

3 May 2024

ATO Correspondence to Shareholders

Further to the announcement made on 23 February 2024 “ATO Decision Regarding Outback Goldfields Transaction”, **Petratherm Limited** (ASX: PTR) (**PTR** or the **Company**) informs shareholders that it has received final correspondence on the matter from the ATO.

Attached to this announcement is:

- Shareholder Letter: Petratherm Ltd – In specie distribution of Outback Goldfield Corp shares
- Determination pursuant to subsection 45B(3) of the ITAA 1936

This correspondence has been despatched to relevant shareholders today.

ENDS

This announcement has been authorised for release on the ASX by the Directors of Petratherm Limited.

For further information:

Katelyn Adams

Company Secretary

08 8133 5000

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PETRATHERM LTD
C/- HLB MANN JUDD (SA) PTY LTD
P O BOX 377
KENT TOWN SA 5071

Our Reference: 1052239113098

15 April 2024

ATTENTION: KATELYN ADAMS and SIMON O'LOUGHLIN

Petratherm Ltd – In specie distribution of Outback Goldfield Corp shares

Dear Directors,

The Commissioner has prepared this letter for Petratherm Ltd (Petratherm) to circulate to shareholders at the Record Date of 13 April 2021 (Relevant Shareholders) to advise them of the tax consequences of the in specie distribution of Outback Goldfield Corp (Outback) shares on 21 April 2021, whereby Relevant Shareholders received Outback shares based on the number of Petratherm shares they held on the Record Date (Outback Distribution).

At Petratherm's Annual General Meeting on 11 December 2020, Petratherm shareholders voted to approve the Outback Distribution by way of pro-rata share capital reduction under sections 256B and 256C of the *Corporations Act 2001*. Details of the scheme, which involved the sale of Victorian mining tenements by Petratherm to Outback (formerly Skarb Exploration Corp) under an Asset Purchase Agreement in return for Outback shares, and the in specie distribution of those shares to Petratherm shareholders, were set out in the Notice of Annual General Meeting and Explanatory Memorandum announced to the Australian Securities Exchange (ASX) on 9 November 2020. The Commissioner notes the Explanatory Memorandum provided a summary of the potential income tax consequences of the Outback Distribution for shareholders.¹

The Commissioner further notes Petratherm's ASX announcement dated 23 February 2024, which outlines the Commissioner's view that the Outback Distribution will be deemed, in part, an unfranked dividend for taxation purposes. The Commissioner notes the concerns communicated to Petratherm that this announcement did not fully reflect his engagement and correspondence with the company over the 2021 – 2024 years in respect of the Outback Distribution. The Commissioner has engaged with Petratherm in an open manner and provides the following information to assist Petratherm and its shareholders.

The Commissioner disagrees with the views in the Explanatory Memorandum in respect of demerger capital gains tax (CGT) roll-over relief and the CGT consequences for Petratherm shareholders in connection with the Outback Distribution. The Commissioner's view set out in this letter relies on the information provided in the course of class ruling and engagement requests by Petratherm (which have since been withdrawn).

The Commissioner has prepared this letter to help Relevant Shareholders understand and comply with their obligations under the tax law. Relevant Shareholders may need to amend their income tax return for the year ended 30 June 2021 to be in line with the Commissioner's view, or, if they are yet to lodge, prepare their return(s) in line with the Commissioner's view.

Summarised taxation consequences²

Portion of Outback Distribution sourced from Petratherm's profits is a dividend

The Commissioner has made a determination under paragraph 45B(3)(b) of the *Income Tax Assessment Act 1936* (ITAA 1936) that part of the Outback Distribution is taken under section 45C of the ITAA 1936 to be an unfranked dividend paid by Petratherm to Relevant Shareholders out of Petratherm's profits on 21 April 2021

¹ At Section 3.16 of the Explanatory Memorandum.

² These summarised taxation consequences apply to Petratherm's Relevant Shareholders who received the Outback Distribution on 21 April 2021 (Payment Date), receiving Outback shares based on the number of Petratherm shares they held on the Record Date (13 April 2021). This does not include shareholders ineligible to receive the Outback Distribution whose pro-rata entitlement of Outback shares were sold on their behalf under a broker facility.

(Payment Date). The Commissioner issued the determination to Petratherm on 15 April 2024. Petratherm is required to provide the determination to shareholders under section 45D of the ITAA 1936.

The Outback Distribution of \$0.51360 per Outback share received³ represented the following components:

- an unfranked dividend of \$0.50878 (Dividend Component), and
- a capital payment of \$0.00482 (Capital Component).

The income tax consequences of the Outback Distribution are summarised below for Relevant Shareholders that held their shares on capital account⁴.

This information does not apply to anyone subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in respect of the Outback Distribution, or that acquired their Petratherm shares under an employee share or option scheme.

Dividend Component of Outback Distribution is assessable

Relevant Shareholders must include the Dividend Component in their assessable income pursuant to subsection 44(1) of the ITAA 1936 whether they are a 'resident of Australia' or a 'non-resident' as defined in subsection 6(1) of the ITAA 1936. Relevant Shareholders that are a non-resident for the year ended 30 June 2021 will be liable to withholding tax on the amount of the unfranked dividend pursuant to subsection 128B(1) of the ITAA 1936.

The Dividend Component is *not* a demerger dividend.⁵

To work out the Dividend Component received, a Relevant Shareholder can multiply the number of Outback Shares received by \$0.50878. For example, if a Relevant Shareholder received 100 Outback shares, the Dividend Component received under the Outback Distribution would be $100 \times \$0.50878 = \50.88 .

Outback Distribution may have CGT consequences

CGT event G1

Broadly, CGT event G1 happens if you receive a capital payment (an amount which is not assessable) from a company in respect of your share in the company. You make a capital gain if the capital payment exceeds your share's cost base. You cannot make a capital loss.

CGT event G1 happened when Relevant Shareholders received the Capital Component on the Payment Date in respect of their Petratherm shares (section 104-135 of the ITAA 1997). The capital payment received was \$0.0008 per Petratherm share. If the cost base of each Petratherm share a Relevant Shareholder owned was or exceeded \$0.0008, they did not make a capital gain or loss. However, the cost base of each Petratherm share was reduced by \$0.0008 (subsection 104-135(4)). If the cost base of a Petratherm share was less than \$0.0008, the Relevant Shareholder made a capital gain in respect of that particular share, equal to the difference between the cost base and \$0.0008. The cost base (and reduced cost base) of that particular share would be reduced to nil (subsection 104-135(3)).

CGT event C2

If a Relevant Shareholder sold Petratherm shares they owned at the Record Date prior to receiving the Outback Distribution, CGT event C2 happened in respect of the right to receive the Outback Distribution on the Payment Date (section 104-25 of the ITAA 1997). Guidance to determine if a capital gain or loss arises in such circumstances is included in the Appendix to this letter which provides an explanation of taxation consequences.

Non-resident shareholders

If a Relevant Shareholder was a 'non-resident' as defined in subsection 6(1) of the ITAA 1936, they can disregard any capital gain made in relation to their Petratherm shares if their Petratherm shares were not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Requesting amendment to assessments

³The monetary value of the 33,333,333 Outback shares Petratherm received as consideration for the sale of the Victorian gold assets was \$18,654,783. Petratherm recognised an accounting loss of \$1,534,664 on revaluation of the Outback shares before the shares were distributed to shareholders. The amount of \$0.51360 per Outback share is calculated as: $(\$18,654,783 \text{ consideration less } \$1,534,664 \text{ loss recognised}) \div 33,333,333 \text{ Outback shares distributed}$.

⁴ That is, did not hold their Petratherm shares as revenue assets (as defined in section 977-50 of the *Income Tax Assessment Act 1997* (ITAA 1997)) or as 'trading stock' (as defined in subsection 995-1(1) of the ITAA 1997).

⁵ A demerger dividend is non-assessable non-exempt income (subsections 44(3) and (4) of the ITAA 1936).

If Relevant Shareholders have lodged their income tax returns contrary to the position set out in this letter, they should request an amendment to their assessment for the income year ended 30 June 2021 (or relevant substituted accounting period) to:

- increase assessable income by the amount of the Outback Distribution received which represented an unfranked dividend (being the Dividend Component of \$0.50878 per Outback share received), and
- reflect the correct CGT outcomes for CGT event G1 or CGT event C2 that happened on the Payment Date, as applicable.

If you contact the ATO regarding requesting an amendment please quote the project code: **1-11PI6HIP - s45B Determination 2024**. Information on how to request an amendment can be found at [Amend your tax return | Australian Taxation Office \(ato.gov.au\)](#).

As a section 45B determination has been made, relevant assessments can be amended within 4 years after the day on which a Relevant Shareholder received a notice of assessment for the year ended 30 June 2021 (or relevant substituted accounting period).⁶ Relevant Shareholders can lodge an objection where it is outside of the time limits for an amendment.

Penalties and interest

Any additional amount of tax that becomes payable as a result of an assessment being amended is subject to penalty and shortfall interest charge (SIC). However, you can ask the Commissioner to exercise his discretion to reduce (remit) the penalty or SIC in full or in part.

In deciding whether to reduce the penalty or SIC in full or in part, the Commissioner will consider, amongst other things:

- shareholders may have lodged their income tax returns based on the general summary of the potential income tax consequences outlined in the Explanatory Memorandum, and the understanding that the Outback Distribution was wholly a return of capital, and
- shareholders being subsequently advised of the Commissioner's position outlined in this letter.

Further information regarding remission of penalties and interest can be found at [Remission of penalties | Australian Taxation Office \(ato.gov.au\)](#) and [Remission of interest charges | Australian Taxation Office \(ato.gov.au\)](#).

Objection

Relevant Shareholders have objection rights in relation to their tax assessment for the income year ended 30 June 2021 (or relevant substituted accounting period), being the year in which the Outback Distribution was received. Petratherm and Relevant Shareholders can also object to the section 45B determination made on 15 April 2024.

If you would like to object to the determination, and/or your amended tax assessment, you must do so within 60 days from the date the determination was issued, or your notice of amended assessment is issued.

If you contact the ATO regarding making an objection please quote the project code: **1-11PI6HIP - s45B Determination 2024**. Further information on how to object can be found at [Object to an ATO decision | Australian Taxation Office \(ato.gov.au\)](#).

Information on how to contact the Australian Taxation Office for further information can be found at [Contact us | Australian Taxation Office \(ato.gov.au\)](#).

Yours sincerely,

Rebecca Saint
Deputy Commissioner of Taxation

⁶ *Income Tax Assessment (1936 Act) Regulations 2015*, Regulation 14, item 8.

Appendix - Explanation of taxation consequences

Demerger relief is not available

Demerger relief (being demerger CGT roll-over under Division 125 and demerger dividend treatment under subsections 44(3) and (4) of the ITAA 1936) 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 Outback was not a 'demerger subsidiary' of Petratherm when the 'restructuring' of the 'demerger group' headed by Petratherm commenced for the purposes of subsections 125-65(6) and 125-70(1).

Application of sections 45B and 45C

Section 45B of the ITAA 1936 is an anti-avoidance provision which, if applicable, allows the Commissioner to make a determination under subsection 45B(3) that section 45C applies. Generally, the effect of such a determination is that all or part of the capital benefit paid to shareholders of the company is treated as an unfranked dividend paid out of the company's profits.

Section 45B

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)).

For the reasons provided in the determination issued by the Commissioner to Petratherm on 15 April 2024 (which Petratherm is required to provide to shareholders under section 45D of the ITAA 1936), the Outback Distribution satisfies all of the above conditions.

Section 45C

Under subsection 45C(1) of the ITAA 1936, if the Commissioner makes a determination under subsection 45B(3), the amount of the capital benefit, or part of the benefit, is taken, for the purposes of the ITAA 1936 and the ITAA 1997, to be an unfranked dividend that is paid by the company to shareholders at the time each shareholder is provided with the capital benefit.

CGT Consequences

CGT Event G1

CGT event G1 happens if a shareholder receives a capital payment (an amount which is not assessable) from a company in respect of their shares in the company (section 104-135 of the ITAA 1997). CGT event G1 happened when Relevant Shareholders received the Capital Component in respect of Petratherm shares they owned at the Record Date and continued to own at the Payment Date. The capital payment received was \$0.0008 per Petratherm share.

If the capital payment of \$0.0008 per Petratherm share received is less than or equal to the cost base of a Relevant Shareholder's Petratherm shares, the cost base and reduced cost base of each Petratherm share is reduced by \$0.0008 (subsection 104-135(4)). A capital loss cannot be made when CGT event G1 happens (Note 1 to subsection 104-135(3)).

A Relevant Shareholder made a capital gain in relation to Petratherm shares held at the Record Date if the capital payment received of \$0.0008 per Petratherm share is more than the cost base of each of those Petratherm shares. The capital gain is equal to the amount of the excess, and the cost base and reduced cost base of each relevant Petratherm share is reduced to nil (subsection 104-135(3)).

CGT Event C2

CGT event C2 happened to a Relevant Shareholder who owned a Petratherm share at the Record Date but ceased to own the Petratherm share before the Payment Date (section 104-25 of the ITAA 1997). That is, when the shareholder sold their Petratherm shares after the Record Date but before the Payment Date and they

received the Outback Distribution. The right to receive the Outback Distribution ended by the right being discharged or satisfied when the Outback Distribution was made.

A Relevant Shareholder made a capital gain if the capital proceeds from the ending of the right, being the amount of the Outback Distribution of \$0.51360 per Outback share (section 116-20 of the ITAA 1997), were more than the cost base of their right to receive the distribution on the Payment Date. The amount of the capital gain is equal to the excess (subsection 104-25(3)). The capital gain from CGT event C2 should be reduced by the part of the Outback Distribution that is included in a Relevant Shareholder's assessable income (section 118-20 of the ITAA 1997), being the Dividend Component, which equates to \$0.50878 per Outback share.

A Relevant Shareholder made a capital loss if the amount of the Outback Distribution received is less than the reduced cost base of the right to receive the distribution. The amount of the capital loss is equal to the difference (subsection 104-25(3)).

The cost base of a Relevant Shareholder's right to receive the Outback Distribution is worked out under Division 110 (modified by Division 112). Any amounts applied in calculating whether a capital gain or loss arose in respect of the Petratherm shares disposed of (after the Record Date but before the Payment Date) should be excluded from the cost base or reduced cost base of the right to receive the Outback Distribution.

Discount capital gain

A Relevant Shareholder can treat a capital gain made when CGT event G1 or C2 happened as a discount capital gain if they acquired their Petratherm shares at least 12 months before the Payment Date (subsection 115-25(1) of the ITAA 1997), provided the other conditions in Division 115 of the ITAA 1997 are satisfied.

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

Time of acquisition, cost base and reduced cost base of Outback shares

The first element of the cost base and reduced cost base of each Outback share received on the Payment Date was \$0.51360 per Outback share (section 112-20 of the ITAA 1997).

A Relevant Shareholder is taken to have acquired the Outback shares they received by way of the Outback Distribution on the Payment Date (subsection 109-5(2) of the ITAA 1997).

Non-resident shareholders

Relevant Shareholders can disregard a capital gain or capital loss made from a CGT event if just before the CGT event happened, they were a foreign resident as defined in subsection 995-1(1) of the ITAA 1997⁷ 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' as defined in section 855-15 of the ITAA 1997 (subsection 855-10(1) of the ITAA 1997).

⁷ Being a person who is not a resident of Australia for the purposes of the ITAA 1936.



PETRATHERM LTD
C/- HLB MANN JUDD (SA) PTY LTD
ATTN: KATELYN ADAMS
PO BOX 377
KENT TOWN SA 5071

Our Reference: 1052131782064
Client ID: 17 106 806 884

15 April 2024

Determination pursuant to subsection 45B(3) of the ITAA 1936

Dear Katelyn,

We refer to the return of capital of Outback Goldfields Corp (Outback) shares that Petratherm Ltd (Petratherm) paid to shareholders on 21 April 2021.

Attached is a copy of a determination made on behalf of the Deputy Commissioner of Taxation and in the name of the Deputy Commissioner of Taxation by me, a duly authorised officer. It is provided to you pursuant to subsection 45D(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

In accordance with paragraph 45D(1A)(b) of the ITAA 1936, Petratherm must give a copy of the notice (the copy of the determination provided with this letter) to the relevant taxpayers.

We have included an explanation of the reasons for this decision.

We have also provided a separate letter summarising the tax consequences of the determination for shareholders.

Right to object

If a taxpayer to whom this determination relates is dissatisfied with the determination, pursuant to subsection 45D(4) of the ITAA 1936, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

For more information on objections, including how long you have to lodge an objection, go to ato.gov.au and type 'objection' in the search box.

For information about your rights and obligations go to ato.gov.au/taxpayerscharter

Yours sincerely,
Rebecca Saint
Deputy Commissioner of Taxation

NEED HELP?

If you have any questions, you can phone us on **13 28 69** between 8.00am and 5.00pm, Monday to Friday. Ask for Niel Kothari on extension **35122**.

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**DETERMINATION MADE PURSUANT TO SUBSECTION 45B(3) OF THE
INCOME TAX ASSESSMENT ACT 1936**

The shareholders of Petratherm Ltd

I, Rebecca Saint, Deputy Commissioner of Taxation, Public Groups, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation by Instrument of the Commissioner's Delegations and Authorisations signed and dated on 26 March 2024 determine under paragraph 45B(3)(b) of the *Income Tax Assessment Act 1936* (ITAA 1936) that section 45C of the ITAA 1936 applies to \$0.50878 per Outback Goldfields Corp share provided by Petratherm Ltd on 21 April 2021 to shareholders registered on the record date, being 13 April 2021.

In accordance with section 45C of the ITAA 1936, the distribution of \$0.50878 per Outback Goldfields Corp share is taken to be an unfranked dividend paid out of the profits of Petratherm Ltd to shareholders on 21 April 2021.

Signed at Brisbane, this 15th day of April 2024.

Rebecca Saint
Deputy Commissioner of Taxation, Public Groups

Per

Niel Kothari
Director, Public Groups, Advice & Guidance

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Reasons for our decision

Facts

Background

1. Petrathern Ltd (Petrathern) is an Australian resident for income tax purposes, incorporated on 24 October 2003.
2. As at 13 April 2021, Petrathern had 198,917,806 ordinary shares on issue.
3. Petrathern has never previously paid a dividend to shareholders.
4. Approximately 0.06% of Petrathern shareholders are not residents of Australia.

Financials

5. As at 30 June 2021 Petrathern, on a stand-alone basis, recorded:
 - a cash balance of \$3.1 million
 - accumulated losses of \$18 million
 - net assets of \$5 million, and
 - profit after income tax expense for the year of \$17,868,244.

Transaction

6. On 9 October 2020, Petrathern entered into an agreement with Skarb Exploration Corp (Skarb), a Canadian company listed on the Canadian Securities Exchange, whereby Skarb would acquire Petrathern's Victorian gold assets for purchase consideration of 100,000,000 shares in Skarb (or 50,000,000 shares if pre-emption rights were exercised by Petrathern). The agreement was subject to Petrathern obtaining shareholder approval to distribute the Skarb shares received as consideration by way of dividend, reduction of share capital or other type of distribution in-specie to Petrathern's shareholders on a pro-rata basis.
7. The Victorian gold assets comprised the following mining tenements:
 - Yuengroon Gold Project (EL 6897 & EL 7280)
 - Silver Spoon Gold Project (ELA 6951)
 - Glenfine Gold Project Farm-in & Joint Venture (EL 5434, EL 5537 & EL 5344)
 - Ballarat West Gold Project (ELA 7276)
8. On 11 December 2020, a shareholder resolution was carried to approve the in-specie distribution of 100% of the Skarb shares received by Petrathern as consideration for the sale of its Victorian gold assets to its shareholders on a pro-rata basis by way of a capital reduction.
9. On 15 December 2020, the sale of Petrathern's Victorian gold assets was completed.
10. Prior to the completion of the sale, Skarb changed its name to Outback Goldfields Corp (Outback) and completed a 3:1 capital consolidation. As a result of Outback's consolidation, the consideration for Petrathern's Victorian gold assets was 33,333,333 shares in Outback, representing a 57% ownership interest.
11. The monetary value of the 33,333,333 Outback shares Petrathern received as consideration was \$18,654,783. An accounting gain of \$18,520,909 was recognised by Petrathern on disposal of its Victorian gold assets and a loss of \$1,534,664 was subsequently recognised on revaluation of the Outback shares before the shares were distributed in-specie to shareholders.

Victorian assets

12. The Victorian gold assets were purchased by Petrathern for a total of \$6,372.90, as follows:
 - Yuengroon Gold Project - \$2,106.80
 - Silver Spoon Gold Project - \$2,106.80
 - Glenfine Gold Project Farm-in & Joint Venture – Nil, as part of a joint venture agreement with an earn-in agreement
 - Ballarat West Gold Project - \$2,159.30
13. Prior to the sale Petrathern spent a total of \$154,198.51 on exploration and evaluation work on the assets, as follows:

- Yuengroon Gold Project - \$111,070.51
- Silver Spoon Gold Project - \$13,047.28
- Glenfine Gold Project Farm-in & Joint Venture – \$22,802.88
- Ballarat West Gold Project - \$7,277.84

14. The source of funds for the acquisition of the assets, and exploration and evaluation expenditure, was share capital.

Return of capital

15. On 21 April 2021, Petratherm made an in-specie distribution of 33,333,333 Outback shares by way of capital reduction to its shareholders on a pro-rata basis (Return of Capital).
16. Petratherm provided Outback shares to Petratherm shareholders based on the number of Petratherm shares each shareholder held as at 13 April 2021 (Record Date).
17. Following the Return of Capital Petratherm did not hold any shares in Outback.
18. Petratherm debited \$17,120,119 against its share capital account in respect of the Return of Capital.

Explanation

All legislative references are to the Income Tax Assessment Act 1936

Section 45B – schemes to provide certain benefits

19. Section 45B is an anti-avoidance provision to ensure that companies do not distribute what are effectively profits to shareholders as preferentially-taxed capital rather than dividends. The substituted dividend rule of section 45B requires that the Commissioner identify and weigh all of the relevant circumstances surrounding the provision of a 'capital benefit' to the relevant taxpayer, in order to determine whether the object of delivering a tax preferred receipt to the shareholders constitutes a more than incidental purpose of the scheme.
20. The Commissioner has published Practice Statement Law Administration PS LA 2008/10 *Application of section 45B of the Income Tax Assessment Act 1936 to share capital reductions* (PS LA 2008/10) which provides a broad outline of section 45B covering the scheme, capital benefit, obtaining a tax benefit, purpose, and determinations.
21. Paragraph 33 of PS LA 2008/10 acknowledges that section 45B is not a 'profits first' rule. However, paragraph 34 explains that by implication it does presuppose some objective non-tax basis for distributing capital rather than profits, where both are available.
22. Paragraph 34 of PS LA 2008/10 explains that profits are a gain to the company which, when surplus to the company's needs, are meant to be divided amongst shareholders. Share capital, on the other hand, is the money contributed by the company's members for carrying out its objects until some event or circumstance renders its retention unnecessary, whereupon it may be returned.

The application of section 45B

23. In so far as it relates to the provision of a capital benefit, subsection 45B(2) provides that section 45B applies where:
 - there is a scheme under which a person is provided with a capital benefit by a company
 - 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, 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 taxpayer (the 'relevant taxpayer') to obtain a tax benefit.

Scheme

24. As outlined in paragraph 40 of PS LA 2008/10, a scheme for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal. Therefore, the Return of Capital satisfies the definition of a scheme.

Capital benefit

25. A capital benefit is explained in subsection 45B(5). The Return of Capital made by Petratherm to its shareholders was a capital benefit as it was a distribution to shareholders of a share capital amount.

Tax benefit

26. Petratherm shareholders have obtained a tax benefit (subsection 45B(9)) by reason of the lower amount of tax payable on a return of capital compared to if the capital benefit had been a dividend.

Relevant circumstances

27. Section 45B applies where, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8), a company provided certain capital payments to its shareholders for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.
28. Having regard to the relevant circumstances of the scheme, the Commissioner considers that the Return of Capital was entered into or carried out for a more than incidental purpose of enabling Petratherm shareholders to obtain a tax benefit.
29. In reaching this view, the Commissioner considers that the following relevant circumstances strongly indicate the existence of the requisite purpose:

- Paragraph 45B(8)(a) includes in the relevant circumstances of a scheme the extent to which the capital benefit is attributable to capital or the extent to which the capital benefit is attributable to profits (realised and unrealised) of the company or of an associate of the company. As explained in paragraph 60 of PS LA 2008/10, the provision of share capital attributable to profits ordinarily leads to the conclusion that section 45B will apply. This is because the statutory purpose of section 45B is to ensure that amounts made in substitution for dividends are taxed as dividends, as stated in paragraph 45B(1)(b).

An amount of capital of \$160,572 can be directly traced to Petratherm's investment into the Victorian gold assets, comprising acquisition costs of the assets (\$6,373) plus exploration and evaluation expenditure (\$154,199). To the extent consideration received by Petratherm from the sale of the Victorian gold assets exceeds the amount of capital invested of \$160,572, this represents profit realised on the sale of the assets. As such, \$16,959,547 of the Return of Capital (\$17,120,119 debited against Petratherm's share capital account less \$160,572 capital invested) is attributable to profit.

- Paragraph 45B(8)(h) looks at whether the interests held by shareholders after the distribution of share capital are the same as they would have been if an equivalent dividend had been paid. The interests held in Petratherm by shareholders after the Return of Capital are the same as they would have been if an equivalent dividend had been paid.
 - Paragraph 177D(2)(b) requires consideration of the form and substance of the scheme. The availability of share capital in excess of \$160,572 to return to Petratherm's shareholders is not supported by the facts. As described above in the analysis pertaining to paragraph 45B(8)(a), \$16,959,547 of the Return of Capital is attributable to profit. As such, in substance \$16,959,547 of the Return of Capital is a distribution of profit rather than share capital.
 - Paragraphs 177D(2)(e) and 177(2)(f) examine the impact of the scheme on taxpayers' financial positions. The changes in the financial positions of the shareholders and Petratherm are the same as the changes that would have occurred had an equivalent dividend been paid. This suggests the Return of Capital performed the same function as a dividend.
30. Accordingly, the Commissioner has made a determination under subsection 45B(3) that section 45C applies to part of the Return of Capital received by Petratherm shareholders. Accordingly, part of the Return of Capital will be taken to be an unfranked dividend pursuant to section 45C.

Unfranked dividend amount

31. Since the Commissioner has determined that \$16,959,547 of the Return of Capital is attributable to profit, the unfranked dividend amount received by Petratherm shareholders is \$0.50878 per Outback share, on the basis that: \$16,959,547 divided by 33,333,333 Outback shares distributed, equals a profit component per Outback share of \$0.50878.

Effect of determination

32. The part of the Return of Capital deemed by the Commissioner to be an unfranked dividend is assessable under section 44. Section 44 provides that the assessable income of a shareholder in a company includes dividends paid to the shareholder by the company out of profits derived from any source.
33. For non-resident shareholders, the part of the Return of Capital deemed by the Commissioner to be an unfranked dividend is subject to withholding tax under subsection 128B(1), unless excluded by another provision.

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