Class Ruling

Income tax: scrip for scrip: exchange of shares in Lihir Gold Limited for shares in Newcrest Mining Limited

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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.

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What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997; and

- Subdivision 124-M of the ITAA 1997.

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

Class of entities

3. The class of entities to whom this Ruling applies are the shareholders of Lihir Gold Limited (LGL)(LGL Shareholders) who, on the Implementation Date of the scheme:

(a) participated in the scheme and exchanged their LGL shares for shares in Newcrest Mining Limited (NCM)(NCM Shares) and/or cash;

(b) held their shares in LGL (LGL Shares) on capital account;

(c) were a 'resident of Australia' within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);

(d) were not a 'temporary resident of Australia' within the meaning of subsection 995-1(1) of the ITAA 1997;

(e) were not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M of the ITAA 1997;

(f) [Omitted].

(g) were not subject to the Taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their LGL Shares.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them).

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 27 of this Ruling.

6. 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.

Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 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 information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application from Blake Dawson dated 4 June 2010;
- the Merger Implementation Agreement (MIA) between LGL and NCM dated 4 May 2010;
- 2009 Annual Report of LGL;
- 2009 Annual Report of NCM;
- Scheme Booklet released on 22 July 2010; and
- correspondence from Blake Dawson dated 6 July 2010, 27 July 2010, 28 July 2010, 20 August 2010, 15 September 2010 and 16 September 2010.

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

Overview

10. The scheme that is the subject of this ruling involves the merger of LGL with NCM.

LGL

11. LGL is a public company incorporated in Papua New Guinea (PNG) in 1995 and is a non-resident for Australian income tax purposes.

12. LGL is an international gold mining and gold production company. LGL was at the time of the scheme, listed on the Australian Securities Exchange (ASX), NASDAQ Stock Exchange (NASDAQ), Port Moresby Stock Exchange (POMSoX) and until 12 July 2010, the Toronto Stock Exchange (TSX).

NCM

13. NCM is an international gold and copper mining company. NCM is an Australian resident public company and its ordinary shares are listed on the ASX. NCM's ordinary shares are also listed on the New York Stock Exchange in the form of American Depositary Receipts.

Disposal of LGL Shares

The Scheme

14. On 4 May 2010, LGL and NCM signed a MIA under which NCM proposed to acquire all LGL Shares under a Scheme of Arrangement under section 250 of the *Companies Act 1997* of Papua New Guinea (PNG Companies Act) (the scheme).

15. The scheme was approved by the LGL Shareholders on 23 August 2010 and approved by the National Court of PNG on 27 August 2010.

16. On 13 September 2010, the scheme was implemented. As a result of the scheme, LGL became a wholly-owned subsidiary of NCM.

Terms of the Scheme

17. LGL Shareholders who participated in the scheme had three options for consideration for the transfer of their LGL shares to NCM (Scheme Consideration):

- Mixed Consideration – under which LGL Shareholders received one NCM Share for every 8.43 LGL Shares and A$0.225 per LGL Share (less any interim dividend recommended, declared or paid or resolved to be recommended, declared or paid by LGL on or after the date of the MIA where the record date for the payment of that dividend occurred on or prior to the Implementation Date); or

- Maximum Cash Consideration – under which LGL Shareholders received all of their Scheme Consideration in cash (subject to scale back as set out in paragraph 21 of this Ruling); or
- Maximum Share Consideration – under which LGL Shareholders received all of their Scheme Consideration in NCM Shares (subject to scale back as set out in paragraph 21 of this Ruling).

18. If no choice was made, the LGL Shareholder was deemed to have elected the Maximum Share Consideration.

19. The total number of NCM Shares issued under the scheme was not to exceed 280,988,130 NCM Shares, and the maximum amount of cash to be paid in aggregate by NCM under the scheme was not to exceed $1 billion.

20. To the extent that valid Maximum Share Consideration elections and valid Maximum Cash Consideration elections could be satisfied in full, LGL Shareholders who made (or were deemed to have made) a valid Maximum Share Consideration election received only NCM Shares and LGL Shareholders who made a valid Maximum Cash Consideration election received only cash. The number of NCM Shares or the amount of cash they received in excess of the proportions set out in the Mixed Consideration was calculated by converting the number of NCM Shares or the amount of cash (as applicable) they would have otherwise received. For this purpose, NCM Shares were valued at the Newcrest VWAP (as defined in the MIA).

21. To the extent that valid Maximum Share Consideration elections and valid Maximum Cash Consideration elections could not be satisfied in full, they were to be scaled back on a pro-rata basis. In those circumstances where a valid Scheme Consideration election could not be satisfied in full, LGL Shareholders were to receive the balance of their Scheme Consideration in cash (if Maximum Share Consideration was elected) or in NCM Shares (if Maximum Cash Consideration was elected).

22. A LGL Shareholder whose address as shown in the LGL share register was in a jurisdiction other than PNG, Australia, the United States, the United Kingdom, Canada, Singapore, Hong Kong, New Zealand, the People's Republic of China, Indonesia, France, Japan, Ireland or Switzerland was an Ineligible Overseas Shareholder for the purposes of the scheme.

23. A LGL Shareholder who would otherwise receive a small holding of NCM Shares under the scheme could choose to be an Electing Unmarketable Parcel Shareholder.

24. Ineligible Overseas Shareholders and Electing Unmarketable Parcel Shareholders did not receive NCM Shares. Instead, the NCM Shares that would otherwise have been issued to them were issued to the Sale Agent on the Implementation Date and they received an amount equivalent to the average price per NCM Share obtained by the Sale Agent.

25. LGL Shareholders with fractional entitlements to a part of a NCM Share had their fractional entitlement rounded up or rounded down to the nearest whole number of NCM Shares (rounded up if the fractional entitlement was equal to or greater than one half, rounded down if the fractional entitlement was less than one half).

Other matters

26. No interim dividend was paid to the LGL shareholders by LGL.

27. The closing price of NCM shares on the Implementation Date of 13 September 2010 was $38.49.

Ruling

CGT event A1 happened on the disposal of LGL Shares

28. CGT event A1 happened as a result of the disposal by a LGL Shareholder of their LGL Shares to NCM under the scheme described in the Ruling (subsection 104-10(1)).

29. The event happens when a contract to dispose of the asset is entered into or if there is no contract, when the change of ownership occurs (section 104-10(3)).

30. The time of the event was when the LGL Shares were transferred to NCM on the Implementation Date under the scheme (paragraph 104-10(3)(b)).

Capital gain or loss

31. A LGL Shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a LGL Share exceeded its cost base. A LGL Shareholder made a capital loss if those capital proceeds were less than its reduced cost base (subsection 104-10(4)).

Capital proceeds

32. The capital proceeds from a CGT event are the money and the market value of any property received or entitled to be received (worked out at the time of the event happening) (subsection 116-20(1)).

33. The capital proceeds for each LGL share are the cash consideration and market value of the NCM Shares received in respect of CGT event A1 happening, worked out at the time of the CGT event (being the Implementation date).

If a capital gain is made

Availability of scrip for scrip roll-over

34. Subject to the qualification in paragraph 35 of this Ruling, a LGL Shareholder who made a capital gain from the disposal of a LGL share may choose scrip for scrip roll-over under Subdivision 124-M (section 124-780).

35. Scrip for scrip roll-over cannot be chosen if any capital gain the LGL Shareholder made from replacement NCM Shares would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

If scrip for scrip roll-over is chosen

36. If a LGL Shareholder chooses scrip for scrip roll-over, the capital gain made from the disposal of a LGL Share is disregarded to the extent the LGL Shareholder received replacement NCM Shares for the disposal of their LGL Shares. The capital gain is not disregarded to the extent that the LGL Shareholder received cash for the disposal of their LGL Shares (subsections 124-785(1) and 124-790(1)).

If scrip for scrip roll-over is not chosen, or cannot be chosen

37. If a LGL Shareholder does not, or cannot, choose scrip for scrip roll-over, the capital gain made from the disposal of a LGL Share is not disregarded.

Discount capital gain

38. LGL Shareholders who made a capital gain where scrip for scrip roll-over is not chosen or cannot be chosen, may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A.

Cost base of NCM Shares

If scrip for scrip roll-over is chosen

39. Where scrip for scrip roll-over is chosen, the first element of the cost base of each NCM Share is worked out by reasonably attributing to it the cost base of the LGL Share exchanged for the relevant NCM Share. The cost base is reduced by so much of it that is attributable to the cash consideration (subsections 124-785(2) and (3)).

40. The first element of the reduced cost base of the NCM Share is calculated in the same manner (subsection 124-785(4)).

41. In working out the amount of the cost base of a LGL Share that is reasonably attributable to the cash consideration, the Commissioner accepts the following method:

$$\text{Cost base of LGL Shares exchanged} \times \frac{\text{Cash consideration}}{\text{Market value of NCM Shares plus cash consideration}}$$

The remaining portion of the cost base is used to determine the first element of the cost base (and reduced cost base) for the replacement NCM Shares issued as consideration for the transfer of the LGL Shares (subsections 124-785(2), 124-785(3) and 124-785(4)). The Commissioner accepts that the cost base of the NCM Shares can be worked out using the following method:

$$\text{Cost base of LGL Shares exchanged} \times \frac{\text{Market value of NCM Shares}}{\text{Market value of NCM Shares plus cash consideration}}$$

If scrip for scrip roll-over is not chosen, or cannot be chosen

42. Where scrip for scrip roll-over is not, or cannot, be chosen, the first element of the cost base and reduced cost base of each NCM Share received is equal to the market value of the part of the LGL Shares given in exchange for the NCM Share (subsections 110-25(2) and 110-55(2)). The Commissioner accepts the following method for working out the relevant part of the LGL Shares given in exchange for NCM Shares:

$$\text{Market value of LGL Shares exchanged} \times \frac{\text{Market value of NCM Shares}}{\text{Market value of NCM Shares plus cash consideration}}$$

43. In working out the market value of a LGL Share, the Commissioner accepts the following method:

$$\text{Market value of LGL Share} = \text{Cash consideration per LGL Share exchanged} + \frac{1}{\text{Number of LGL Shares exchanged for each NCM Share}} \times \text{Market value of NCM Share on Implementation Date}$$

Acquisition date of NCM Shares

44. LGL Shareholders acquired their NCM Shares on the date those shares were issued to each LGL Shareholder, that is, the Implementation Date (item 2 of the table in section 109-10).

45. However, for the purposes of determining eligibility to a discount capital gain, LGL Shareholders who choose scrip for scrip roll-over are taken to have acquired their NCM Shares when they acquired the corresponding LGL Shares (item 2 of the table in subsection 115-30(1)).

Commissioner of Taxation
10 November 2010

Appendix 1 – Explanation

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.

46. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this ruling are outlined in the Ruling part of this document.

47. The significant tax consequence is availability of scrip for scrip roll-over under Subdivision 124-M. Scrip for scrip roll-over 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 the exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

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

(a) shares in a company are exchanged for shares in another company;

(b) the exchange occurs as part of a single arrangement;

(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.

49. Under the scheme the conditions for roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted other than the following matters relating to the determination of market value.

50. The Commissioner accepts that the market value of the NCM Shares on the Implementation Date of the scheme may be determined by reference to the closing share price of NCM Shares traded on the ASX on that day. The closing price of NCM Shares on the Implementation Date was $38.49.

Appendix 2 – Detailed contents list

51. 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:

- CGT asset
- CGT capital proceeds
- CGT cost base
- CGT event A1
- scrip for scrip roll-over
- takeovers & mergers

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)
- ITAA 1997 109-10
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-55
- ITAA 1997 110-55(2)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780
- ITAA 1997 124-785(1)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(3)
- ITAA 1997 124-785(4)
- ITAA 1997 124-790(1)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 Div 230
- ITAA 1997 995-1(1)
- Companies Act 1997 (PNG) 250
- TAA 1953
- Copyright Act 1968

ATO references

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