


# ***CR 2020/49 - Gindalbie Metals Ltd - return of capital by way of in specie distribution***

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## Class Ruling

# Gindalbie Metals Ltd – return of capital by way of in specie distribution

### **📌 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 pay any 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.

| <b>Table of Contents</b>                   | <b>Paragraph</b> |
|--|------------------|
| What this Ruling is about                  | 1                |
| Who this Ruling applies to                 | 4                |
| When this Ruling applies                   | 6                |
| <b>Ruling</b>                              | <b>7</b>         |
| <b>Scheme</b>                              | <b>19</b>        |
| <b>Appendix 1 – Explanation</b>            | <b>40</b>        |
| <b>Appendix 2 – Legislative provisions</b> | <b>61</b>        |

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

1. This Ruling sets out the tax consequences for shareholders of Gindalbie Metals Ltd (Gindalbie) who received a return of capital from Gindalbie on 23 July 2019 (the Implementation Date) by way of an in specie distribution of shares in Coda Minerals Ltd (Coda) (the Demerger Scheme).
2. Details of the Demerger Scheme are set out in paragraphs 19 to 39 of this Ruling.
3. All legislative references 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:
  - were a Gindalbie shareholder on 16 July 2019 (the Scheme Record Date) and you continued to hold your Gindalbie shares on the Implementation Date
  - are not exempt from Australian income tax, and

- held your Gindalbie shares on capital account, that is, your Gindalbie shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(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 19 to 39 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**

### **Return of capital is not a dividend**

7. The return of capital by way of the in specie distribution of Coda shares is not a 'dividend' as defined in subsection 6(1).

### **Sections 45A, 45B and 45C**

8. The Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) that section 45C applies to the whole, or a part, of the return of capital made to you.

### **Capital gains tax consequences**

9. CGT event G1 happened when Gindalbie made a return of capital to you by way of the in specie distribution in respect of Gindalbie shares you owned on the Scheme Record Date and continued to own on the Implementation Date (section 104-135).

10. You made a capital gain from CGT event G1 happening to your Gindalbie share if the return of capital of 0.79926963 cents per Gindalbie share is more than the cost base. The capital gain is equal to the difference, and the cost base and reduced cost base of your Gindalbie share is reduced to nil (subsection 104-135(3)). You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

11. If the return of capital of 0.79926963 cents is not more than the cost base of your Gindalbie share, the cost base and reduced cost base of the Gindalbie share is reduced by the amount of the return of capital (but not below nil) (subsection 104-135(4)).

### **Discount capital gain**

12. You can treat a capital gain made when CGT event G1 happened as a discount capital gain under Subdivision 115-A, provided that you acquired your Gindalbie share at least 12 months before the Implementation Date (subsection 115-25(1)) and the other conditions in that Subdivision are satisfied.

**Capital gains tax consequences for ineligible overseas shareholders**

13. CGT event A1 happened to you if you were entitled to participate on the same basis as Gindalbie shareholders but were not entitled to receive the Coda shares as they were instead transferred to a nominee for sale under the Demerger Scheme (Ineligible Overseas Shareholder). CGT event A1 happened when the share was transferred to the nominee on the Implementation Date (subsection 104-10(3)).

14. The capital proceeds from the disposal of the share are the proceeds received from the nominee (paragraph 116-20(1)(a)).

**Capital gains tax cost base and reduced cost base of Coda shares**

15. The first element of the cost base and reduced cost base of each Coda share you received is 17.00352421 cents, being the market value of each Coda share, worked out as at the time of their acquisition on the Implementation Date (subsections 110-25(2) and 110-55(2)).

16. You are taken to have acquired the Coda share you received by way of the in specie distribution on the Implementation Date (Event number A1 (case 1) of the table in subsection 109-5(2)).

**Non-resident shareholders**

17. If you were a non-resident or the trustee of a non-resident trust for capital gains tax (CGT) purposes at the Implementation Date, you cannot disregard any capital gain when CGT event G1 happened in relation to your Gindalbie share pursuant to section 855-10 if:

- your Gindalbie share was an indirect Australian real property interest (table item 2 of section 855-15), having satisfied the non-portfolio test in section 960-195 at the Implementation Date, or throughout a 12-month period that began no earlier than 24 months before the Implementation Date and ended no later than that time
- you used your Gindalbie share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- you held your Gindalbie share as an individual and your share was covered by subsection 104-165(3) (table item 5 of section 855-15).

18. If you were an Ineligible Overseas Shareholder, being a non-resident or the trustee of a non-resident trust for CGT purposes at the Implementation Date, you cannot disregard a capital gain or capital loss from CGT event A1 if your Coda share had been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15).

**Scheme**

19. 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**

20. Gindalbie is an Australian resident company. Gindalbie was incorporated on 16 July 1993 and listed on the Australian Securities Exchange on 12 April 1994.

21. Coda, a wholly-owned subsidiary of Gindalbie, was incorporated on 26 April 2018.
22. Gindalbie transferred its Mt Gunson assets to Coda and Gindalbie was issued with 33,462,651 fully paid ordinary shares in Coda, to give effect to the restructuring of its operations on 22 August 2018.
23. As at 11 March 2019, 535,492,521, being 35.71%, of Gindalbie's shares were held by Angang Group Hong Kong (Holdings) Limited (Angang).
24. On 11 March 2019, Gindalbie announced that:
  - it proposed to undertake the Demerger Scheme, and
  - Angang had agreed to acquire the balance of Gindalbie shares it did not already own (the Acquisition Scheme).

## **Return of capital**

25. At the shareholder meeting held on 3 July 2019, the Scheme of Arrangement under which Coda would be demerged from Gindalbie by way of an in specie return of capital was approved.
26. On 23 July 2019, Gindalbie implemented the return of capital by making an in specie distribution of 33,463,651 Coda shares to Gindalbie shareholders and the nominee in the case of Ineligible Overseas Shareholders. Gindalbie shareholders were entitled to receive one Coda share for every 45 Gindalbie shares held on the Scheme Record Date.
27. A return of capital of 0.79926963 cents per Gindalbie share was made to all shareholders of Gindalbie on the Implementation Date, by way of the in specie distribution of Coda shares.
28. The return of capital of \$12,036,098 was debited in full against Gindalbie's share capital account.
29. On the Implementation Date, the market value of a Coda share received by a Gindalbie shareholder and the nominee (in the case of an Ineligible Overseas Shareholder) was 17.00352421 cents.

## **Ineligible overseas shareholders**

30. Ineligible Overseas Shareholders were entitled to participate on the same basis as Gindalbie shareholders but were not entitled to receive the Coda shares. The Coda shares were instead transferred to the nominee.
31. The Coda shares were sold by the nominee and the net sales proceeds were paid to Ineligible Overseas Shareholders. The amount paid was equal to the number of Coda shares transferred to the nominee in respect of an Ineligible Overseas Shareholder multiplied by the average net proceeds of sale of all Coda shares transferred to the nominee.

## **Gindalbie's capital accounts**

32. As at 30 June 2019, Gindalbie had:
  - no current year profits and accumulated losses of \$730,553,381, and
  - a credit balance in its share capital account of \$753,965,079.

33. As at 23 July 2019, Gindalbie had:

- 1,505,887,060 ordinary shares on issue, and
- a market capitalisation of approximately \$43,670,724.

#### **Other matters**

34. On the Implementation Date, the sum of the market values of the assets of Gindalbie and its subsidiaries that are 'taxable Australian real property', exceeds the sum of the market value of their other assets for the purposes of section 855-30.

35. On the Implementation Date, the sum of the market values of Coda's assets that are 'taxable Australian real property', did not exceed the sum of the market value of Coda's other assets for the purposes of section 855-30.

36. As at 11 March 2019, 37.36% of Gindalbie's shares were held directly or indirectly by non-resident shareholders.

37. Gindalbie had:

- not previously declared or paid a dividend
- a franking account balance of nil, and
- not previously made a return of capital to its shareholders.

38. Gindalbie's share capital account (as defined in section 975-300) was not tainted for the purpose of section 197-50.

39. Demerger relief (being demerger roll-over under Division 125 and demerger dividend treatment under subsections 44(3) and 44(4)) is not available as the scheme does not satisfy the requirements of a demerger under subsection 125-70(1).

**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.*

| <b>Table of Contents</b>   | <b>Paragraph</b> |
|--|------------------|
| Return of capital not a dividend   | 40               |
| Sections 45A, 45B and 45C do not apply   | 42               |
| CGT consequences   | 47               |
| <i>Example – cost base of Gindalbie and Coda shares after the in specie distribution</i> | 49               |
| Non-resident shareholders  | 54               |

**Return of capital not a dividend**

40. The term 'dividend' is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders but excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

41. As the return of capital was recorded as a debit to Gindalbie's share capital account, the return of capital will not be a dividend.

**Sections 45A, 45B and 45C do not apply**

42. Sections 45A and 45B are anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital received by Gindalbie shareholders as an unfranked dividend paid by the company out of profits.

43. Section 45A generally applies when a company streams the provision of capital benefits to shareholders who would derive a greater benefit from the capital benefits than other shareholders while those other shareholders have received, or will receive, dividends.

44. As all Gindalbie shareholders received the in specie distribution of one Coda share for every 45 Gindalbie shares, there was no streaming of capital benefits to some shareholders, and accordingly, section 45A does not apply.

45. Section 45B applies where certain capital benefits are, having regard to the relevant circumstances of the scheme set out 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.

46. Having regard to the relevant circumstances of the scheme, the Commissioner considers the scheme was not entered into or carried out for a more than incidental purpose of enabling Gindalbie shareholders to obtain a tax benefit. Accordingly, section 45B does not apply.

**Capital gains tax consequences**

47. The Ruling section provides a detailed explanation of the Commissioner's decision and consequences for CGT event G1 and A1 happening. Therefore, no further explanation is required.

48. The following example is provided to assist you.

**Example – cost base of Gindalbie and Coda shares after the in specie distribution**

49. *Peppa owned 100,000 Gindalbie shares which she acquired for \$1,000 (1 cent per share).*

50. *Peppa held the Gindalbie shares on capital account.*

51. *Peppa received 2,222 Coda shares by way of the in specie distribution. No part of the in specie distribution is a dividend nor taken to be a dividend.*

52. *Peppa did not make a capital gain when CGT event G1 happened because the amount of \$799.26 she received (being 100,000 Gindalbie shares  $\times$  0.79926963 cents per share), did not exceed the cost base of her Gindalbie shares. Therefore, she is required to reduce the cost base and reduced cost base of her Gindalbie shares by \$799.26 to \$200.74 (0.200730 cents per share).*

53. *Peppa was taken to have acquired her Coda shares on 23 July 2019 for \$377.82 (17.00352421 cents per share).*

**Non-resident shareholders**

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

- just before the CGT event happened, you are a non-resident, or the trustee of a non-resident trust for CGT purposes, and
- the CGT event happens in relation to a share that is not 'taxable Australian property' (subsection 855-10(1)).

55. Your Gindalbie share will be taxable Australian property on the Implementation Date if the Gindalbie share:

- was an indirect Australian real property interest within table item 2 of section 855-15 (see paragraphs 56 to 59 of this Ruling)
- had been used at any time by you in carrying on a business through a permanent establishment in Australia within table item 3 of section 855-15, or
- was covered by subsection 104-165(3) within table item 5 of section 855-15.

56. An indirect Australian real property interest is a membership interest held by an entity in another entity if the interest passes the principal asset test (section 855-30) and the non-portfolio interest test in section 960-195 (section 855-25).

57. A Gindalbie share passes the principal asset test as the sum of the market values of Gindalbie's assets that were taxable Australian real property exceeds the sum of the market values of its assets that were not taxable Australian real property (subsection 855-30(2)).



58. The non-portfolio interest test is passed if the sum of the direct participation interests held in Gindalbie shares by a non-resident and its associates was 10% or more of the total interests in Gindalbie shares.

59. Therefore, if you are a non-resident shareholder, or the trustee of a non-resident trust for CGT purposes, and you and your associates held at least 10% of the direct participation interests in Gindalbie, you cannot disregard a capital gain made when CGT event G1 happened to your Gindalbie share under subsection 855-10(1).

60. If you were an Ineligible Overseas Shareholder, your Coda share was not an indirect Australian real property interest (table item 2 of section 855-15). Therefore, your Coda share was not taxable Australian property unless you used your Coda share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15).

**Appendix 2 – Legislative provisions**

61. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

|                                       |                        |
|---------------------------------------|------------------------|
| <i>Income Tax Assessment Act 1936</i> | subsection 6(1)        |
| <i>Income Tax Assessment Act 1936</i> | subsection 44(3)       |
| <i>Income Tax Assessment Act 1936</i> | subsection 44(4)       |
| <i>Income Tax Assessment Act 1936</i> | section 45A            |
| <i>Income Tax Assessment Act 1936</i> | subsection 45A(2)      |
| <i>Income Tax Assessment Act 1936</i> | section 45B            |
| <i>Income Tax Assessment Act 1936</i> | paragraph 45B(3)(b)    |
| <i>Income Tax Assessment Act 1936</i> | subsection 45B(8)      |
| <i>Income Tax Assessment Act 1936</i> | section 45C            |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-10(3)   |
| <i>Income Tax Assessment Act 1997</i> | section 104-135        |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-135(3)  |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-135(4)  |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-165(3)  |
| <i>Income Tax Assessment Act 1997</i> | subsection 109-5(2)    |
| <i>Income Tax Assessment Act 1997</i> | subsection 110-25(2)   |
| <i>Income Tax Assessment Act 1997</i> | subsection 110-55(2)   |
| <i>Income Tax Assessment Act 1997</i> | Subdivision 115-A      |
| <i>Income Tax Assessment Act 1997</i> | subsection 115-25(1)   |
| <i>Income Tax Assessment Act 1997</i> | paragraph 116-20(1)(a) |
| <i>Income Tax Assessment Act 1997</i> | Division 125           |
| <i>Income Tax Assessment Act 1997</i> | subsection 125-70(1)   |
| <i>Income Tax Assessment Act 1997</i> | section 197-50         |
| <i>Income Tax Assessment Act 1997</i> | Division 230           |
| <i>Income Tax Assessment Act 1997</i> | section 855-10         |
| <i>Income Tax Assessment Act 1997</i> | subsection 855-10(1)   |
| <i>Income Tax Assessment Act 1997</i> | section 855-15         |
| <i>Income Tax Assessment Act 1997</i> | section 855-25         |
| <i>Income Tax Assessment Act 1997</i> | section 855-30         |
| <i>Income Tax Assessment Act 1997</i> | subsection 855-30(2)   |
| <i>Income Tax Assessment Act 1997</i> | section 960-195        |
| <i>Income Tax Assessment Act 1997</i> | section 975-300        |
| <i>Income Tax Assessment Act 1997</i> | section 977-50         |
| <i>Income Tax Assessment Act 1997</i> | subsection 995-1(1)    |

## Reference

*Previous draft:*

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