were met.

12. No shareholder owned more than 20% of the HRL shares at the time of the demerger. There are no other shares or ownership interests in HRL.

13. HRL is a mining and exploration company engaged in the exploration and development of base and precious metal deposits in Australia. HRL is focused on the development of its high grade Woodlawn Project located 250km south-west of Sydney in New South Wales (NSW). HRL also owns the Kalgoorlie Nickel Project (KNP) located north of Kalgoorlie in Western Australia (WA). HRL holds a number of other base metal and copper-gold exploration properties located in the Lachlan Fold Belt of NSW.

14. In the Annual Report for the year ended 30 June 2016, HRL disclosed the following amounts of shareholder equity:

Contributed equity	\$	122,765,000
Option Reserve	\$	935,000
Accumulated losses	\$	<u>(84,527,000)</u>
Total equity	\$	39,173,000

Ardea

15. On 10 August 2016, HRL announced that it intended to restructure its non-Woodlawn asset portfolio through the proposed demerger and listing of the Ardea sub-group. On 17 August 2016, HRL incorporated Ardea for this purpose. Ardea is a wholly owned subsidiary of HRL.

16. The non-Woodlawn assets include the tenements in respect of the Lewis Ponds Gold-Zinc Project in central NSW, the Kalgoorlie Nickel Project (KNP) in WA and Mt Zephyr and Bardoc Tectonic Zone gold projects in the Eastern Goldfields of WA.

17. The total market value of the non-Woodlawn assets was determined by the directors of HRL to be \$8.3 million with the Lewis Ponds Gold-Zinc Project comprising \$4.9 million and the Kalgoorlie Nickel Project tenements \$3.4 million (the other tenements being insignificant in value).

18. The market value accorded with the capitalised Exploration, Evaluation and Development costs for the Lewis Ponds and Kalgorlie Nickel projects recorded in HRL's Annual Report for the year ended 30 June 2016 (Note 9 page 55) as follows:

	Woodlawn	Lewis Ponds	KNP	Explor'n	Total
	\$'000	\$'000	\$'000	\$'000	\$'000
Balance brought forward 1-7-2015	17,638	4,903	4,578	-	27,119
Exploration expenditure	-	169	927	618	1,714
Capitalised exploration expenditure	7,432	-	-	-	7,432
Exploration and evaluation expense as incurred	-	(169)	(927)	(618)	(1,714)
Exploration and evaluation impairment	-	-	(1,181)	-	(1,181)
R&D refund received	(2,302)	-	-	-	(2,302)
Balance carried forward 30-6-2016	22,768	4,903	3,397	-	31,068

19. HRL's Annual Report for the year ending 30 June 2016 states that the total value of all its exploration assets was \$31,068,000. These assets comprised of the Woodlawn assets of \$22,768,000 and 'non-Woodlawn' assets of \$8,300,000.

20. To give effect to the restructuring of the 'non-Woodlawn assets' and creation of the Ardea subgroup, HRL was issued with (approximately) 41.5 million new fully paid ordinary shares in Ardea prior to the Demerger Date.

21. The 41.5 million shares in Ardea were distributed by HRL in-specie to the HRL Shareholders. The HRL Shareholders received one Ardea share for every ten HRL shares held at the Record Date.

22. Based on an asset value of \$8.3 million (for the non-Woodlawn assets held) the Ardea shares were ascribed a value of \$0.20 per share.

Shareholder meeting

23. At the Shareholders' Extraordinary General meeting held on 29 September 2016, HRL Shareholders approved:

- the disposal of Ardea, a subsidiary company of HRL which held the tenements described in Schedule 5 of the Explanatory Memorandum accompanying the HRL EGM Notice
- a reduction in the issued share capital of HRL by the making of a pro rata distribution in-specie of Ardea shares to all eligible HRL Shareholders at the Record Date on the terms and conditions set out in the Explanatory Memorandum accompanying the HRL EGM Notice.

24. Following the issue of Ardea's shares, there remained approximately 415 million HRL shares on issue.

Pre-demerger transactions

25. To effect the separation of its non-Woodlawn operations, HRL transferred the majority of its 'non-Woodlawn' tenements as detailed in Schedule 5 of the HRL EGM Notice, which issued on 29 August 2016.

26. The pre-demerger transfer of entities and assets were undertaken within the HRL tax consolidated group.

The demerger

27. Pursuant to the demerger, each HRL Shareholder received one Ardea Share for each ten HRL shares that they held.

28. On the Demerger Date, HRL demerged Ardea by making a capital reduction by way of an in-specie distribution to HRL Shareholders of one Ardea share for each ten HRL shares that they held. All Ardea shares were distributed to HRL Shareholders (subject to the Sale Facility).

29. No HRL shares were cancelled under the demerger. HRL Shareholders continued to hold the same number and proportion of HRL shares as they held before the demerger (subject to the Sale Facility). After the demerger HRL no longer held any shares in Ardea.

Sale Facility

30. HRL Shareholders on the Record Date with an address outside Australia (**Ineligible Shareholders**) had their pro-rata entitlement of Ardea Shares sold by the Lead Manager through a share sale facility (**Sale Facility**) and the net proceeds paid to the Ineligible Shareholders.

31. Ineligible Shareholders could have chosen to retain their Ardea shares. In such cases, their Ardea Shares were transferred to those shareholders at no cost through the Sale Facility.

Accounting for the demerger distribution

32. HRL accounted for the market value of the in-specie distribution of Ardea shares transferred to HRL Shareholders by debiting the entire demerger distribution amount to HRL's share capital account.

33. The value of the demerger distribution amount was \$8.3 million.

Reasons for the demerger

34. HRL's primary reason for undertaking the demerger was to separate the business operationally and strategically. The commercial rationale included that the demerger:

- provided HRL Shareholders with flexibility of investment choice
- was consistent with HRL's strategic focus of investment in production assets
- created two companies which would operate through two independent, listed companies, with fundamentally different operating models, strategies and capital requirements
- enabled HRL and Ardea as listed companies to benefit from separate ownership and separate management and Boards
- allowed independent focus, strategic decision making and tailored capital structures and allocation frameworks
- removed competition for capital resources within HRL which would enhance access to growth capital as both HRL and Ardea saw fit.

Other matters

35. All HRL shares were acquired or are taken to have been acquired on or after 20 September 1985 for Australian income tax purposes.
36. Immediately before the demerger, HRL's share capital account was not 'tainted', within the meaning of Division 197.
37. HRL has never paid dividends to its shareholders.

Ruling

Capital gains tax (CGT)

CGT event G1

38. CGT event G1 happened in relation to the HRL shares when HRL, the head entity of the demerger group, made a payment of the capital reduction amount which was satisfied by the in-specie distribution of Ardea shares to HRL's shareholders (section 104-135).
39. An HRL Shareholder will make a capital gain from CGT event G1 happening if the capital reduction amount of \$0.02 per share exceeds the cost base of the HRL shares. Any capital gain will be equal to the amount of the excess. The cost base and reduced cost base of the HRL share will be reduced to nil (subsection 104-135(3)). No capital loss can be made when CGT event G1 happens (Note 1 to subsection 104-135(3)).

Demerger roll-over

40. HRL and its subsidiary Ardea were part of a demerger group (subsection 125-65(1)).
41. A demerger, as defined in section 125-70, happened to the HRL demerger group under the scheme.
42. HRL Shareholders could choose to obtain demerger roll-over (subsection 125-55(1)).

CGT consequences of choosing demerger roll-over

43. If an HRL Shareholder chose demerger roll-over, any capital gain made when CGT event G1 happened to their HRL share under the demerger was disregarded (subsection 125-80(1)).
44. An HRL Shareholder who chose demerger roll-over must recalculate the first element of the cost base and reduced cost base of their HRL shares, and calculate the first element of the cost base and reduced cost base of their new Ardea shares acquired under the demerger in the manner described in paragraphs 65 to 70 below (subsection 125-80(2)).

45. The Commissioner accepts that a reasonable apportionment of the summed cost base is to attribute:

- 14.29% of the shareholder's original cost base and the reduced cost base for the HRL share to the first element of the cost base and reduced cost base of the Ardea share
- 85.71% to the first element of the cost base and reduced cost base of the HRL share.

CGT consequences of not choosing demerger roll-over

46. An HRL Shareholder who did not choose demerger roll-over:

- was not entitled to disregard any capital gain made when CGT event G1 happened under the demerger to their HRL shares
- must make adjustments to the cost bases and reduced cost bases of their HRL shares and Ardea shares in the manner described in paragraphs 69 to 70 below (subsections 125-85(1), 125-85(2) and 125-80(2)).

Acquisition date of Ardea Shares

47. For CGT purposes, an HRL Shareholder acquired their Ardea shares on the Demerger Date (subsection 109-5(2)).

48. However, for the purpose of determining eligibility to a discount capital gain, the Ardea shares to be acquired by an HRL Shareholder as a result of the demerger are taken to have been acquired on the date the HRL Shareholder acquired, for CGT purposes, the corresponding HRL shares (Item 2 in the table in subsection 115-30(1)).

Dividend consequences

49. No part of the in-specie distribution of Ardea shares to HRL Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Section 45A of the ITAA 1936

50. 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

51. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies.

52. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies.

Commissioner of Taxation

1 March 2017

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 G1

53. CGT event G1 (section 104-135) happens when:

- a company makes a payment (which may include providing property) to a shareholder in respect of a share they own in the company
- some or all of the payment (the non-assessable part) is not a dividend nor an amount that is taken to be a dividend under section 47 of the ITAA 1936
- the payment is not included in the shareholder's assessable income.

54. Under the demerger, HRL made a payment to its shareholders in the form of an in-specie distribution of 41.5 million Ardea shares held by HRL. The full value of the in-specie distribution was debited to the share capital account (that is, \$8.3 million is not a dividend and is not included in the assessable income of HRL Shareholders).

55. Accordingly, CGT event G1 happened in relation to each HRL share owned by an HRL Shareholder on the Demerger Date when HRL made the payment of the capital reduction amount which was satisfied by the in-specie distribution of Ardea shares.

56. An HRL Shareholder will have made a capital gain when CGT event G1 happened if the capital reduction amount of \$0.02 per HRL share exceeded the cost base of that share. The capital gain is equal to the amount of the excess. The cost base and reduced cost base of the HRL share is reduced to nil (subsection 104-135(3)). No capital loss can be made when CGT event G1 happens.

Demerger roll-over

57. HRL Shareholders may obtain demerger roll-over where the requirements of section 125-70 and subsection 125-55(1) are satisfied.

58. A shareholder in a company may at the time of a demerger choose to obtain a demerger roll-over if:

- the shareholder owns a share in the company (the original interest)
- the company is the head entity of a demerger group
- a demerger happens to the demerger group

- under the demerger, a CGT event happens to the original interest and the shareholder acquires a new or replacement interest (the new interest) in the demerged entity (subsection 125-55(1)).

59. The HRL shareholders held shares in HRL which was the head entity of the HRL demerger group. The demerger happened to the HRL demerger group, a CGT event happened to the original interests and the HRL shareholders acquired new interests in Ardea, the demerged entity.

60. A demerger happened to the HRL demerger group because:

- there was a restructuring of the HRL demerger group (paragraph 125-70(1)(a))
- under the restructuring, HRL disposed of at least 80% of its total ownership interests in Ardea to HRL Shareholders (subparagraph 125-70(1)(b)(i))
- under the restructure:
 - a CGT event G1 happened in relation to the HRL shares held by the HRL Shareholders and the HRL Shareholders acquired new Ardea shares and nothing else (subparagraph 125-70(1)(c)(i))
 - the Ardea shares were acquired by HRL Shareholders because of their ownership of interests in HRL (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(i))
 - neither HRL nor Ardea is a trust that is a superannuation fund (paragraph 125-70(1)(g))
 - each HRL Shareholder acquired Ardea shares in the same proportion as they owned HRL shares just before the demerger (paragraph 125-70(2)(a))
 - each HRL Shareholder owned, just after the demerger, the same proportionate total market value of HRL and Ardea shares as they owned in HRL just before the demerger (paragraph 125-70(2)(b))
 - subsections 125-70(4) and (5) do not apply.

61. The requirements of a demerger and the conditions for choosing demerger roll-over were satisfied in respect of the demerger (section 125-70 and subsection 125-55(1)). Accordingly, HRL Shareholders were (and are) entitled to obtain demerger roll-over in Division 125 for the demerger.

62. If an HRL Shareholder chose demerger roll-over, they may disregard any capital gain made when CGT event G1 happened to their HRL shares under the demerger (subsection 125-80(1)).

63. If an HRL Shareholder did not choose demerger roll-over, they cannot disregard any capital gain made when CGT event G1 happened under the demerger.

64. Whether or not an HRL Shareholder chose the demerger roll-over, they must recalculate the cost base and reduced cost base of their HRL shares and calculate the cost base and reduced cost base of their new Ardea shares in the same way (subsections 125-80(2), 125-80(3) and 125-85(2)).

65. The first element of the cost base and reduced cost base of each HRL share and the corresponding Ardea share received under the demerger is worked out as follows:

- taking the sum of the cost bases of each HRL share just before the demerger
- apportioning that sum between the HRL shares and the Ardea shares acquired under the demerger.

66. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and (3), the Commissioner accepts the 5-day volume weighted average price (VWAP) of the HRL shares as at the Record Date was \$0.14 per share.

67. The Commissioner accepts that the market value of HRL based on the 5-day VWAP as at the Record Date was \$58.1 million (415 million shares x \$0.14).

68. The Directors of HRL have determined that the market value of the assets which exited the HRL group when Ardea demerged was \$8.3 million.

69. This means that the market value of HRL just after the demerger was \$49.8 million. Therefore, the proportional 'split' in value between an HRL share and an Ardea share to existing HRL Shareholders was 14.29% to each Ardea share and 85.71% to each HRL share.

70. In other words, based on the VWAP calculated in paragraph 66 (above), 14.29% of the shareholder's original cost base and reduced cost base for the HRL shares becomes the first element of the cost base and reduced cost base of Ardea shares, and 85.71% becomes the first element of the cost base and reduced cost base of the HRL shares (section 125-85 and subsections 125-80(2) and (3)).

Dividend consequences

71. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders whether in money or other property. However, paragraph (d) of the definition of 'dividend' excludes a distribution that is debited against an amount standing to the credit of the share capital account of the company.

72. An account is not a share capital account if it is tainted (subsection 975-300(3)). HRL confirmed that its share capital account was not tainted immediately before the demerger.

73. The demerger of Ardea was implemented by way of HRL making an in-specie distribution of Ardea shares to HRL Shareholders. The full amount of the total market value of Ardea shares distributed to HRL Shareholders was debited against an amount standing to the credit of HRL's share capital account which was not tainted within the meaning of Division 197.

74. Therefore, no part of the in-specie distribution of Ardea shares is taken to be a dividend.

Section 45A of the ITAA 1936

75. Subsection 45A(1) of the ITAA 1936 applies where capital benefits are streamed 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 (the disadvantaged shareholders) received, or would receive, dividends.

76. Although HRL provided its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(a) of the ITAA 1936 in the form of Ardea shares, the capital benefit was provided to all HRL Shareholders in the same proportion as their respective shareholding in HRL with no regard to their respective tax preferences.

77. Accordingly, 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

78. Section 45B of the ITAA 1936 applies where certain payments, allocations and distributions are made to shareholders in substitution for dividends. In the event of demergers, section 45B also applies where the components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger.

79. In broad terms, there needs to be a scheme in which, 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, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit.

80. The in-specie distribution of Ardea shares to HRL Shareholders under the demerger constituted the provision of a demerger benefit and, to the extent the value of Ardea shares was debited to HRL's share capital account, also represented the provision of a capital benefit (paragraphs 45B(2)(a), 45B(4)(a) and 45B(5)(a), and subsection 45B(6) of the ITAA 1936).

81. As the provision of Ardea shares would generally result in a lesser amount of tax payable by HRL Shareholders than the amount that would be payable if the provision of those shares was instead an assessable dividend, HRL Shareholders would obtain a tax benefit (paragraph 45B(2)(b) and subsection 45B(9) of the ITAA 1936).

82. The relevant circumstances of the scheme which the Commissioner is required to have regard to in determining whether or not the requisite purpose exists are set out in subsection 45B(8) of the ITAA 1936.

83. Having regard to the relevant circumstances, the Commissioner considers that the requisite purpose of enabling one or more HRL Shareholders or other taxpayers to obtain a tax benefit did not exist.

84. Accordingly, section 45B of the ITAA 1936 will not apply to the demerger and the Commissioner will not make a determination:

- under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of the demerger benefit provided to HRL Shareholders under the demerger
- under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefit provided to HRL Shareholders under the demerger.

Appendix 2 – Detailed contents list

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

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

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