

CR 2018/7 - Income tax: Eneabba Gas Limited - return of capital by way of in specie distribution



This cover sheet is provided for information only. It does not form part of *CR 2018/7 - Income tax: Eneabba Gas Limited - return of capital by way of in specie distribution*



Class Ruling

Income tax: Eneabba Gas Limited – return of capital by way of in specie distribution

| | |
|--|-----------|
| Contents | Para |
| LEGALLY BINDING SECTION: | |
| Summary – what this ruling is about | 1 |
| Date of effect | 7 |
| Scheme | 8 |
| Ruling | 26 |
| NOT LEGALLY BINDING SECTION: | |
| Appendix 1: | |
| Explanation | 47 |
| Appendix 2: | |
| Detailed contents list | 93 |

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.

Summary – 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 45A of the ITAA 1936
 - section 45B of the ITAA 1936
 - section 45C of the ITAA 1936
 - section 128B of the ITAA 1936
 - section 128D of the ITAA 1936
 - section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)

- section 104-135 of the ITAA 1997
- section 112-20 of the ITAA 1997
- section 118-20 of the ITAA 1997
- subsection 125-70(1) of the ITAA 1997
- subsection 130-60(3) of the ITAA 1997
- section 855-10 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the holders of ordinary shares in Eneabba Gas Limited (ENB) who:

- were registered on the ENB share register on 14 September 2016 (Record Date)
- held those shares and the UIL Energy Ltd (UIL) shares acquired as a consequence of the scheme on capital account, that is, neither as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997)
- are either:
 - residents of Australia (as that term is defined in subsection 6(1)), or
 - foreign residents (as that term is defined in subsection 995-1(1) of the ITAA 1997) whose shares in ENB and in UIL (acquired as a consequence of the scheme) are not taxable Australian property (as defined in section 855-15 of the ITAA 1997) and who are not carrying on business in Australia at or through a permanent establishment in Australia
- are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997.

(Note: Division 230 of the ITAA 1997 will not generally 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 an ENB 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 25 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.

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. ENB is an Australian resident energy company listed on the Australian Securities Exchange since 28 April 2006. ENB has a portfolio of energy projects located in the North Perth Basin.
10. Ocean Hill Pty Ltd (Ocean Hill), a wholly owned subsidiary of ENB, was incorporated in October 2014.
11. In October 2014, ENB executed an agreement with Black Rock Mining Limited (Black Rock) to acquire (through its wholly owned subsidiary Ocean Hill) 100% of the Ocean Hill Block Application (STP EPA 0900) located in the North Perth Basin.

12. In April 2015, ENB acquired all of the shares in GCC Methane Pty Ltd (GCC), which held a 50% interest in permit EP447, with UIL being the owner of the other 50% interest.

13. On 25 February 2016, ENB announced that it had entered into a conditional sale and purchase agreement with UIL for the sale of all of the shares in Ocean Hill and GCC to UIL in return for convertible redeemable preference shares (CRPS) in UIL. This was subject to shareholder approval.

14. At ENB's General Meeting on 9 May 2016, ENB shareholders approved a reduction of share capital under section 256B of the *Corporations Act 2001*. This would be satisfied by ENB making a pro rata in specie distribution of the CRPS in UIL (which ENB would acquire) to ENB shareholders.

15. On 31 August 2016, ENB, through Ocean Hill, completed the acquisition of 100% of the Ocean Hill Block Application from Black Rock.

Disposal of shares in GCC and Ocean Hill to UIL

16. On 8 September 2016, ENB disposed 100% of its shares in Ocean Hill and GCC to UIL for the following consideration:

- 55 million Class A CRPS in UIL which would convert into 55 million ordinary shares in UIL, and
- 35 million Class B CRPS in UIL which will convert into ordinary shares in UIL in the event of successful results from drilling the Ocean Hill No. 2 well.

Return of capital

17. On 19 September 2016, ENB implemented the return of capital by making an in specie distribution of the Class A and Class B CRPS in UIL to ENB shareholders as follows¹:

- 1 Class A CRPS for every 5.47 fully paid ENB shares, and
- 1 Class B CRPS for every 8.59 fully paid ENB shares.

18. Following the distribution, the Class A CRPS converted to ordinary shares in UIL on 21 September 2016. Class B CRPS will only convert to ordinary shares in UIL in the event of successful drilling results. If unsuccessful, they can be redeemed by UIL.

19. At the Record Date, ENB had 300,979,312 ordinary shares on issue, with more than 300 members holding shares in ENB.

¹ Fractional entitlements were rounded down to the nearest whole UIL CRPS.

ENB's share capital account

20. ENB debited its share capital account by an amount of \$4,123,417 to record the in specie distribution of CRPS in UIL to its shareholders.

21. ENB has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

Accounting profit

22. In its half yearly report to 31 December 2016, ENB reported an accounting profit of \$1,982,107 on the disposal of its shares in GCC and Ocean Hill.

Other matters

23. Approximately 5% of the shares in ENB are held by foreign residents (predominantly residing in Singapore). No single foreign resident shareholder (together with their associates) holds, directly or indirectly, 10% or more of the membership interests in ENB.

24. ENB's franking account balance was nil as at 3 May 2017.

25. The Commissioner accepts the following market value² of the in specie distribution of Class A CRPS and Class B CRPS in UIL:

| | |
|--|-------------|
| Class A CRPS 55 million @ 7.5c/share | \$4,125,000 |
| Class B CRPS 35 million @ 7.5c/share *10% ³ | \$262,500 |
| Total | \$4,387,500 |

Ruling**Demerger relief not available**

26. Demerger relief (being demerger roll-over under Division 125 of the ITAA 1997 and demerger dividend treatment under subsections 44(3) and 44(4) of the ITAA 1936) is not available as the scheme does not satisfy the requirements of a demerger under subsection 125-70(1) of the ITAA 1997.

² Source: UIL Energy Ltd Financial Statements for the Half Year Period 31 December 2016, Note 4.

³ Valued on the basis of a 10% probability that a success milestone will be met and conversion will occur.

Return of capital and dividend component

27. The amount of \$0.013700001 per ENB share, being the amount per share debited to the share capital account of ENB, is not a 'dividend' as defined in subsection 6(1).

28. The amount of \$0.000877412 per ENB share, being the difference between the market value of the in specie distribution and the amount debited to the share capital account of ENB on a per share basis, is a 'dividend' as defined in subsection 6(1) that is paid out of ENB's profits. The dividend is unfranked. This amount is included in the assessable income of a resident ENB shareholder pursuant to subsection 44(1).

Application of sections 45A, 45B and 45C

29. The Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the whole or any part of the return of capital.

30. The Commissioner has made a determination under paragraph 45B(3)(b) that section 45C applies to a part of the amount that was debited to the share capital account of ENB, being \$0.006585525 per ENB share. That amount is included in the assessable income of a resident ENB shareholder pursuant to subsection 44(1).

CGT consequences

CGT event G1

31. CGT event G1 happened to a resident ENB shareholder when ENB made the in specie distribution to the ENB shareholder in respect of ENB shares that they owned at the Record Date and continued to own at the time of the in specie distribution (section 104-135 of the ITAA 1997), but only to the extent of that part of the in specie distribution that was not a dividend.

32. The non-assessable part of the in specie distribution, to which CGT event G1 applies, is \$0.007114475 per ENB share (subsection 104-135(1) of the ITAA 1997).

33. An ENB shareholder will make a capital gain if the non-assessable part is more than the cost base of the shareholder's ENB share. The amount of the capital gain is equal to that excess (subsection 104-135(3) of the ITAA 1997). If the non-assessable part is not more than the cost base of the shareholder's ENB share, the cost base and reduced cost base of the share are reduced by the amount of the non-assessable part (subsection 104-135(4) of the ITAA 1997).

CGT event C2

34. CGT event C2 happened to a resident ENB shareholder when ENB made the in specie distribution to the ENB shareholder in respect of ENB shares that they owned at the Record Date but had ceased to own at the time of the in specie distribution (section 104-25 of the ITAA 1997). The capital gain will be equal to the market value of the Class A and Class B CRPS in UIL received by the ENB shareholder (section 116-20 of the ITAA 1997), being \$0.014577412 per ENB share.

35. Under section 118-20 of the ITAA 1997, any capital gain made as a result of CGT event C2 happening is reduced by \$0.007462937 per ENB share, being that part of the in specie distribution that is included in the shareholder's assessable income. This is made up of the normal dividend as defined in subsection 6(1), and the deemed dividend arising under paragraph 45B(3)(b) and section 45C.

Conversion of CRPS

36. CGT event C2 happened to a resident ENB shareholder on 21 September 2016 when the Class A CRPS in UIL that had been distributed to the ENB shareholder converted into ordinary shares in UIL (section 104-25 of the ITAA 1997).

37. The Class A CRPS were a 'convertible interest' in UIL (as defined in subsection 995-1(1) and item 4 of the table in subsection 974-75(1) of the ITAA 1997). Any capital gain or capital loss made by the ENB shareholder from CGT event C2 happening on the conversion of the Class A CRPS in UIL is disregarded (subsection 130-60(3)) of the ITAA 1997).

38. Similar CGT outcomes will arise for a resident ENB shareholder if their Class B CRPS in UIL are converted into ordinary shares in UIL.

Redemption of Class B CRPS

39. If the Class B CRPS are redeemed by UIL, CGT event C2 will happen to a resident ENB shareholder (section 104-25 of the ITAA 1997).

40. The ENB shareholder will make a capital gain if the capital proceeds on redemption are more than the cost base of the Class B CRPS. The ENB shareholder will make a capital loss if the capital proceeds on redemption are less than the reduced cost base of the Class B CRPS (subsection 104-25(3) of the ITAA 1997).

Time of acquisition, cost base and reduced cost base of CRPS and ordinary shares in UIL

41. The Class A and Class B CRPS in UIL received by ENB shareholders will be taken to have been acquired at the time when the in specie distribution was made to the ENB shareholders by ENB on 19 September 2016 (event number A1 (case 1) of the table in subsection 109-5(2) of the ITAA 1997).

42. The cost base and reduced cost base of the Class A CRPS in UIL on 19 September 2016 was \$0.075 per Class A CRPS (section 112-20 of the ITAA 1997). The Class A CRPS in UIL converted to ordinary shares in UIL on 21 September 2016. An ENB shareholder is taken to have acquired the UIL ordinary shares on 21 September 2016 (subsection 130-60(2) of the ITAA 1997). The first element of the cost base and reduced cost base of these ordinary shares in UIL will also be \$0.075 per share (subsection 130-60(1) of the ITAA 1997).

43. On 19 September 2016, the cost base and reduced cost base of each Class B CRPS in UIL was \$0.0075 (section 112-20 of the ITAA 1997).

Foreign resident shareholders

44. A foreign resident ENB shareholder who received the in specie distribution may disregard a capital gain or capital loss from a CGT event where it happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). Similar CGT outcomes will arise for such a foreign resident ENB shareholder from CGT events happening to the ordinary shares they hold in UIL (as a consequence of the conversion of the Class A and Class B CRPS in UIL) or on redemption of the Class B CRPS in UIL (if not converted). A capital gain or capital loss from the conversion of the Class A and Class B CRPS in UIL into ordinary shares in UIL will be disregarded (subsection 130-60(3) of the ITAA 1997).

45. A foreign resident ENB shareholder will be subject to withholding tax on the amount of the total unfranked dividend of \$0.007462937 per ENB share (being the sum of the normal dividend as defined in subsection 6(1), and the deemed dividend arising under paragraph 45B(3)(b) and section 45C) (see paragraphs 53 and 65 of this Ruling). This is because of the combined effect of subsection 128B(1) and paragraph 128B(3)(ga).

46. The withholding tax rate is 30% (subsection 128B(4) of the ITAA 1936 and paragraph 7(a) of the *Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974*), unless reduced by an applicable tax treaty (section 4 and subsection 17A(1) of the *International Tax Agreements Act 1953*). A foreign resident ENB shareholder does not include the amount of the total unfranked dividend of \$0.007462937 per ENB share in their Australian assessable income (section 128D of the ITAA 1936).

Commissioner of Taxation31 January 2018

Appendix 1 – Explanation

① *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 relief not available

47. For a demerger to happen (as defined in subsection 125-70(1) of the ITAA 1997), there must be a 'demerger group' consisting of one head entity and at least one demerger subsidiary (subsection 125-65(1) of the ITAA 1997). UIL is not a demerger subsidiary of ENB when the restructuring commences.

48. The exchange of ENB's shares in Ocean Hill and GCC for Class A and Class B CRPS in UIL (step 1), and the subsequent distribution of those CRPS to ENB shareholders (step 2), is a single restructuring for the purposes of the definition of a 'demerger' in subsection 125-70(1) of the ITAA 1997. Therefore, the demerger group to which the restructuring happens is the one that existed before step 1 was implemented, at which time UIL was not a member of the demerger group.

Return of capital and dividend component

49. The assessable income of a shareholder in a company includes any dividends paid to the shareholder out of profits derived by the company (subsection 44(1)).

50. The term 'dividend' is defined in subsection 6(1) 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 money or a distribution of property where the amount of the money or the amount of the value of the property is debited against an amount standing to the credit of the share capital account of the company.

51. ENB made an in specie distribution consisting of the Class A CRPS and Class B CRPS in UIL to the ENB shareholders. The market value of this in specie distribution was \$4,387,500. ENB debited its untainted share capital account by an amount of \$4,123,417 to record the in specie distribution of CRPS in UIL to its shareholders.

52. The amount debited to the untainted share capital account, being \$0.013700001 (\$4,123,417 divided by 300,979,312 shares) per ENB share, is not a dividend for the purposes of subsection 6(1).

53. The difference between the market value of the in specie distribution and the amount debited to the share capital account was \$264,083. The Commissioner's view, as set out in Taxation Ruling TR 2003/8 *Income tax: distributions of property by companies to shareholders – amount to be included as an assessable dividend*, is that this amount is a dividend as defined in subsection 6(1) that is taken to be paid out of profits. Therefore, a resident ENB shareholder received a dividend of \$0.000877412 (\$264,083 divided by 300,979,312 shares) per ENB share which is included in their assessable income under subsection 44(1). The dividend was unfranked as there were no franking credits attached.

Application of sections 45A, 45B and 45C

54. Sections 45A and 45B are anti-avoidance provisions which, if they apply in the circumstances of this Ruling, allow the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the capital benefit paid to an ENB shareholder under the in specie distribution is treated as an unfranked dividend paid out of profits of ENB.

Section 45A – streaming of dividends and capital benefits

55. Section 45A applies if capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the capital benefits than other shareholders, and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

56. Although a capital benefit (as defined in paragraph 45A(3)(b)) was provided to ENB shareholders under the in specie distribution, there was no streaming of capital benefits to some shareholders and dividends to the other shareholders. All ENB shareholders received the in specie distribution in direct proportion to their ENB shareholding. Accordingly, section 45A does not apply to the in specie distribution.

Section 45B – return of capital in substitution for a dividend

57. Section 45B applies where certain payments or distributions are made to shareholders in substitution for dividends.

58. Paragraph 45B(2)(a) is satisfied because there is a scheme under which a person (each of the ENB shareholders) is provided with a capital benefit (specifically under paragraph 45B(5)(b)) by a company. Paragraph 45B(2)(b) is satisfied because under the scheme, the ENB shareholders obtain a tax benefit (within the meaning of subsection 45B(9)).

59. Under paragraph 45B(2)(c), the Commissioner has regard to the relevant circumstances of the scheme as set out in subsection 45B(8) to determine whether it would be concluded that any person who entered into or carried out any part of the scheme did so for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

60. Where a company's return of capital coincides with the disposal of a significant part of the company's business, this can be indicative of releasing share capital. However, where the disposal also realises a profit, it is (subject to all of the relevant circumstances) considered to be attributable to both share capital and the profit from the disposal.

61. The in specie distribution was treated by ENB as wholly a return of capital. However, ENB realised a profit of \$1,982,107 from the sale of its shares in Ocean Hill and GCC. Even though ENB has sought to apply the profit from the sale against accumulated losses (for accounting purposes), the Commissioner considers that, having regard to all of the relevant circumstances of the scheme in subsection 45B(8), to some extent, the in specie distribution is attributable to profits of ENB from the sale.

62. Therefore, the Commissioner considers that \$0.006585525 per ENB share (\$1,982,107 divided by 300,979,312 shares) is a reasonable proportionate component of the in specie distribution that is attributable to profits of ENB on the disposal of its shares in Ocean Hill and GCC.

63. Having regard to the relevant circumstances in subsection 45B(8), the purpose test in paragraph 45B(2)(c) is satisfied.

64. Accordingly, the Commissioner has made a determination under paragraph 45B(3)(b) that section 45C applies in relation to a part of the capital benefit constituted by the in specie distribution.

Section 45C – effect of the determination under section 45B

65. As the Commissioner has made a determination under paragraph 45B(3)(b) that section 45C applies, a capital benefit in the amount of \$0.006585525 per ENB share is taken to be an unfranked dividend that is paid by ENB, out of profits of ENB, to an ENB shareholder at the time that the ENB shareholder was provided with the capital benefit (subsections 45C(1) and 45C(2)). This amount is included in the assessable income of a resident ENB shareholder under subsection 44(1).

CGT consequences

CGT event G1

66. CGT event G1 happens if a company makes a payment 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, or an amount that is taken to be a dividend under section 47 of the ITAA 1936, and the payment is not included in the shareholder's assessable income (section 104-135 of the ITAA 1997). The payment can include giving property, such as the Class A CRPS and Class B CRPS in UIL that were given to ENB shareholders.

67. CGT event G1 happened to a resident ENB shareholder when ENB made the in specie distribution to them in respect of ENB shares that they owned at the Record Date and continued to own at the time of the distribution, to the extent of the non-assessable part of the distribution. The non-assessable part of the distribution excludes:

- the part of the in specie distribution that is a dividend under subsection 6(1), and
- the part of the in specie distribution that is taken to be a dividend under section 45C.

68. Therefore, the non-assessable part which is the subject of CGT event G1 is \$0.007114475 per ENB share (subsection 104-135(1) of the ITAA 1997).

69. An ENB shareholder will make a capital gain if the non-assessable part is more than the cost base of the shareholder's ENB share. The amount of the capital gain is equal to that excess (subsection 104-135(3) of the ITAA 1997).

70. If an ENB shareholder makes a capital gain from CGT event G1 happening, the cost base and reduced cost base of that ENB share is reduced to nil (subsection 104-135(3) of the ITAA 1997).

71. A capital gain made when CGT event G1 happens will be a discount capital gain under Subdivision 115-A of the ITAA 1997 provided the ENB share was acquired at least 12 months before the CGT event (subsection 115-25(1) of the ITAA 1997) and the other conditions in that Subdivision are satisfied.

72. If the non-assessable part is not more than the cost base of the shareholder's ENB share, the cost base and reduced cost base of the share are reduced by the amount of the non-assessable part (subsection 104-135(4) of the ITAA 1997).

Example 1

73. *An ENB shareholder purchased 10,000 ENB shares in February 2015. At the time the cost base of these shares (excluding any brokerage) was \$260.00 or \$0.026 per share.*

74. *As a result of the in specie distribution, for income tax purposes, the ENB shareholder received from ENB the following distribution:*

- *an unfranked dividend (subsection 6(1)) @ \$0.000877412 per ENB share ~ \$8.77412*

- an unfranked dividend (section 45B) @ \$0.006585525 per ENB share ~ \$65.85525, and
- the non-assessable part @ \$0.007114475 per ENB share ~ \$71.14475.

75. Step 1 – unfranked dividend – the ENB shareholder must include in their assessable income the total unfranked dividend of \$74.62937 (\$8.77412 + \$65.85525). No franking credits are attached to this dividend.

76. Step 2 – non-assessable part – the ENB shareholder must reduce the cost base and reduced cost base of each of their ENB shares. The new cost base and reduced cost base of each share acquired by the shareholder in February 2015 is \$188.85525 (\$260.00 – \$71.14475) divided by 10,000 = \$0.018885525 per ENB share.

77. Because the ENB shareholder still has a positive cost base (that is, the above adjustment did not reduce the cost base below nil), the ENB shareholder has not made a capital gain from CGT event G1 happening to their ENB shares as a result of the in specie distribution.

78. Should the ENB shareholder sell their shares in ENB after the in specie distribution, they will make a capital gain (or capital loss) on the difference between the capital proceeds and the cost base (and reduced cost base) of \$0.018885525 per ENB share (assuming no other adjustments need to be made to the cost base and reduced cost base of the ENB shareholder's shares).

Example 2

79. The facts are the same as in Example 1, except the ENB shareholder purchased the 10,000 ENB shares in December 2012. At the time the cost base of these shares (excluding any brokerage) was \$20.00 or \$0.002 per share.

Step 1 would be same as in Example 1.

Step 2 the CGT consequences would be as follows:

| | |
|--|------------|
| Cost base (10,000 x \$0.002 per share) | \$20.00 |
| Less non-assessable part (10,000 x \$0.007114475) | \$71.14475 |

80. Because the non-assessable part is more than the cost base of the ENB shares, the ENB shareholder makes a capital gain under CGT G1 of \$51.14475. If the ENB shareholder satisfies Subdivision 115-A, it will be a discount capital gain.

81. *The new cost base for each share acquired by the ENB shareholder in December 2012 is nil. Should the shareholder sell these ENB shares after the in specie distribution, they will make a capital gain on the difference between the capital proceeds and their cost base (which would be nil, but would include any brokerage fee on the sale of shares, as well as any other amount that, after the in specie distribution is made, becomes part of the cost base of the shares).*

CGT event C2

82. If, after the Record Date but before the time of the in specie distribution, an ENB shareholder ceased to own an ENB share in respect of which the in specie distribution was payable, the right to receive the in specie distribution in respect of that share is retained by the ENB shareholder and is a separate CGT asset from the ENB share.

83. CGT event C2 happened when the in specie distribution was made. The right to receive the in specie distribution (being an intangible CGT asset) ended by the right being discharged or satisfied when the in specie distribution was made (section 104-25 of the ITAA 1997).

84. An ENB shareholder will make a capital gain under CGT event C2 if the capital proceeds from the ending of the right are more than the cost base of the right. The capital gain is equal to the amount of the excess. An ENB shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

85. The capital proceeds will be the market value of the Class A and Class B CRPS in UIL received by ENB shareholders (subsection 116-20(1) of the ITAA 1997). The market value is worked out as at the time of CGT event C2.

86. The cost base of the right of the ENB shareholder to receive the in specie distribution is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the ENB share previously owned by an ENB shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the ENB share – for example, when the shareholder disposed of the share after the Record Date. Therefore, the right to receive the in specie distribution will have a nil cost base. As a result, an ENB shareholder will make a capital gain equal to the capital proceeds, being \$0.014577412 per ENB share.

87. Under section 118-20 of the ITAA 1997, any capital gain made as a result of CGT event C2 happening is reduced by \$0.007462937 per ENB share, being that part of the in specie distribution that is included in the shareholder's assessable income. This is made up of the normal dividend as defined in subsection 6(1) of the ITAA 1936, and the deemed dividend arising under paragraph 45B(3)(b) and section 45C of the ITAA 1936.

88. The right to receive the in specie distribution was acquired at the time when the right was created (section 109-5 of the ITAA 1997). This would be no earlier than 9 May 2016 when the ENB shareholders approved the return of capital by ENB, to be satisfied by way of the in specie distribution of the CRPS in UIL.

89. As the right to receive the in specie distribution was not acquired by an ENB shareholder at least 12 months before the distribution was made, any capital gain made from CGT event C2 happening on the ending of the corresponding right will not satisfy subsection 115-25(1) of the ITAA 1997. Such a capital gain will not be eligible to be treated as a discount capital gain.

Foreign resident shareholders

90. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if:

- just before the CGT event happens, the entity is a foreign resident, or the trustee of a foreign trust for CGT purposes, and
- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

91. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. It sets out five categories of CGT assets that are broadly described as:

| | |
|--------|--|
| Item 1 | taxable Australian real property |
| Item 2 | an indirect Australian real property interest not covered by item 5 |
| Item 3 | a CGT asset used at any time in carrying on a business through a permanent establishment in Australia, and which is not covered by item 1, 2, or 5 |
| Item 4 | an option or right to acquire a CGT asset covered by item 1, 2 or 3 |
| Item 5 | a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident) |

92. Where the ENB shares, the ordinary shares in UIL (acquired as a consequence of the conversion of the Class A and Class B CRPS in UIL) and the Class B CRPS in UIL (if they are not converted) held by a foreign resident shareholder are not taxable Australian property, subsection 855-10(1) of the ITAA 1997 will apply to disregard any capital gain they may make from a CGT event happening in relation to those shares.

Appendix 2 – Detailed contents list

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

| | Paragraph |
|--|------------------|
| Summary – what this ruling is about | 1 |
| Relevant provisions | 2 |
| Class of entities | 3 |
| Qualifications | 4 |
| Date of effect | 7 |
| Scheme | 8 |
| Background | 9 |
| Disposal of shares in GCC and Ocean Hill to UIL | 16 |
| Return of capital | 17 |
| ENB's share capital account | 20 |
| Accounting profit | 22 |
| Other matters | 23 |
| Ruling | 26 |
| Demerger relief not available | 26 |
| Return of capital and dividend component | 27 |
| Application of sections 45A, 45B and 45C | 29 |
| CGT consequences | 31 |
| <i>CGT event G1</i> | 31 |
| <i>CGT event C2</i> | 34 |
| <i>Conversion of CRPS</i> | 36 |
| <i>Redemption of Class B CRPS</i> | 39 |
| <i>Time of acquisition, cost base and reduced cost base of CRPS and ordinary shares in UIL</i> | 41 |
| <i>Foreign resident shareholders</i> | 44 |
| Appendix 1 – Explanation | 47 |
| Demerger relief not available | 47 |
| Return of capital and dividend component | 49 |
| Application of sections 45A, 45B and 45C | 54 |
| <i>Section 45A – streaming of dividends and capital benefits</i> | 55 |
| <i>Section 45B – return of capital in substitution for a dividend</i> | 57 |
| <i>Section 45C – effect of determination under section 45B</i> | 65 |
| CGT consequences | 66 |

| | |
|--|-----------|
| <i>CGT event G1</i> | 66 |
| <i>Example 1</i> | 73 |
| <i>Example 2</i> | 79 |
| <i>CGT event C2</i> | 82 |
| Foreign resident shareholders | 90 |
| Appendix 2 – Detailed contents list | 93 |

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45B(5)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 45C(1)
- ITAA 1936 45C(2)
- ITAA 1936 47
- ITAA 1936 128B
- ITAA 1936 128B(1)
- ITAA 1936 128B(3)(ga)
- ITAA 1936 128B(4)
- ITAA 1936 128D
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(1)
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 109-5(2)
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 112-20
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 118-20
- ITAA 1997 Div 125
- ITAA 1997 125-65(1)
- ITAA 1997 125-70(1)
- ITAA 1997 130-60(1)
- ITAA 1997 130-60(2)
- ITAA 1997 130-60(3)
- ITAA 1997 Div 197
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 974-75(1)
- ITAA 1997 975-300
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974
- International Tax Agreements Act 1953
- International Tax Agreements Act 1953 4
- International Tax Agreements Act 1953 17A(1)
- Corporations Act 2001
- Corporations Act 2001 256B

ATO references

NO: 1-BGJTD2Z

ISSN: 2205-5517

ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend income ~~
Deemed income
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT
events C1 to C3 – end of a CGT asset
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT
events G1 to G3 – shares
Income tax ~~ Capital gains tax ~~ Cost base and
reduced cost base
Income tax ~~ Capital gains tax ~~ Discount capital gains
Income tax ~~ Capital management ~~ Assessability of
distribution

**© AUSTRALIAN TAXATION OFFICE FOR THE
COMMONWEALTH OF AUSTRALIA**

You are free to copy, adapt, modify, transmit and distribute
this material as you wish (but not in any way that suggests
the ATO or the Commonwealth endorses you or any of
your services or products).