


CR 2011/96 - Income tax: In specie return of capital: Navigator Resources Limited

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Class Ruling

Income tax: In specie return of capital: Navigator Resources Limited

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ⓘ 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 provision(s) identified apply to the defined class of entities, who take part in the scheme to which this Ruling relates. It does not deal with the capital gains tax consequences of the scheme.

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 45B of the ITAA 1936;
- section 45C of the ITAA 1936;

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

Class of entities

4. The class of entities to which this Ruling applies are the holders of ordinary shares in Navigator Resources Limited (Navigator) who:

- are registered on the Navigator share register on the Record Date, being the date for determining entitlements under the proposed return of capital;
- hold their Navigator shares on capital account;
- are residents of Australia for the purposes of the Australian income tax legislation, including by virtue of the operation of any double tax agreement between Australia and any other country;
- are not 'temporary residents' of Australia within the meaning of section 995-1 of the ITAA 1997; 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 Navigator shares.

(Note – Division 230 will generally not 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 a 'Navigator shareholder'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 10 to 30 of this Ruling.

7. 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.

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Date of effect

9. This Ruling applies from 1 July 2010 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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

10. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Application for Class Ruling dated 11 March 2011; and
- Additional information provided by the applicant dated 10 August 2011.

11. Navigator is the head company of a tax consolidated group. Navigator has positioned itself as a gold producer and this has included its acquisition of the Bronzewing Gold Project.

12. Navigator has prioritised the company's financial resources into developing gold interests.

13. Navigator has owned Cummins Range Rare Earth Project for a number of years, the original acquisition cost of which was nil, and has been investing in the development of this Project in years past. It contains rare earth minerals used in applications such as high temperature semi-conductors and microwave filters.

14. Due to Navigator's prioritising its business in gold production, the development of the Cummins Range Rare Earth Project has stalled, consequently Navigator considers that it is not maximising the use of shareholders' capital.

15. Kimberly Rare Earths Limited (KRE) was incorporated on 2 December 2010 in order to facilitate the development of the Cummins Range Rare Earth Project (Cummins Range).

16. KRE acquired a 25% interest in Navigator's tenement for the Cummins Range in return for issuing 34,400,000 shares and 3,000,000 options on 13 May 2011. Shares have been ascribed a value of \$6,879,998 (\$0.20 each) and the options \$279,810. The total consideration being \$7,159,808.

17. The options are held by Navigator which would allow Navigator to increase its stake in KRE at a later date if the project exceeds expectations.

18. The disposal of the interest in the Cummins Range tenement took place within the consolidated group and hence any profit realised from the said disposal was ignored for income tax purposes.

19. An independent valuation has valued Cummins Range at between \$20 and \$30 million.

20. KRE and Navigator have entered into a 'farm-in' arrangement whereby KRE can further increase its interest in Cummins Range in the future. This would be subject to certain terms of that agreement being achieved. However, these potential future events are not the subject of this Class Ruling.

21. KRE has undertaken a priority entitlement offer and public offer (which Navigator did not participate in) to raise \$18,236,854 million, issuing 91,184,269 shares at \$0.20.

22. Navigator has made an in-specie distribution of KRE shares to Navigator shareholders on a 1 for 20 basis. That is, for every 20 Navigator shares held, 1 KRE share is received.

23. On 16 May 2011 (the record date) there were 465,788,927 issued shares in Navigator.

24. On the 20 June 2011, Navigator had a total issue of 465,790,327 shares with a share price of \$0.062, providing a market capitalisation of \$28,879,000. An in-specie distribution of 23,289,610 KRE shares was made. KRE's closing share price on the record date was \$0.15 resulting in a market value of \$3,493,442 for the in-specie distribution. This distribution, combined with the public offer and priority entitlement offer, leaves Navigator with 11,110,390 KRE shares, representing approximately 8.8% of KRE.

25. The in-specie distribution consisted of return of share capital only.

26. For international legal reasons, foreign shareholders did and will not receive in-specie KRE shares. Instead, Navigator will directly sell their otherwise entitled KRE shares. The sale proceeds will then be paid to those shareholders as essentially an equivalent return of value as compared to the in-specie distribution of KRE shares to resident shareholders.

27. Navigator has never paid a dividend and has no realised or unrealised profits.

28. Navigator 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).

29. The return of capital per Navigator share was \$0.0075.

30. The return was in the form of shares in KRE valued as a return of capital of \$0.0075.

Ruling

Distribution is not a dividend

31. The in specie return of capital to Navigator shareholders is not a dividend as defined in subsection 6(1).

The application of sections 45B and 45C to the return of capital

32. The Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the return of capital.

Commissioner of Taxation

2 November 2011

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.*

Distribution is not a dividend

33. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

34. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) specifically excludes a distribution from the definition of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the share capital account of the company.

35. 'Share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

36. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account, and the account is not already tainted.

37. As the return of capital was wholly debited against Navigator's untainted share capital account, it did not constitute a dividend because of the exclusion in paragraph 6(1)(d) of the ITAA 1936 that provides a definition of 'dividend'.

Anti-avoidance provisions

38. Section 45B is an anti-avoidance provision, which, if it applies, allows the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend.

Section 45B – schemes to provide capital benefits in substitution for dividends

39. Section 45B applies where certain payments are made to shareholders in substitution for dividends. It allows the Commissioner to make a determination that section 45C applies to a capital benefit.

40. Subsection 45B(2) sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

- 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 taxpayer (the 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 the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each of these conditions is considered in paragraphs 41 to 56 of this Ruling.

Scheme

41. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

42. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

43. The in specie return of share capital constituted a scheme for the purposes of paragraph 45B(2)(a), because the return of capital which was debited to the Navigator's share capital account, provided shareholders with a capital benefit.

Tax benefit

44. A taxpayer 'obtains a tax benefit', as defined in subsection 45B(9), if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B be:

- less than the amount that would have been payable; or
- payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

45. The in-specie distribution by Navigator includes return of capital payment and therefore the in-specie distribution constituted a capital benefit. In the event that the relevant distributions were dividends rather than a capital benefit, it is likely that the amount of tax payable by Navigator shareholders would be greater than is payable in respect of in specie return of share capital (that payment being the capital benefit). Consequently, the receipt of the capital benefit is a 'tax benefit'.

46. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax under section 128B. Therefore, Navigator shareholders will obtain tax benefits from the return of capital.

Relevant circumstances

47. For the purposes of paragraph 45B(2)(c) the Commissioner is required to consider the 'relevant circumstances' set out under subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

48. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

49. The purpose which causes section 45B to apply may be the purpose of any party to the scheme.

50. In this case, however, the Commissioner is only concerned with the purpose of Navigator. The Commissioner cannot at this stage ascertain the purposes of Navigator's numerous shareholders, all of whom were eligible to vote on the return of capital under section 256C of the *Corporations Act 2001* and all of whom have participated in the return of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the proposal.

51. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, because the return of capital was made to all resident Navigator shareholders holding ordinary shares, regardless of individual circumstances, paragraphs 45B(8)(c) to (h) do not incline towards or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j), pertaining to the provision of ownership interests and demerger respectively, are not relevant. The relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

52. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company. The in specie return of capital is not considered attributable to the profits of Navigator. The in specie return of capital is considered attributable to its share capital only and not to any realised or unrealised profits of Navigator.

53. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. Navigator has not made a distribution to shareholders and will not be declaring a dividend to shareholders as it has made operating losses. The absence of payment of dividends does not suggest that the in specie return of capital was made in substitution for dividends.

54. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and its financial and other implications for the parties involved.

55. In this case, the form and substance of Navigator's in specie return of capital do not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

56. Accordingly, the Commissioner will not make a determination under subsection 45B(3), that section 45C applies to the whole, or any part, of the return of capital.

Section 45C

57. As the Commissioner will not make a determination under subsection 45B(3) in relation to the scheme as described, section 45C will not deem any part of the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Appendix 2 – Detailed contents list

58. 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

Subject references:

- dividend
- distributions
- in specie return of capital
- share capital

Legislative references:

- | | |
|-----------------------|------------------------------|
| - ITAA 1936 | - ITAA 1936 45B(8)(f) |
| - ITAA 1936 6(1) | - ITAA 1936 45B(8)(g) |
| - ITAA 1936 6(1)(d) | - ITAA 1936 45B(8)(h) |
| - ITAA 1936 44(1) | - ITAA 1936 45B(8)(i) |
| - ITAA 1936 45B | - ITAA 1936 45B(8)(j) |
| - ITAA 1936 45B(2)(a) | - ITAA 1936 45B(8)(k) |
| - ITAA 1936 45B(2)(b) | - ITAA 1936 45B(9) |
| - ITAA 1936 45B(2)(c) | - ITAA 1936 45C |
| - ITAA 1936 45B(3) | - ITAA 1936 128B |
| - ITAA 1936 45B(5) | - ITAA 1936 177A(1) |
| - ITAA 1936 45B(8) | - ITAA 1936 177D(b)(i) |
| - ITAA 1936 45B(8)(a) | - ITAA 1936 177D(b)(ii) |
| - ITAA 1936 45B(8)(b) | - ITAA 1936 177D(b)(iii) |
| - ITAA 1936 45B(8)(c) | - ITAA 1936 177D(b)(iv) |
| - ITAA 1936 45B(8)(d) | - ITAA 1936 177D(b)(v) |
| - ITAA 1936 45B(8)(e) | - ITAA 1936 177D(b)(vi) |
| | - ITAA 1936 177D(b)(vii) |
| | - ITAA 1936 177D(b)(viii) |
| | - ITAA 1997 |
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| | - ITAA 1997 975-300 |
| | - ITAA 1997 975-300(3) |
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ATO references

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