



## **Class Ruling:**

### **Income tax: UNiTAB Limited Employee Share Bonus Plan**

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#### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

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

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are sections:
- 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - 139BA of the ITAA 1936;
  - 139C of the ITAA 1936;
  - 139CA of the ITAA 1936;
  - 139CC of the ITAA 1936;
  - 139CD of the ITAA 1936;
  - 139CE of the ITAA 1936;
  - 139E of the ITAA 1936;
  - 139FA of the ITAA 1936;
  - 139FB of the ITAA 1936;
  - 139FG of the ITAA 1936;
  - 139GB of the ITAA 1936;

- 139GF of the ITAA 1936;
- 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- 115-5 of the ITAA 1997;
- 115-10 of the ITAA 1997;
- 115-15 of the ITAA 1997;
- 115-20 of the ITAA 1997;
- 115-25 of the ITAA 1997;
- 115-100 of the ITAA 1997;
- 130-80 of the ITAA 1997; and
- 130-83 of the ITAA 1997.

## Class of persons

3. The class of persons to whom this Ruling applies are the Australian resident employees of UNiTAB Limited and its Group Companies listed in paragraph 4 ('UNiTAB'), who receive shares in UNiTAB Limited under the UNiTAB Limited Employee Share Bonus Plan ('Plan'). In this Ruling, this class of persons is referred to as the 'Participating Employees'.

4. The UNiTAB Group of companies involved in this Plan include UNiTAB Limited and its 100% owned subsidiaries:

- SA TAB Pty Limited
- NT TAB Pty Limited
- UNiTAB Gaming Pty Limited
- Gaming Systems Qld Pty Limited
- Broadcasting Station 4IP Pty Limited
- TAB Queensland Pty Limited

5. This Ruling does **not** apply to a person who, immediately after first participating in the Plan, either holds a legal or beneficial interest in more than 5% of the shares in UNiTAB, or is in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of UNiTAB.

**Qualifications**

6. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
7. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 11 to 12.
8. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
  - (b) this Ruling may be withdrawn or modified.
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**Date of effect**

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10. This Ruling applies from the 2002/2003 year of income. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:
- (a) It is not later withdrawn by notice in the Gazette;
  - (b) It is not taken to be withdrawn by an inconsistent later public ruling; or
  - (c) The relevant tax laws are not amended.

## Arrangement

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11. The arrangement that is the subject of the Ruling is described below. This description is based on the documents listed below as (a) to (f) inclusive. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description are:

- (a) Class Ruling Request dated 11 April 2002
- (b) Rules of the UNiTAB Employee Share Bonus Plan
- (c) Invitation to Apply for UNiTAB Limited Shares
- (d) Employee acceptance of terms and conditions
- (e) Facsimile from Applicant dated 9 August 2002
- (f) Facsimile from Applicant dated 15 January 2003.

12. The following is a brief description of the Plan:-

- (a) Full time employees of the UNiTAB Group (i.e. those casual or permanent employees who work a standard 38 hour week over the 12 months preceding the offer) with at least 12 months service will be offered UNiTAB shares to the value of \$1,000, for nil consideration.
- (b) Permanent part time and casual employees of the UNiTAB Group (i.e. those whose average weekly hours are less than 38) with at least 12 months service will be offered a pro rata allocation proportionate to the ratio of average weekly hours worked to a standard 38 hour week, for nil consideration.
- (c) Over 75 per cent of the permanent employees of the UNiTAB Group with 3 or more years of service are full time employees.
- (d) Each employee eligible to participate in the Plan is given a copy of the Plan and a reasonable time to accept any offer made.

- (e) UNiTAB shares issued under the Plan (Plan shares) will be fully paid ordinary shares ranking equally and having the same rights as other fully paid ordinary shares in the capital of the company. UNiTAB ordinary shares are listed on the Australian Stock Exchange (ASX). The Plan shares will be subject to a separate application for official quotation under the ASX rules with respect to employee incentive scheme shares. Such application to the ASX has not been made on behalf of UNiTAB at the date of this Ruling.
- (f) The value of the Plan shares is taken to be the weighted average closing price of ordinary UNiTAB shares on ASX for the ten trading days immediately preceding the day on which the offer is made under the Plan.
- (g) Any Plan share may not be disposed of by a Participating Employee until the earlier of the expiration of the period of three years commencing at the time the share was acquired by the Participating Employee, or the time when the Participating Employee ceases to be employed by the UNiTAB Group. UNiTAB must apply to ASX for quotation of such a Plan share within a reasonable period of this time.
- (h) The Plan shares will not be subject to conditions that could result in forfeiture.

## **Ruling**

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*[All legislative references are to the ITAA 1936 unless stated otherwise]*

### **The following rulings apply to Participating Employees who make an election under section 139E**

13. The discount given to a Participating Employee on Plan shares will be included in the Participating Employee's assessable income for the year of income in which the shares are acquired (subsection 139B(2) applies).

14. The discount will be calculated in accordance with subsection 139CC(2). The discount is the market value of the shares at the time they are acquired.

15. Pursuant to section 139BA only the amount of discount that is greater than \$1,000 (if any) will be included in the Participating Employee's assessable income.

16. Where a Plan share is sold by a Participating Employee, a capital gain arises to the extent that the capital proceeds from the sale exceed the cost base of the share. A capital loss occurs where those capital proceeds are less than the reduced cost base of the share (section 104-10 of the ITAA 1997 applies).

17. The first element of the cost base of Plan shares will be their market value at the time they were acquired (subsection 130-80(2) of the ITAA 1997 applies).

18. A capital gain on disposal of a Plan share will be a discount capital gain if the disposal occurs at least 12 months after it was acquired by the Participating Employee (section 115-5 of the ITAA 1997 applies).

**The following rulings apply to Participating Employees who do not make an election under section 139E**

19. The discount given to a Participating Employee on Plan shares will be included in the Participating Employee's assessable income for the year of income in which the cessation time occurs (subsection 139B(3) applies).

20. Pursuant to subsection 139CA(2), the cessation time for a Plan share will be the earlier of when:

- The Participating Employee ceases to be employed by any company in the UNiTAB Group; and
- 3 years after the acquisition of the Plan shares.

21. Where a Participating Employee disposes of the Plan shares in an arm's length transaction within 30 days of the cessation time, the discount assessable under subsection 139B(3) will be the consideration received on disposal of the shares (subsection 139CC(3) applies)

22. A capital gain or capital loss made as a consequence of such a disposal will be disregarded pursuant to subsection 130-83(2) of the ITAA 1997.

23. Where Plan shares are not disposed of by the Participating Employee in an arm's length transaction within 30 days of the cessation time, the discount assessable under subsection 139B(3) will be the market value of the shares at the cessation time (subsection 139CC(4) applies).

24. Where a Plan share is disposed of by a Participating Employee after 30 days of the cessation time, a capital gain arises to the extent that the capital proceeds from the disposal exceed the cost base of the share. A capital loss occurs where those capital proceeds are less than the reduced cost base of the share (section 104-10 of the ITAA 1997 applies).

25. The first element of the cost base of a Plan share will be its market value at the cessation time (subsection 130-83(3) of the ITAA 1997 applies).

26. A capital gain on disposal of a Plan share will be a discount capital gain if the disposal occurs at least 12 months after it was acquired by the Participating Employee (section 115-5 of the ITAA 1997 applies).

## **Explanations**

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### **Division 13A**

27. Division 13A of Part III of the ITAA 1936 provides for the taxation treatment of shares acquired under employee share schemes.

28. Participating Employees will acquire Plan shares under an employee share scheme as the Plan shares are acquired for less than their market value and in respect of or in relation to the Participating Employee's employment (subsections 139C(1) and 139C(3)).

### **Qualifying Shares**

29. If shares acquired under an employee share scheme are qualifying shares, certain concessions may be available to the taxpayer under Division 13A.

30. The shares acquired under the Plan by Participating Employees meet the six conditions for qualifying shares contained in section 139CD as follows:

- The Plan shares are acquired under an employee share scheme, satisfying subsection 139CD(2) (refer to paragraph 28 above);
- UNiTAB is the employer or the holding company of the employer of the Participating Employees, satisfying subsection 139CD(3);
- The Plan shares are ordinary shares, satisfying subsection 139CD(4);

- All UNiTAB Group employees with at least 12 months service are invited to participate in the Plan, satisfying the requirement in subsection 139CD(5) that at least 75% of permanent employees (defined by section 139GB to be those full time and permanent part time employees with at least 36 months service) be entitled to participate; and
- The conditions in subsections 139CD(6) and 139CD(7) (that immediately after the acquisition of Plan shares the relevant Participating Employee does not hold an interest in more than 5% of UNiTAB shares and is not in a position to cast or control the casting of more than 5% of the votes that might be cast at a general meeting of UNiTAB) are likely to be satisfied for most or all Participating Employees. However, note that this Ruling does **not** apply to any Participating Employee who does not satisfy these conditions (refer to paragraph 5) above.

31. Therefore, as the six conditions in section 139CD are satisfied for all persons to whom this Ruling applies, Plan shares for these persons will be qualifying shares under Division 13A.

### **Where the employee makes an election**

32. A Participating Employee can make an election under section 139E that subsection 139B(2) applies for a year of income. The election will apply to each qualifying share acquired by the Participating Employee in that year of income. Subsection 139B(2) includes the discount given in relation to these shares in the employee's assessable income in the year the shares were acquired.

33. An election under section 139E must be made in writing in a form approved by the Commissioner, before the Participating Employee lodges his or her return of income for the year of income or within such further time as the Commissioner allows.

Notwithstanding this, paragraph 3 of TD 97/23 provides that unless specifically requested to do so, taxpayers should not forward their section 139E elections to the Australian Taxation Office.

34. The discount given in relation to Plan shares is calculated in accordance with subsection 139CC(2). As the Participating Employee does not provide any consideration for the acquisition of a Plan share the discount will be the market value of the Plan share at the time it was acquired by the Participating Employee.

35. As Plan shares are unlisted at the time they are acquired by Participating Employees, their market value at this time is determined under section 139FB. Under section 139FB the market value of an unlisted Plan share is the arm's length value of a Plan share:

- As specified in a written report, in a form approved by the Commissioner, given to UNiTAB by a registered company auditor (who is not associated with UNiTAB as specified by section 139FG); or
- As calculated in accordance with any other method approved in writing by the Commissioner as a reasonable method of calculating the arm's length value of unlisted shares (see paragraph 36 below).

36. Given that UNiTAB ordinary shares are quoted on the ASX, it is considered that, if an application were made for an approved method under section 139FB(1)(b), the method provided under paragraph 139FA(1)(a) and subparagraph 139FA(1)(b)(i) would most likely be preferred.

37. It is noted that the Company is using a similar method to that in paragraph 139FA(1)(a) as the basis of its offer to Eligible Employees consisting of the weighted average closing price of ordinary UNiTAB shares on ASX for the ten trading days immediately preceding the day of valuation. The company may adopt the values under its method with the support of a report by a qualified person for the purposes of paragraph 139FB(1)(a). Alternatively, it may apply for approval under paragraph 139FB(1)(b) if it can be demonstrated that the outcomes are substantially similar as those produced by the statutory methods for listed shares.

### ***\$1,000 tax-free threshold***

38. The Plan currently satisfies the exemption conditions in section 139CE as it:

- Does not contain any conditions which could result in Participating Employees forfeiting ownership of the shares that were acquired under the Plan, satisfying subsection 139CE(2).
- Is operated so that no Participating Employee is permitted to dispose of Plan shares until the earlier of when they cease to be employed by the UNiTAB Group or three years after the Plan shares were acquired, satisfying subsection 139CE(3).

- Is operated on a non discriminatory basis, satisfying subsection 139CE(4). In relation to this condition, section 139GF provides that to be non-discriminatory the Plan must:
  - be open to at least 75% of the permanent employees (defined by section 139GB to be those full time and permanent part time employees with at least 36 months service) of each employer in the UNiTAB Group;
  - provide employees a reasonable time to accept any offer to participate in the Plan; and
  - make offers with the same essential features (including the number of shares offered) to at least 75% of the permanent employees of each employer in the UNiTAB group.

The condition is satisfied as the Plan is open to all permanent employees of the UNiTAB Group (as defined in section 139GB), at least 75% of whom – being full time – will receive offers for the same number of shares.

39. As the Plan satisfies the exemption conditions in section 139CE, subsection 139BA(2) will apply so that only the discount greater than \$1,000 (if any) will be included in the employees assessable income.

### ***Capital gains tax***

40. CGT event A1 happens if a Participating Employee sells a share acquired under the Plan (section 104-10 of the ITAA 1997 applies). The Participating Employee will make a capital gain if the proceeds from the sale are more than the cost base for the share. Where the capital proceeds from the sale are less than the reduced cost base of the share, a capital loss arises.

41. Subsection 130-80(2) of the ITAA 1997 indicates that the first element of the Participating Employee's cost base for a Plan share is its market value at the time it was acquired (see paragraph 35 above).

42. If a Plan share is sold within 12 months of its acquisition by the Participating Employee then any capital gain resulting from the sale cannot be a discount capital gain because the requirements of section 115-25 of the ITAA 1997 are not met.

43. If the Plan share is sold 12 months or after it was acquired by the Participating Employee, any capital gain resulting from the sale will be a discount capital gain for the purposes of section 115-5 of the ITAA 1997. This is because the requirements of sections 115-10, 115-15, 115-20 and 115-25 of the ITAA 1997 are met. The discount percentage for a discount capital gain is 50 per cent (paragraph 115-100(a) of the ITAA 1997 applies).

#### **Where the employee does not make an election**

44. Where a Participating Employee does not make an election under section 139E, as the Plan shares are qualifying shares, the discount in relation to these shares will be included in the Participating Employee's assessable income under subsection 139B(3) for the year of income in which the cessation time occurs (the cessation year).

45. As the shares acquired under the Plan will have restrictions on their disposal, subsection 139CA(2) will determine when the cessation time occurs.

46. Under the Plan, the cessation time will be the earliest of:

- (a) three years after the Participating Employee acquires the Plan shares, being the later of the time when any restriction preventing the employee from disposing of the share and any condition that could result in the employee forfeiting the share ceases to have effect (paragraph 139CA(2)(b)); and
- (b) the time when the Participating Employee ceases to be employed by any company in the UNiTAB Group, being the time when the employment in respect of which the share was acquired ceases (paragraph 139CA(2)(c)).

47. Exactly when an employee is no longer employed by the UNiTAB Group is a question of fact. It is expected that in the case of permanent full time or part time employees the point of time that the employment comes to an end will usually be fairly obvious because it co-incides with a termination of the contract of employment initiated by either the employer or employee. In relation to casual employees, the employment relationship may consist of a series of engagements or separate contracts of employment. For the purposes of section 139CA it is accepted that the employment will not end while the employment relationship continues even though for the time being there is no contract of employment on foot. For Participating Employees engaged as casuals on a regular or systematic basis this means that the cessation time with respect to shares acquired under the

Plan will not be triggered merely because a particular engagement under the employment relationship has come to an end.

### ***Disposal within 30 days of cessation time***

48. Subsection 139CC(3) calculates the discount to be included in the Participating Employee's assessable income where they dispose of Plan shares in an arm's length transaction within 30 days of the cessation time. As no consideration has been given by the Participating Employee for the shares, the entire proceeds received on disposal will represent the discount to be included in the Participating Employee's assessable income in the cessation year.

### ***Capital gains tax***

49. As a Plan share is a qualifying share and no election is made under section 139E for the year of income in which the share was acquired, a capital gain or loss made on the disposal will be disregarded in accordance with subsection 130-83(2) of the ITAA 1997.

### ***No disposal within 30 days of cessation time***

50. The discount to be included in a Participating Employee's assessable income in the cessation year in respect of Plan shares that are not disposed of by the Participating Employee in an arm's length transaction within 30 days of the cessation time is calculated in accordance with subsection 139CC(4). As no consideration was given by the Participating Employee for Plan shares, under subsection 139CC(4) the discount will be the market value of the Plan shares at the cessation time.

51. If the Plan shares have been listed on the stock market at the cessation time, the market value of the Plan shares at the cessation time will be determined in accordance with section 139FA.

52. Under section 139FA, the market value of a listed Plan share at the cessation time will be:

- if there is at least one transaction on the stock market in UNiTAB shares in the week up to and including the cessation time– the weighted average of the prices at which those shares were traded on the stock market during that week; or

- if there are no such transactions in the week up to and including the cessation time— the last price at which an offer was made on the stock market in that period to buy a UNITAB share, or if no such offer was made, the value of an unlisted Plan share at this time (see paragraph 35 above).

53. If the Plan shares have not been listed at the cessation time, their market value at this time is determined under section 139FB, as set out in paragraph 35 above.

### ***Capital gains tax***

54. The cost base of the Plan shares for the purposes of the capital gains tax provisions will be determined in accordance with subsection 130-83(3) of the ITAA 1997, the first element being the market value of the Plan shares calculated at the cessation time, (see paragraphs 51 to 53 above).

55. If a Plan share is sold within 12 months of its acquisition, any capital gain resulting from the sale cannot be a discount capital gain because the requirements of section 115-25 of the ITAA 1997 are not met.

56. If a Plan share is sold 12 months or more after it was acquired by the Participating Employee, any capital gain resulting from the sale will be a discount capital gain for the purposes of section 115-5 of the ITAA 1997 because the requirements of sections 115-10, 115-15, 115-20 and 115-25 of the ITAA 1997 will be met. The discount percentage for a discount capital gain is 50 per cent (paragraph 115-100(a) of the ITAA 1997 applies).

## **Detailed contents list**

57. Below is a detailed contents list for this Class Ruling:

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**Commissioner of Taxation**26 March 2003

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| <i>Previous draft:</i>                      | - ITAA 1936 139B        |
| Not previously released in draft form.      | - ITAA 1936 139B(2)     |
|                                             | - ITAA 1936 139B(3)     |
| <i>Related Rulings/Determinations:</i>      | - ITAA 1936 139BA       |
| CR 2001/1; TR 92/1; TR 92/20;               | - ITAA 1936 139BA(2)    |
| TR 97/16; TD 97/23                          | - ITAA 1936 139C        |
|                                             | - ITAA 1936 139C(1)     |
|                                             | - ITAA 1936 139C(3)     |
| <i>Subject references:</i>                  | - ITAA 1936 139CA       |
| - capital gains tax                         | - ITAA 1936 139CA(2)    |
| - CGT discount                              | - ITAA 1936 139CA(2)(b) |
| - cost base                                 | - ITAA 1936 139CA(2)(c) |
| - employee share acquisition scheme         | - ITAA 1936 139CC       |
| - employee share ownership                  | - ITAA 1936 139CC(2)    |
| - employee share schemes and option         | - ITAA 1936 139CC(3)    |
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| - share discounts on employee share schemes | - ITAA 1936 139CD       |
|                                             | - ITAA 1936 139CD(2)    |
|                                             | - ITAA 1936 139CD(3)    |
|                                             | - ITAA 1936 139CD(4)    |
|                                             | - ITAA 1936 139CD(5)    |
| <i>Legislative references:</i>              | - ITAA 1936 139CD(6)    |
| - ITAA Division 13A Part III                | - ITAA 1936 139CD(7)    |

- ITAA 1936 139CE
  - ITAA 1936 139CE(2)
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  - ITAA 1936 139FA
  - ITAA 1936 139FA(1)(a)
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  - ITAA 1997 130-80
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  - TAA 1953 Part IVAAA
  - Copyright Act 1968
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## ATO References

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