


# ***CR 2019/55 - Mackay Sugar Limited - conversion of shares and variation of rights***

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## Class Ruling

### Mackay Sugar Limited – conversion of shares and variation of rights

#### **❶ Relying on this Ruling**

This publication (excluding appendixes) 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 this 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 this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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#### **What this Ruling is about**

1. This Ruling sets out the tax consequences of the conversion of Mackay Sugar Limited (Mackay Sugar) Voting Shares and Investment Shares into ordinary shares by way of the variation of rights (Capital Reorganisation).
2. Full details of this Capital Reorganisation are set out in paragraphs 13 to 29 of this Ruling.
3. All legislative references in this Class Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling) unless otherwise indicated.

#### **Who this Ruling applies to**

4. This Ruling applies to you if you are the holder of Voting Shares and/or Investment Shares (Member) in Mackay Sugar and you:
  - were registered on the Mackay Sugar share register on 27 July 2019 (the Record Date)

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- held your Voting Shares and/or Investment Shares on capital account (that is, you neither held your Voting Shares and/or Investment Shares as 'revenue assets' nor as 'trading stock' (as defined in section 977-50 and subsection 995-1(1), and
- are a resident of Australia within the meaning of that expression in subsection 6(1).

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 13 to 29 of this Ruling.

**Note:** Division 230 will not apply to individuals, unless they have made an election for it to apply.

## When this Ruling applies

6. This Ruling applies from 1 July 2019 to 30 June 2020.

## Ruling

### Capital gains tax

7. Capital gains tax (CGT) event A1 (subsection 104-10(1)) did not happen to you as the Capital Reorganisation did not result in a disposal of the Voting Shares and/or the Investment Shares you owned at the Record Date.

8. CGT event C2 (subsection 104-25(1)) did not happen to you as the Capital Reorganisation did not result in a redemption or cancellation of the Voting Shares and/or the Investment Shares you owned at the Record Date.

9. CGT event H2 (subsection 104-155(1)) happened to you when the Capital Reorganisation occurred. However, you will not make a capital gain as a result of CGT event H2 happening as you did not receive capital proceeds. You will make a capital loss to the extent of any incidental costs incurred in respect of the Capital Reorganisation.

### Value shifting provisions

10. The Capital Reorganisation will not result in either a direct value shift (Division 725) or an indirect value shift (Division 727).

### Assessable dividend

11. The Capital Reorganisation will not result in an assessable dividend (as defined in subsection 6(1) being paid to you.

### Anti-avoidance provisions

12. Section 45A and section 45B will not apply to the Capital Reorganisation. The Commissioner will therefore not make a determination that section 45C applies to deem the conversion of the Voting Shares and/or Investment Shares into ordinary shares to be an unfranked dividend.

## **Scheme**

13. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

## **Background**

14. Mackay Sugar is an unlisted public company registered under the *Corporations Act 2001* having previously converted from a co-operative on 17 July 2008.

15. The principal activities of Mackay Sugar and its subsidiaries are the production and distribution of raw and refined sugar, molasses and value-added commodities.

## **Members of Mackay Sugar**

16. The majority of the Members of Mackay Sugar were canegrowers (Growers) who actively supplied sugar cane to Mackay Sugar as part of its business operations.

17. A Grower was defined as a person who produces and supplies sugar cane to Mackay Sugar under a Cane Supply and Processing Agreement.

18. Mackay Sugar had two classes of shares on issue, being Voting Shares and Investment Shares.

19. Voting Shares were held by Growers, whilst Investment Shares were held by Growers or associates of Growers.

20. Voting Shares provided Members with the right to vote, but did not carry a right to receive dividends or participate in any capital distribution upon winding up.

21. Investment Shares did not entitle Members to vote, except in respect of a fundraising event, but carried a right to receive dividends and participate in any capital distribution on winding up.

22. The Mackay Sugar constitution held restrictions on the control of Mackay Sugar by requiring that:

- (a) a Member could only hold a single Voting Share, and
- (b) each Member could only hold a maximum of 5% of the Investment Shares.

23. The Mackay Sugar constitution allowed for a variation of rights.

## **Capital Reorganisation**

24. Mackay Sugar sought approval from its Members for the restructure of the company's share capital such that each of the Members had their Voting Shares and/or Investment Shares converted to ordinary shares at the Record Date.

25. The Capital Reorganisation was executed to support a substantial investment in Mackay Sugar by Nordzucker AG.

26. The new constitution is necessary to allow shares to be issued to Nordzucker AG and to change the structure of the Board of Mackay Sugar.

27. Each Voting Share was converted to one ordinary share and each Investment Share was converted to one ordinary share as a result of the variation of the rights attached to each class of share.

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28. Each ordinary share carries full voting, dividend and capital rights in Mackay Sugar.

29. No proceeds in the form of cash or property were received by the Members in return for the variation of rights attaching to their shares.

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**Commissioner of Taxation**

11 September 2019

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**Appendix 1 – Explanation**

**ⓘ** *This Explanation 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.*

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**CGT event H2**

30. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base (section 104-155). The Capital Reorganisation was an act, transaction or event in relation to the Voting Shares and Investment Shares. Therefore, the Capital Reorganisation resulted in CGT event H2 occurring in respect of the Voting Shares and Investment Shares.

31. A capital gain is made if the capital proceeds from the event are more than the incidental costs incurred in relation to it; a capital loss is made if the capital proceeds are less than the incidental costs (subsection 104-155(3)).

32. Capital proceeds are the money or other consideration received, or entitled to be received, because of the act, transaction or event (subsection 116-20(2)).

33. You did not receive or were entitled to receive any capital proceeds. Therefore, although CGT event H2 happened in respect of the Voting Shares and/or Investment Shares, you will not make a capital gain. However, you will make a capital loss to the extent of any incidental costs incurred in respect of the Capital Reorganisation.

**Value shifting provisions**

34. There can only be consequences under Division 725 where there is a direct value shift. One of the requirements for there to be a direct value shift as defined in section 725-145 is that there is a decrease in the market value of one or more equity or loan interests in an entity, where the decrease is reasonably attributable to one or more things done under a scheme involving those interests. A direct value shift did not occur as there was not a decrease in market value of the share interests as a result of the Capital Reorganisation.

35. An indirect value shift as defined in subsection 727-150(3) involves an unequal exchange of economic benefits between two entities, called the losing entity and the gaining entity. Division 727 will not apply if entities deal with each other at arm's length (subsection 727-15(3)). There will be no consequences for any indirect value shift as the entities have dealt with each other at arm's length (paragraph 727-100(b)).

## **Assessable dividend**

36. Subsection 6(1) defines 'dividend' to include:

- (a) any distribution made by a company to any of its shareholders, whether in money or other property, and
- (b) any amount credited by a company to any of its shareholders as shareholders.

37. The Capital Reorganisation did not involve a distribution of money or property to the Members.

38. No amount has been credited to any of the Members in their capacity as shareholders.

39. As the Capital Reorganisation did not involve either a distribution of money or property of the company to the Members or an amount being credited by the company to any of its Members as shareholders, it will not constitute a dividend.

## **Anti-avoidance provisions**

### *Section 45A*

40. Sections 45A and 45B are anti-avoidance provisions which, if either applies, allow the Commissioner to make a determination under section 45C that all or part of a capital benefit is treated as an unfranked dividend.

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

42. The 'provision of capital benefit' is defined in subsection 45A(3) to include something that is done in relation to a share that has the effect of increasing the value of a share held by the shareholder. The circumstances of the Capital Reorganisation indicate there was no streaming of capital benefits to some and the payment of dividends to others. As subsection 45A(1) is not satisfied, section 45A does not apply.

43. As section 45A does not apply the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to deem the conversion of the Voting Shares and Investment Shares by way of the variation of rights to be an unfranked dividend.

### *Section 45B*

44. Section 45B applies where certain capital benefits are provided to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is 'provided with a capital benefit' by a company (paragraph 45B(2)(a)), and
- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, 'obtains a tax benefit' (paragraph 45B(2)(b)), and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other

than an incidental purpose, of enabling a taxpayer to 'obtain a tax benefit' (paragraph 45B(2)(c)).

45. In this case, it is apparent that there was no requisite purpose, in the Capital Reorganisation, of enabling the Members to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies.



**Appendix 2 – Legislative provisions**

46. This paragraph sets out the details of the provisions ruled upon in this Ruling.

<i>Income Tax Assessment Act 1936</i>	section 6(1)
<i>Income Tax Assessment Act 1936</i>	section 45A
<i>Income Tax Assessment Act 1936</i>	subsection 45A(1)
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	subsection 45A(3)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	subsection 45B(2)(a)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(2)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(2)(c)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-155(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-155(3)
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(2)
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Division 725
<i>Income Tax Assessment Act 1997</i>	section 725-145
<i>Income Tax Assessment Act 1997</i>	Division 727
<i>Income Tax Assessment Act 1997</i>	subsection 727-15(3)
<i>Income Tax Assessment Act 1997</i>	subsection 727-100(b)
<i>Income Tax Assessment Act 1997</i>	subsection 727-150(3)
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)
<i>Taxation Administration Act 1953</i>	TAA 1953
<i>Corporations Act 2001</i>	<i>Corporations Act 2001</i>

**References***Previous draft:*

Not previously issued as a draft

*Legislative references:*

- ITAA 1997 104-10(1)
- ITAA 1997 104-25(1)
- ITAA 1997 104-155(1)
- ITAA 1997 104-155(3)
- ITAA 1997 116-20(2)
- ITAA 1997 Div 230
- ITAA 1997 Div 725
- ITAA 1997 725-145
- ITAA 1997 Div 727
- ITAA 1997 727-15(3)
- ITAA 1997 727-100(b)
- ITAA 1997 727-150(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001
- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 45A
- ITAA 1936 45A(1)
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45C
- ITAA 1997

## ATO references

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