


CR 2008/74 - Income tax: demerger of Buru Energy Ltd by ARC Energy Ltd and merger of ARC Energy Ltd with Australian Worldwide Exploration Ltd

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Class Ruling

Income tax: demerger of Buru Energy Ltd by ARC Energy Ltd and merger of ARC Energy Ltd with Australian Worldwide Exploration Ltd

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

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the Scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;

- section 115-30 of the ITAA 1997;
- subsection 116-20(1) of the ITAA 1997;
- subsection 116-40(1) of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997; and
- Division 125 of the ITAA 1997.

All subsequent legislative references in the Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of ARC Energy Ltd (ARC) who:
- (a) received shares in Buru Energy Ltd (Buru) and disposed of their ARC shares to Australian Worldwide Exploration Ltd (AWE) as described in the Scheme Booklet issued by ARC dated 1 July 2008;
 - (b) were residents of Australia as defined in subsection 6(1) of the ITAA 1936 on the Implementation Date (25 August 2008); and
 - (c) held their ARC shares on capital account at that time.

In this Ruling, a person belonging to this class of entities is referred to as an 'ARC 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 9 to 36 of this Ruling.
6. If the Scheme actually carried out was 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.

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Date of effect

8. This Ruling applies from 1 July 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 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

9. The following description of the Scheme is based on documents and information provided by ARC's advisors, Mallesons Stephen Jaques. These documents include the following:

- Class Ruling application dated 9 May 2008;
- Merger Implementation Agreement dated 1 July 2008;
- correspondence and emails received in relation to the Class Ruling application; and
- Scheme Booklet for the demerger of Buru from ARC and the Scheme of Arrangement in relation to the merger of ARC and AWE.

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

Relevant entities

ARC

10. ARC was, at the time of the demerger and the merger, an Australian resident company listed on the Australian Securities Exchange (ASX). ARC was the head company of a consolidated tax group for the purposes of Part 3-90.

11. The main business of ARC was exploration for and the production of oil and gas. ARC's principal assets were oil and gas production assets situated both onshore and offshore in the Perth Basin approximately 360 kilometres north of Perth. These assets included a significant portfolio of exploration interests in the onshore Canning Basin in north-west Western Australia (the Canning Basin assets).

12. The Canning Basin assets were the subject assets for the demerger.

13. As at 25 August 2008 ARC had 324,239,455 fully paid ordinary shares on issue. Prior to this date, it also had 1,650,000 employee share options and 3,678,569 performance rights on issue. Before the demerger, these options and performance rights were either exercised or cancelled.

14. There were no other ownership interests in ARC just before the demerger.

Buru

15. Buru was incorporated as a wholly-owned subsidiary of ARC on 16 April 2008.

16. At the time of the demerger Buru was an Australian resident company undertaking the business of exploration for oil and gas.

17. Just before the demerger, Buru had a total of approximately 162,119,728 ordinary shares on issue. ARC owned all of the shares on issue in Buru at the time of the demerger.

18. There were no other ownership interests in Buru just before the demerger.

19. Buru listed on the ASX, first trading on 1 September 2008.

AWE

20. AWE is an oil and gas company with a focus on production operations in regions of proven potential where there is a high chance of commercial success.

21. AWE is a public company listed on the ASX and just before the merger had 451,097,675 shares on issue.

The demerger of Buru

Transfer of assets and liabilities to Buru

22. ARC transferred the following assets and liabilities to Buru before the demerger:

- the Canning Basin assets;

- \$84.45m of cash (which will be used by Buru to fund exploration activities); and
- certain liabilities, including a liability to Alcoa of Australia Limited and for rehabilitation expenses.

23. The net value of assets transferred to Buru was initially recognised as a debt owing by Buru to ARC. Buru then satisfied that debt by the issue of new shares to ARC. This happened on 25 August 2008. The total number of Buru shares on issue at that time equalled approximately half the number of ARC shares on issue.

Distribution of Buru shares

24. ARC shareholders voted at a general meeting on 5 August 2008 for an ordinary resolution to reduce the share capital of ARC. The ordinary resolution became effective on 11 August 2008.

25. ARC then distributed 85% of the shares it owned in Buru to the ARC shareholders on 25 August 2008. ARC shareholders received 0.425 Buru shares for each ARC share they owned at the Record Date of 18 August 2008. As a result of the demerger, ARC shareholders held ownership interests in both ARC and Buru.

26. The Buru shares were acquired by the ARC shareholders by applying the following amounts distributed to them by ARC to the acquisition of those Buru shares:

- the capital reduction amount – being a return of share capital in the amount of approximately 13.75 cents on each ARC share; and
- the dividend amount – being a dividend paid on each ARC share in the amount of approximately 8.56 cents on each ARC share.

Accounting for the distribution to effect the demerger

27. ARC accounted for the distributions that effected the demerger by debiting its share capital by \$44,592,766 (the total capital reduction) and its profit and loss account by \$27,753,163 (the total dividend).

Reasons for the demerger

28. ARC expects that a number of advantages will accrue to its shareholders as a result of the demerger. These advantages are said to include:

- increased Board and management focus on the Canning Basin assets;
- the prioritisation of the development of the Canning Basin assets;

- greater financial flexibility for the exploration and development of the Canning Basin assets;
- allowing the market to value the Canning Basin assets independently of the balance of the ARC portfolio; and
- improved investment choice for ARC shareholders who will have the choice of holding an investment in companies with markedly different risk profiles, that is, AWE (proven resources and existing operations) and Buru (exploration).

The merger of AWE and ARC

29. ARC shareholders voted at a meeting on 5 August 2008 for a special resolution to adopt a Scheme of Arrangement for the disposal of ARC shares to AWE. Under the Scheme, AWE then acquired all of the ordinary shares in ARC, and as consideration an ARC shareholder could elect to receive either:

- the Standard Consideration – being 0.3 AWE* shares and a cash payment of 19 cents; or
- the Maximum Cash Alternative – being 0.062 AWE* shares and a cash payment of \$1.05.

* The number of AWE shares received may be subject to rounding.

30. As a consequence of the merger, the ARC shareholders were issued approximately 69,724,266 new ordinary AWE shares, increasing the total issued shares of AWE to 520,821,941.

Ineligible foreign shareholders

31. Shareholders of ARC whose address, as shown in ARC's register of members as at the Record Date, was outside Australia and its external territories, New Zealand or Singapore were not entitled to receive Buru and AWE shares. Instead, the shares in Buru and AWE that these shareholders would otherwise have been entitled to receive were issued or transferred to a nominee who sold them on the ASX and paid to each foreign shareholder the net proceeds of the sale in accordance with the procedures outlined in the Scheme Booklet.

Other matters

32. None of the ARC shareholders acquired their shares in ARC before 20 September 1985.

33. ARC confirms that no amounts have been transferred to ARC's share capital account (as defined in section 975-300) and accordingly its share capital account is not tainted (within the meaning in Division 197).

34. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by Buru were used in the carrying on of a business.

35. ARC did not elect under subsection 44(2) of the ITAA 1936 that subsections 44(3) and (4) of the ITAA 1936 not apply to any dividend paid under the demerger.

36. There were no 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of those expressions in section 124-783.

Ruling

The demerger of Buru

CGT event G1

37. CGT event G1 happened in relation to each of the ARC ordinary shares owned by ARC shareholders at the time ARC made the payment of the capital reduction amount (section 104-135).

Capital gain

38. ARC shareholders made a capital gain under CGT event G1 if the capital reduction amount exceeded the cost base of the ARC share (subsection 104-135(3)). No capital loss can be made under CGT event G1.

Conditions for demerger relief satisfied

39. A demerger, as described under section 125-70, happened on the distribution of the Buru shares. Therefore, ARC shareholders can choose demerger roll-over relief under subsection 125-55(1) for their ARC shares.

Demerger roll-over relief is chosen

40. ARC shareholders will disregard any capital gain made when CGT event G1 happened if they choose demerger roll-over relief (subsections 125-55(1) and 125-80(1)).

Demerger roll-over relief is not chosen

41. An ARC shareholder who does not choose demerger roll-over relief is not entitled to disregard any capital gain made when CGT event G1 happened to their ARC shares under the demerger.

Cost bases of ARC and Buru shares

42. Whether or not an ARC shareholder chooses demerger roll-over relief, they must recalculate the cost base and reduced cost base of their ARC and Buru shares in the manner described in paragraphs 43 and 44 of this Ruling.

43. For an ARC shareholder, the first element of the cost base and reduced cost base of each ARC share and corresponding Buru share received under the demerger is worked out as follows:

- take the sum of the cost bases of the ARC shares (just before the demerger); and
- apportion that sum over the ARC shares and corresponding new Buru shares received under the demerger.

The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the ARC shares and Buru shares, or a reasonable approximation of those market values (subsections 125-80(2) and (3), 125-85(1) and (2)).

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

- attribute 90.87% of the summed cost base to the ARC shares; and
- attribute 9.13% of the summed cost base to the Buru shares.

Acquisition date of the Buru shares for the purposes of the CGT discount

45. For the purposes of determining eligibility for a discount capital gain, the Buru shares received by an ARC shareholder are taken to have been acquired on the same date as the corresponding ARC shares (item 2 of the table in subsection 115-30(1)). This will be the case whether demerger roll-over relief is chosen or not.

Demerger dividend

46. Any dividend arising under the demerger is a demerger dividend (subsection 6(1) of the ITAA 1936).

47. The demerger dividend is neither assessable income nor exempt income of the ARC shareholders (subsections 44(3) and (4) of the ITAA 1936).

48. As the share capital reduction amount was debited to ARC's share capital account it is not a dividend as defined in subsection 6(1) of the ITAA 1936 (see the exclusion contained in paragraph (d) of the definition of a dividend contained in subsection 6(1) of the ITAA 1936).

Application of sections 45B, 45BA and 45C

49. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole or any part of any demerger benefit provided to ARC shareholders under the demerger.

50. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the capital benefit provided to ARC shareholders under the demerger.

The merger of AWE and ARC**CGT event A1 happened on the disposal of ARC shares**

51. CGT event A1 happened as a result of the disposal by an ARC shareholder of each ARC share to AWE on the Implementation Date (subsections 104-10(1) and (2) and paragraph 104-10(3)(b)).

Capital gain or capital loss

52. An ARC shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an ARC share exceeded its cost base. An ARC shareholder made a capital loss if those capital proceeds were less than the ARC share's reduced cost base (subsection 104-10(4)).

Capital proceeds

53. For an ARC shareholder the capital proceeds for each ARC share will be the sum of:

- the amount of cash received; and
- the market value of the part of an AWE share received,

in respect of its disposal (subsections 116-20(1) and 116-40(1)).

54. In working out the market value of that part of the AWE shares that is reasonably attributable to the disposal of each ARC share the Commissioner accepts the following formula:

$$\begin{array}{r} \text{Market Value of AWE} \\ \text{share on the} \\ \text{Implementation Date} \end{array} \times \frac{\text{Total number of AWE shares received}}{\text{Total number of ARC shares exchanged}}$$

55. The Commissioner accepts \$3.39 as the market value of an AWE share on the Implementation Date. This is worked out by taking the Volume Weighted Average Price (VWAP) of an AWE share for the first 5 days of trading on the ASX after the Implementation Date, that is, 26 August 2008 until 1 September 2008 inclusive.

If a capital loss was made

56. If an ARC shareholder made a capital loss from the disposal of their ARC shares, they cannot choose scrip for scrip roll over under Subdivision 124-M (subsection 124-780(3)).

If a capital gain was made

Capital gain referable to AWE shares – partial scrip for scrip roll-over

57. Subject to the qualification in paragraph 58 of this Ruling, an ARC shareholder who made a capital gain from the disposal of their ARC share may choose partial scrip for scrip roll-over for the disposal of their ARC shares (section 124-790).

58. Partial scrip for scrip roll-over cannot be chosen if any capital gain the ARC shareholder might make from the replacement AWE shares would be disregarded, except because of a roll-over (subsection 124-795(2)).

59. If partial scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of AWE shares is disregarded.

Capital gain referable to cash

60. The part of the capital gain that is referable to the receipt of cash is not disregarded (an ineligible capital gain). This is because the cash received is ineligible proceeds under subsection 124-790(1).

Discount capital gain

61. ARC shareholders who made capital gains that are not disregarded (that is, ineligible capital gains and eligible capital gains where roll-over is not chosen) can treat the amount of those gains as 'discount capital gains' provided that the requirements of Subdivision 115-A are satisfied.

Cost base of AWE shares

Scrip for scrip roll-over is not chosen

62. Where scrip for scrip roll-over is not chosen, the first element of the relevant ARC shareholder's cost base and reduced cost base of each new AWE share is equal to the market value of the part of the ARC shares given in exchange for the new AWE share (subsections 110-25(2) and 110-55(2)).

Scrip for scrip roll-over is chosen

63. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each AWE share received is equal to the part of the cost bases of the ARC shares exchanged for the relevant AWE share (that is, the part of the cost base of the ARC shares that does not relate to the cash consideration received) (subsections 124-785(2) and 124-785(4)).

Acquisition date of AWE shares

64. ARC shareholders acquired their AWE shares on the date that the AWE shares are issued to them being the Implementation Date (item 2 of the table in section 109-10).

65. For the purposes of determining if a capital gain on a subsequent disposal of a AWE share is eligible to be treated as a discount capital gain, relevant ARC shareholders who choose scrip for scrip roll-over are taken to have acquired their AWE share when they acquired the corresponding ARC share (item 2 of the table in subsection 115-30(1)).

Commissioner of Taxation12 November 2008

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

66. The tax consequences and relevant legislative provisions that arise concerning the Scheme are outlined in the Ruling part of this document.

The demerger of Buru

67. The first significant tax consequence is the availability of demerger roll-over under Division 125. It enables a shareholder to disregard a capital gain made under a demerger. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

Conditions for demerger roll-over relief

68. The demerger roll-over provisions in Division 125 contain a number of conditions for eligibility to choose demerger roll-over relief. The main conditions that are relevant to the Scheme are:

- (a) a shareholder owns a share in a company;
- (b) the company is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity and nothing else.

Under the Scheme the conditions for choosing demerger roll-over relief under Division 125 were satisfied.

Application of sections 45B, 45BA and 45C

69. Section 45B of the ITAA 1936 applies to ensure that relevant amounts are treated as dividends for taxation purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends.

70. Where the requirements of subsection 45B(2) of the ITAA 1936 are met, subsection 45B(3) of the ITAA 1936 empowers the Commissioner to make a determination that either section 45BA of the ITAA 1936 applies in relation to a demerger benefit or section 45C of the ITAA 1936 applies in relation to a capital benefit.

71. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 were met, the requisite purpose of enabling the ARC shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) was not present.

72. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(a) or (b) of the ITAA 1936 that either sections 45BA or 45C of the ITAA 1936 applied to the Scheme to which this Ruling relates.

The merger of AWE and ARC

73. The other significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

Conditions for scrip for scrip roll-over relief

74. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over relief. The main conditions and exceptions that are relevant to the circumstances of the Scheme are:

- (a) shares are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement in which participation was available on substantially the same terms to all shareholders;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

75. Subject to the qualification in paragraph 76 of this Ruling, if an ARC shareholder makes a capital gain from the disposal of their ARC share, scrip for scrip roll-over can be chosen under Subdivision 124-M to the extent that the capital gain is referable to the receipt of part of an AWE share (section 124-790).

76. Scrip for scrip roll-over cannot be chosen if any capital gain the ARC shareholder might make from the AWE shares would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

Appendix 2 – Detailed contents list

77. The following is a detailed contents list for this Ruling

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References

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Related Rulings/Determinations:

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Subject references:

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NO: 2008/17292

ISSN: 1445-2014

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