



CR 2023/46 - MetalsTech Limited - return of capital by way of in specie distribution

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Class Ruling

MetalsTech Limited – return of capital by way of in specie distribution

❶ Relying on this Ruling

This publication (excluding appendix) 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.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for the holders of ordinary shares in MetalsTech Limited (MTC) in relation to the in specie distribution of shares in Winsome Resources Limited (WR1) by MTC to its shareholders on 15 November 2021 (Payment Date).
2. Details of this scheme are set out in paragraphs 28 to 57 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - received the in specie distribution of WR1 shares from MTC on the Payment Date
 - held an ordinary share in MTC on 7 October 2021 (Record Date)
 - held your MTC shares on capital account – that is, your MTC shares were neither held as revenue assets (as defined in section 977-50 of the *Income Tax Assessment Act 1997* (ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997)
 - were a ‘resident of Australia’ or a ‘non-resident’ (other than a non-resident who used their MTC shares at any time in carrying on a business at or

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through a 'permanent establishment' in Australia), as the terms are defined in subsection 6(1), and

- did not acquire your MTC shares under an employee share or option scheme.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to the scheme outlined in paragraphs 28 to 57 of this Ruling.

Note: Division 230 of the ITAA 1997 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 2021 to 30 June 2022. This Ruling will continue to apply after 30 June 2022 to all entities within the specified class who entered into the scheme during the term of the Ruling.

Ruling

Demerger relief not available

7. Demerger relief (being demerger roll-over under Division 125 of the ITAA 1997) is not available as the scheme does not satisfy the requirements under subsection 125-70(1) of the ITAA 1997.

Application of sections 45A, 45B and 45C

8. The Commissioner will not make a determination under section 45A that section 45C applies to the whole or any part of the in specie distribution.

9. The Commissioner has made a determination under paragraph 45B(3)(b) that part of the in specie distribution, being \$0.1055 per WR1 share, is taken under section 45C to be an unfranked dividend paid by MTC to you out of MTC's profits on the Payment Date.

Return of capital and dividend component

10. The amount of \$0.0945 per WR1 share is a return of capital and not a 'dividend' as defined in subsection 6(1).

11. The amount of \$0.1055 per WR1 share is taken to be an unfranked dividend paid out of MTC's profits for Australian income tax purposes under section 45C and is included in the assessable income of an MTC shareholder pursuant to subsection 44(1).

Assessability of the dividend component

Resident shareholders

12. If you are a 'resident' as defined in subsection 6(1), you include the amount of the unfranked dividend of \$0.1055 per WR1 share in your assessable income pursuant to paragraph 44(1)(a).

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Non-resident shareholders

13. If you are a 'non-resident' as defined in subsection 6(1), you do not include the amount of the unfranked dividend of \$0.1055 per WR1 share in your Australian assessable income (paragraph 44(1)(b) and section 128D).

14. You are liable to withholding tax on the amount of the unfranked dividend of \$0.1055 per WR1 share pursuant to subsection 128B(1). The withholding tax rate is 30% (subsection 128B(4) 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*).

Capital gains tax consequences**CGT event G1**

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

16. The non-assessable part of the in specie distribution, to which CGT event G1 applies, is \$0.0945 per WR1 share (subsection 104-135(1) of the ITAA 1997).

17. You made a capital gain if the amount of the return of capital of \$0.0945 per WR1 share you received (multiplied by the number of WR1 shares you received) via the in specie distribution is more than the cost base of your MTC shares. The amount of your capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

18. If the amount of the return of capital of \$0.0945 per WR1 share you received (multiplied by the number of WR1 shares you received) is not more than the cost base of your MTC shares, the cost base and reduced cost base of your MTC shares are reduced by the amount of the return of capital (but not below nil) (subsection 104-135(4) of the ITAA 1997). You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

CGT event C2

19. CGT event C2 happened to you in respect of your right to receive the in specie distribution for each MTC share that you owned at the Record Date and had ceased to own prior to the Payment Date (section 104-25 of the ITAA 1997). That is, when you sold your MTC shares after the Record Date but before the Payment Date and you received the WR1 shares.

20. You made a capital gain if the capital proceeds, being the amount of the in specie distribution of \$0.20 per WR1 share, is more than the cost base of your right to receive the distribution. The amount of the capital gain is equal to the difference (subsection 104-25(3) of the ITAA 1997).

21. You made a capital loss if the amount of the in specie distribution is less than the reduced cost base of your right to receive the distribution. The amount of the capital loss is equal to the difference (subsection 104-25(3) of the ITAA 1997).

22. Any capital gain made as a result of CGT event C2 happening is reduced by that part of the capital benefit taken to be an unfranked dividend under section 45C (section 118-20 of the ITAA 1997).

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Discount capital gain

23. You can treat a capital gain made when CGT event G1 or C2 happened as a discount capital gain if you acquired your MTC shares at least 12 months before the Payment Date (subsection 115-25(1) of the ITAA 1997), provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

24. You cannot disregard a capital gain made when CGT event G1 or C2 happened as demerger roll-over relief is not available under Division 125 of the ITAA 1997.

Time of acquisition, cost base and reduced cost base of Winsome Resources Limited shares

25. The first element of the cost base and reduced cost base of each WR1 share you received on the Payment Date was \$0.0945 per WR1 share (section 112-20 of the ITAA 1997).

26. You are taken to have acquired the WR1 shares you received by way of the in specie distribution on the Payment Date (table event number A1 (case 1) in subsection 109-5(2) of the ITAA 1997).

Non-resident shareholders

27. If you were a non-resident or the trustee of a foreign trust for CGT purposes (as defined in subsection 995-1(1) of the ITAA 1997) as at the Payment Date, you can disregard any capital gain made from CGT event G1, or a capital gain or capital loss from CGT event C2, in relation to your MTC shares if your MTC shares were not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Scheme

28. The following description of the scheme is based on information provided by the applicant and contained in documents released to the Australian Securities Exchange (ASX).

Background

29. MTC is a public company incorporated in Australia and listed on the ASX since 24 February 2017.

30. MTC is headquartered in Western Australia and is a global mining exploration company with projects primarily located in Canada (including but not limited to the Cancet, Adina and Sirmac-Clapier lithium projects (collectively referred to as the 'Lithium Projects') and gold and silver exploration in Slovakia.

31. The Lithium Projects were owned by the following entities, each of which were wholly-owned subsidiaries of MTC and incorporated in Canada on 17 November 2017 (collectively referred to as the 'Lithium Entities'):

- the Cancet project owned by MetalsTech Cancet Lithium Inc
- the Adina project owned by MetalsTech Adina Lithium Inc, and
- the Sirmac-Clapier project owned by MetalsTech Sirmac Lithium Inc.

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32. On 17 March 2021, MTC announced to the ASX that its future exploration focus would be on its gold and silver projects in Slovakia. Therefore, it intended to pursue a demerger whereby it would spin out its Lithium Projects to a newly incorporated entity, WR1, subject to shareholder and other requisite approvals (Demerger).

33. The Demerger was effected by way of a pro rata in specie distribution of all shares in WR1 paid by MTC to its shareholders on the basis of 1 WR1 share for every 3.68 MTC shares held by the shareholder on the Record Date. MTC shareholders were not entitled to fractional entitlements to WR1 shares and no fractional entitlements were distributed. Any fractional entitlements were rounded down.

34. It was expected that WR1 would require capital to pursue development of the Lithium Projects. Accordingly, in conjunction with the Demerger, WR1 listed for quotation on the ASX and undertook the WR1 Initial Public Offer (WR1 IPO) to raise capital (Capital Raising).

35. The core purpose of the Capital Raising was to ensure WR1 was financed to embark on an evaluation and exploration program of the Lithium Projects.

36. At the Record Date, MTC had 166,664,590 fully paid ordinary shares on issue with a share price of \$0.57, providing a market capitalisation of \$94,998,816.

Demerger

37. The Demerger was implemented as follows.

38. On 6 April 2021, WR1 was incorporated as a wholly-owned subsidiary of MTC with 1 ordinary share on issue.

39. On 17 August 2021, MTC entered into Share Sale Agreements with WR1 whereby MTC agreed to transfer 100% of the shares on issue in each of the Lithium Entities to WR1 (Share Transfer). As consideration, WR1 issued 45,000,000 fully paid ordinary shares in WR1 to MTC. The WR1 shares were valued at A\$0.20 per WR1 share (valuing the Lithium Entities at A\$9,000,000).

40. On 2 September 2021, the Short Form Prospectus containing the offer for the in specie distribution and Notice of General Meeting was lodged with the Australian Securities and Investments Commission .

41. On 4 October 2021, MTC shareholders approved the Share Transfer and the in specie distribution, as a reduction of share capital, under sections 256B and 256C of the *Corporations Act 2001* at a General Meeting.

42. On 15 November 2021 (being the Payment Date), the Share Transfer completed and the in specie distribution was paid to MTC shareholders. The entire amount of the in specie distribution, being A\$9,000,000, was debited to MTC's share capital account.

43. Immediately following the in specie distribution, MTC ceased to hold WR1 shares and MTC shareholders held shares in both MTC and WR1.

Winsome Resources Limited Initial Public Offer

44. On 11 October 2021, WR1 lodged a prospectus with Australian Securities and Investments Commission to collectively raise (before costs) between the minimum of A\$12,000,000 and a maximum of A\$18,000,000 of share capital for WR1 at a price of A\$0.20 per WR1 share from the following:

- a pro rata priority offer of 10,000,000 WR1 shares to MTC shareholders

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- a priority offer of 15,000,000 WR1 shares to Lithium Royalty Corporation (LRC) pursuant to the Subscription Agreement entered into between MTC and LRC dated 26 May 2021, and
- the issue of between 35,000,000 to 65,000,000 WR1 shares to the general public through a broker offering.

45. On 18 November 2021, WR1 shares that were subscribed for under the WR1 IPO were issued.

46. On 26 November 2021, an ASX announcement provided that WR1 raised A\$18,000,000 under the WR1 IPO through the issue of 90,000,000 shares at A\$0.20 each. On completion of the Capital Raising, WR1 had the following substantial shareholders:

- LRC acquired 15 million WR1 shares which represented 13.4% (undiluted) or 12.63% (fully diluted), and
- Zhenshi Holding Group Co Ltd acquired 11 million WR1 shares which represented 9.9% (undiluted) or 9.33% (fully diluted).

47. On 30 November 2021, WR1 listed and commenced trading on the ASX.

Subscription Agreement with Lithium Royalty Corporation

48. On 27 May 2021, MTC announced to the ASX that it had entered into an agreement with LRC that comprised an A\$3,000,000 cornerstone subscription by LRC in the WR1 IPO at an issue price of A\$0.20 per WR1 share.

Sale facility to some foreign shareholders

49. Under a sale facility, the WR1 shares that the ineligible overseas shareholders would have otherwise received were transferred to MTC's sale nominee, Canaccord Genuity (Australia) Limited (Canaccord).

50. Canaccord sold the relevant WR1 shares on the market with the net sales proceeds remitted to those ineligible overseas shareholders in accordance with their respective entitlements.

MTC's share capital account

51. MTC debited its share capital account by an amount of A\$9,000,000 to record the in specie distribution of WR1 shares to its shareholders.

52. MTC 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).

MetalsTech Limited's accounting profit

53. For the year ended 30 June 2022, MTC reported an accounting profit of A\$7,287,876, which included profit on the sale of discontinued operations (being the Lithium Entities) of A\$4,846,570.

Other relevant facts

54. At the Record Date, 6.23% of shares in MTC were held by foreign residents.

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- 55. MTC has not paid a dividend since incorporation.
- 56. MTC's franking account balance was nil at 30 June 2021.
- 57. An MTC share is not an 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

Commissioner of Taxation

23 August 2023

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Appendix – 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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Demerger relief is not available

58. Demerger relief (being demerger roll-over under Division 125 of the ITAA 1997) is not available as the scheme does not satisfy the requirements of a demerger under subsection 125-70(1) of the ITAA 1997. This is because the 'restructure' of the demerger group headed by MTC for the purposes of paragraph 125-70(1)(a) of the ITAA 1997 was taken to include the Capital Raising, resulting in the condition in subsection 125-70(2) of the ITAA 1997 not being satisfied.

Application of sections 45A, 45B and 45C

59. Sections 45A and 45B are anti-avoidance provisions which, if they apply, 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 MTC shareholder via the in specie distribution is treated as an unfranked dividend paid out of the profits of MTC.

Section 45A – streaming of dividends and capital benefits

60. 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.

61. Although a capital benefit (as defined in paragraph 45A(3)(b)) was provided to MTC shareholders via the in specie distribution, there was no streaming of capital benefits to some shareholders as the in specie distribution was paid to all MTC shareholders in direct proportion to their MTC shareholding. Accordingly, section 45A does not apply to the in specie distribution.

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

62. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Broadly, section 45B applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a))
- under the scheme, a relevant 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, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

63. The return of capital by way of the in specie distribution to MTC shareholders constitutes a scheme for the purposes of section 45B.

64. The return of capital by way of the in specie distribution was recorded as a debit to MTC's share capital account. Therefore, MTC shareholders were provided with a capital benefit (paragraph 45B(5)(b)).

65. A taxpayer obtains a 'tax benefit' where the amount of tax payable would, apart from the operation of section 45B, be less than the amount that would be payable, or would be payable at a later time, if the distribution had instead been a dividend (subsection 45B(9)). As a return of capital will generally result in a lesser amount of tax being payable or tax being payable at a later time than an equivalent dividend, if not for section 45B, MTC shareholders would have obtained a tax benefit.

66. 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.

67. 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 (paragraph 45B(8)(a)).

68. The in specie distribution was treated by MTC as wholly a return of capital. However, MTC realised a profit from the disposal of the Lithium Entities (refer to paragraph 53 of this Ruling). Therefore, the Commissioner considers that, having regard to all of the relevant circumstances of the scheme in subsection 45B(8), the in specie distribution is partly attributable to the profits of MTC from the disposal of the Lithium Entities.

69. The Commissioner considers that \$0.1055 per WR1 share is a reasonable proportionate component of the in specie distribution that is attributable to profits of MTC from the disposal of the Lithium Entities (paragraph 45B(8)(a)).

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

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

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

72. As the Commissioner has made a determination under paragraph 45B(3)(b) that section 45C applies, a part of the capital benefit in the amount of \$0.1055 per WR1 share is taken to be an unfranked dividend that was paid by MTC, out of MTC's profits, to an MTC shareholder at the time that the MTC shareholder was provided with the capital benefit (subsections 45C(1) and 45C(2)).

Return of capital and dividend component

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

74. 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.

75. MTC debited the total of the in specie distribution against its share capital account. As MTC has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies. Accordingly, the capital component of the in specie distribution, being \$0.0945 per WR1 share, is not a dividend for the purposes of subsection 6(1).

76. The unfranked dividend component of the in specie distribution, being \$0.1055 per WR1 share, is deemed to have been paid out of profits derived by MTC. Accordingly, the unfranked dividend of \$0.1055 per WR1 share is included in the assessable income of a MTC shareholder under subsection 44(1).

CGT consequences

CGT event G1

77. 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, and
- the payment is not included in the shareholder's assessable income (section 104-135 of the ITAA 1997).

78. CGT event G1 happened to your MTC shares when you received the in specie distribution from MTC in respect of the MTC shares you owned at the Record Date and continued to own at the Payment Date, but only to the extent of that part of the in specie distribution not taken to be a dividend under section 45C (section 104-135 of the ITAA 1997).

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79. The amount of the capital benefit taken to be an unfranked dividend (\$0.1055 per WR1 share) under section 45C is excluded from the non-assessable part of the payment. Therefore, the amount of the non-assessable part of the payment to which CGT event G1 happened is \$0.0945 per WR1 share.

80. You made a capital gain when CGT event G1 happened if the amount of the return of capital of \$0.0945 cents per WR1 share you received (multiplied by the number of WR1 shares you received) via the in specie distribution exceeded the cost base of your MTC shares. The capital gain is equal to the amount of the excess and the cost base and reduced cost base of your MTC shares are reduced to nil (subsection 104-135(3) of the ITAA 1997).

81. If the amount of the return of capital of \$0.0945 cents per WR1 share you received (multiplied by the number of WR1 shares you received) is not more than the cost base of your MTC shares, the cost base and reduced cost base of your MTC shares are reduced by the amount of the non-assessable part (subsection 104-135(4) of the ITAA 1997). You cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

82. A capital gain made when CGT event G1 happened will be eligible to be treated as a discount capital gain under Division 115 of the ITAA 1997 if you acquired the MTC share at least 12 months before the Payment Date and the other conditions in Division 115 of the ITAA 1997 are satisfied (subsection 115-25(1) of the ITAA 1997).

CGT event C2

83. If, after the Record Date but before the Payment Date, you ceased to own an MTC share in respect of which the in specie distribution was made, the right to receive the in specie distribution in respect of that MTC share is retained by you and is a separate CGT asset from the MTC share.

84. CGT event C2 happened if you owned an MTC share at the Record Date but ceased to own the MTC share before the Payment Date (subsection 104-25(2) of the ITAA 1997). The right to receive the in specie distribution ended by the right being discharged or satisfied when the in specie distribution was made.

85. You made 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. You made 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).

86. In working out your capital gain or capital loss when CGT event C2 happens, the capital proceeds are equal to the amount of the in specie distribution paid by MTC, being \$0.20 per WR1 share (subsection 116-20(1) of the ITAA 1997).

87. The cost base of your right 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 share previously owned by you to the extent that it was applied in working out a capital gain or capital loss made when a CGT event happened to the share; for example, when you disposed of your MTC share after the Record Date and before the Payment Date. Therefore, if the cost base or reduced cost base of the MTC share previously owned by you has been fully applied in working out a capital gain or capital loss on the MTC share, the right to receive the in specie distribution will have a nil cost base. As a result, you will, in those

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circumstances, make a capital gain equal to the in specie distribution of \$0.20 per WR1 share.

88. Under section 118-20 of the ITAA 1997, any capital gain made as a result of CGT event C2 happening is reduced by \$0.1055 per WR1 share, being that part of the in specie distribution that is included in your assessable income. This is the deemed unfranked dividend arising under paragraph 45B(3)(b) and section 45C.

89. You can treat a capital gain resulting from CGT event C2 happening as a discount capital gain under Division 115 of the ITAA 1997 if you acquired the MTC shares at least 12 months before the Payment Date and the other conditions in Division 115 of the ITAA 1997 are satisfied.

Non-resident shareholders

90. You disregard a capital gain or capital loss you made from a CGT event if:

- just before the CGT event happened, you are 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 (subsection 855-10(1) of the ITAA 1997).

91. CGT assets that are 'taxable Australian property' are set out in the table in section 855-15 of the ITAA 1997. The 5 categories of CGT assets set out are:

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. Items 1, 2 and 4 of the table in section 855-15 of the ITAA 1997 do not apply to MTC shares.

93. Accordingly, you can disregard a capital gain or capital loss from the CGT event unless your MTC shares were taxable Australian property because:

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

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References

Legislative references:

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 Capital gains tax ~~ CGT events ~~ CGT events G1 to G3 – shares

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