


CR 2019/21 - Income tax: Intrepid Mines Limited - return of capital

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Class Ruling

Income tax: Intrepid Mines Limited – return of capital

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable 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:

- section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-135 of the ITAA 1997
- Subdivision 115-A of the ITAA 1997
- Division 855 of the ITAA 1997.

All subsequent legislative references in this Ruling are to provisions of the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are holders of ordinary shares in Intrepid Mines Limited (Intrepid) who:

- were registered on the Intrepid share register on 11 February 2019 (the Record Date)
- did not hold their shares in Intrepid as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)) on the Record Date – that is, they held their shares on capital account, and
- 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 Intrepid shares.

(Note: Division 230 of the ITAA 1997 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 'Intrepid shareholder'.

Qualifications

4. 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 7 to 20 of this Ruling.

5. 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

6. This Ruling applies from 1 July 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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 *Public Rulings*).

Scheme

7. 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

8. Intrepid is an Australian resident company listed on the Australian Securities Exchange since 9 November 1993.

9. Intrepid has invested in base and precious metals exploration and development projects.

Reduction of share capital

10. In recent years, Intrepid has focused on mining projects in the Republic of Zambia, operated by its indirect wholly owned subsidiary Intrepid Mines Zambia Limited, while also reviewing other possible projects.

11. At an Extraordinary General Meeting held on 2 February 2018, the shareholders of Intrepid approved an equal reduction of share capital of up to A\$15 million under section 256B of the *Corporations Act 2001*.

12. Following the sale of the shares in its Zambian subsidiary, Intrepid's only active project is a farm-in and joint venture arrangement in relation to a copper and gold mine in Western Australia.

13. As a result of the narrowing of Intrepid's activities and strategic direction, the directors of Intrepid have formed the opinion that Intrepid has share capital in excess of what is needed for its ongoing operations.

14. The reduction of share capital of A\$0.75 per share was paid to all shareholders of Intrepid on 18 February 2019 (the Payment Date).

15. The reduction of share capital of A\$10,339,494 was debited in full against Intrepid's share capital account and was funded from Intrepid's existing cash reserves.

Other matters

16. As at 31 December 2018, Intrepid had 13,785,992 shares on issue, a credit balance in its share capital account of A\$237,259,551, and accumulated accounting losses of A\$206,628,558.
17. Intrepid does not have an asset revaluation reserve.
18. Intrepid 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).
19. Intrepid has never paid a dividend to its shareholders.
20. Shares in Intrepid are not 'taxable Australian property' under items 1 or 4 of the table in section 855-15 of the ITAA 1997. As less than 50% of the market values of Intrepid's assets are 'taxable Australian real property' under section 855-20 of the ITAA 1997, shares in Intrepid are not 'taxable Australian property' under item 2 of the table in section 855-15 of the ITAA 1997.

Ruling

Not a dividend

21. The reduction of share capital will not give rise to a dividend for income tax purposes under the definition of 'dividend' in subsection 6(1). Furthermore, the Commissioner will not make a determination under paragraph 45B(3)(b) that section 45C applies in relation to the whole, or any part, of the reduction of share capital. Therefore, no part of the reduction of share capital will be included in the assessable income of Intrepid shareholders under section 44.

CGT consequences

CGT event G1

22. CGT event G1 happened to an Australian resident Intrepid shareholder when Intrepid paid the amount of the reduction of share capital to the Intrepid shareholder in respect of Intrepid shares that they owned at the Record Date and continued to own at the Payment Date (section 104-135 of the ITAA 1997).
23. CGT event G1 happened because a company (Intrepid) made a payment to a shareholder in respect of a share they own in the company, some or all of the payment is not a dividend (or an amount that is taken to be a dividend under section 47), and the payment is not included in the shareholder's assessable income.
24. The amount of the reduction of share capital to which CGT event G1 applies is A\$0.75 per Intrepid share (subsection 104-135(1) of the ITAA 1997).
25. An Intrepid shareholder will make a capital gain from CGT event G1 happening if the amount of the reduction of share capital of

A\$0.75 is more than the cost base of the shareholder's Intrepid share. If so, the capital gain is equal to the amount of the excess and the cost base and reduced cost base of the Intrepid share is reduced to nil (subsection 104-135(3) of the ITAA 1997). No capital loss can be made from CGT event G1 (Note 1 to subsection 104-135(3) of the ITAA 1997).

26. 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 Intrepid 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.

27. If the amount of the reduction of share capital is not more than the cost base of the shareholder's Intrepid share, the cost base and reduced cost base of the share are reduced by the amount of the reduction of share capital (subsection 104-135(4) of the ITAA 1997).

CGT event C2

28. CGT event C2 happened to an Australian resident Intrepid shareholder when Intrepid paid the amount of the reduction of share capital to the Intrepid shareholder in respect of Intrepid shares that they owned at the Record Date but had ceased to own at the Payment Date (section 104-25 of the ITAA 1997).

29. CGT event C2 happened because, by ceasing to own an Intrepid share after the Record Date but before the Payment Date, an Intrepid shareholder retained the right to receive the reduction of share capital (which is a separate CGT asset from the Intrepid share). When the reduction of share capital was paid, the right to receive the return of capital (being an intangible CGT asset) ended by the right being discharged or satisfied.

30. An Intrepid shareholder will make a capital gain 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 Intrepid shareholder will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

31. In working out the capital gain or capital loss made from CGT event C2, the capital proceeds will be the amount of the reduction of share capital of A\$0.75 per Intrepid share (subsection 116-20(1) of the ITAA 1997).

32. The cost base of the right of the Intrepid shareholder to receive the reduction of share capital 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 Intrepid share previously owned by an Intrepid shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the Intrepid

share – for example, when the shareholder disposed of the share after the Record Date. Therefore, the right to receive the reduction of share capital will have a nil cost base. As a result, an Intrepid shareholder will make a capital gain equal to the capital proceeds, being A\$0.75 per Intrepid share.

Foreign resident shareholders

33. A foreign resident Intrepid shareholder must disregard a capital gain from CGT event G1, and a capital gain or capital loss from CGT event C2, where it happens in relation to a CGT asset that is not ‘taxable Australian property’ (section 855-10 of the ITAA 1997).

34. An Intrepid share is taxable Australian property if:

- the Intrepid share has been used at any time by the shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- the Intrepid share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

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.

35. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling section of this document.

36. The main issues that arise under the scheme are:

- the reduction of share capital will not give rise to a dividend for income tax purposes under the definition of 'dividend' in subsection 6(1) (as the entire amount of the reduction of share capital was debited against an amount standing to the credit of the share capital account of Intrepid), and hence will not be included in the assessable income of Intrepid shareholders under section 44
- the reduction of share capital will not give rise to a dividend for income tax purposes under section 45B (pursuant to section 45C) that would otherwise be included in the assessable income of Intrepid shareholders under section 44, and
- the reduction of share capital will cause CGT event G1 or CGT event C2 to happen.

37. Section 45B applies where certain capital benefits are, having regard to the relevant circumstances of the scheme in subsection 45B(8), considered to have been provided to shareholders by a company for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. Where section 45B applies, the Commissioner may make a determination that all or part of the capital benefit is taken to be a dividend paid by the company for income tax purposes.

38. Having regard to the relevant circumstances of Intrepid's reduction of share capital, the Commissioner considers that the scheme was not entered into or carried out for a more than incidental purpose of enabling Intrepid shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) that section 45C applies in relation to the whole, or a part, of the capital benefit constituted by the distribution of share capital to Intrepid shareholders. No part of the reduction of share capital will be treated as a dividend for income tax purposes under section 45B.

39. The Ruling section provides a detailed explanation of the CGT consequences of the reduction of share capital. Therefore, no further explanation is warranted.

Appendix 2 – Detailed contents list

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

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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 45B
 - ITAA 1936 45B(3)(b)
 - ITAA 1936 45B(8)
 - ITAA 1936 45C
 - ITAA 1936 47
 - 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 Div 110
 - ITAA 1997 Div 112
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-25(1)
 - ITAA 1997 116-20(1)
 - ITAA 1997 Div 197
 - ITAA 1997 Div 230
 - ITAA 1997 855-10
 - ITAA 1997 855-15
 - ITAA 1997 855-20
 - ITAA 1997 975-300
 - ITAA 1997 977-50
 - ITAA 1997 995-1(1)
 - TAA 1953
 - Corporation Act 2001
 - Corporations Act 2001 256B
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ATO references

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