



Class Ruling

Income tax: Promina Group Limited – Employee Share Purchase Plan (Exemption 2003) – proposed merger with Suncorp-Metway 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified 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 139BA of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- section 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997).

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

Class of entities

3. The class of entities to which this Ruling applies is all persons who:
- are employees of Promina Group Limited (PGL) and Australian Associated Motor Insurers Limited (collectively referred to as the PGL group);
 - have acquired PGL ordinary shares under the Promina Group Limited Employee Share Purchase Plan (Exemption 2003) (the Plan);
 - have made an election under section 139E in respect of their PGL shares; and
 - will receive a combination of cash and Suncorp-Metway Limited (Suncorp) ordinary shares as consideration for the transfer of their PGL shares to Suncorp Insurance Holdings Limited (SIHL), if the proposed scheme of arrangement as described in paragraphs 19 to 24 of this Ruling, is implemented.
4. In this Ruling, a person belonging to this class of entities is referred to as a 'participating employee'.

Qualifications

5. The Commissioner makes this Ruling based on the precise Scheme identified in this Ruling.
6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 14 to 24 of this Ruling.
7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

9. This Ruling will apply to the income year (as defined in subsection 995-1(1) of the ITAA 1997) ending 30 June 2007 if the proposed scheme of arrangement as described in paragraphs 19 to 24 of this Ruling, is implemented. However, the Ruling will continue to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

10. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

12. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

13. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

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

- Application letter from Clayton Utz (the applicant), dated 30 November 2006, requesting a Class Ruling;
- the PGL Employee Share Purchase Plan Rules (the Plan Rules);

- the PGL Employee Share Purchase Plan Management Agreement (the Custody Agreement), obliging the Plan Manager, Computershare Plan Managers Pty Ltd (the Custodian), to act as custodian for the Plan;
- the 2006 Promina Employee Share Purchase Plans Booklet provided to employees of PGL;
- Draft Scheme Booklet from PGL;
- Merger Implementation Agreement;
- Deed Poll;
- scheme of arrangement pursuant to section 411 of the *Corporations Act 2001*; and
- letter to the Tax Office from the applicant, dated 8 December 2006, providing further particulars.

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

15. The Plan was established in 2003 to provide an opportunity for eligible employees of the PGL group to acquire fully paid ordinary shares in PGL (PGL shares).

16. Under the Plan, PGL shares are purchased by the Custodian and registered in the name of eligible employees who then become participants in the Plan.

17. PGL shares acquired by participating employees are qualifying shares (within the meaning of section 139CD) and are subject to disposal restrictions under the Plan that prevent the PGL shares from being disposed of before the earlier of:

- three years from the date they were acquired; or
- the time the participating employee ceases employment with PGL, any subsidiary of PGL or the company which employed the participating employee at the time of acquisition.

18. The Plan Rules do not provide for the forfeiture of PGL shares and the applicant has previously advised that all offers to acquire shares under the Plan are made on a non-discriminatory basis within the meaning of subsection 139CE(4).

Proposed merger of Suncorp and PGL

19. On 21 October 2006, Suncorp and PGL entered into a Merger Implementation Agreement under which it was agreed to merge the two groups.

20. The proposed merger is to be implemented by way of a scheme of arrangement which is subject to the approval of PGL shareholders (with the exception of Suncorp) and the Federal Court of Australia.

21. Where approval is obtained, the scheme of arrangement is expected to be implemented on 20 March 2007.

22. The applicant has advised that the terms of the scheme of arrangement seek to ensure that all PGL ordinary shareholders (including participating employees) will receive Suncorp ordinary shares (Suncorp shares) and cash, equivalent to their economic interest in PGL prior to the proposed merger.

23. Under the proposed scheme of arrangement:

- the disposal restrictions placed on PGL shares under the Plan Rules will cease to be effective;
- participating employees will be required to dispose of their PGL shares in the same manner as other PGL shareholders;
- Suncorp will compulsorily acquire, through SIHL, all PGL shares;
- PGL will then become a wholly-owned subsidiary of Suncorp; and
- PGL shareholders, including participating employees, will receive a combination of cash and Suncorp shares as consideration for their PGL shares held.

24. Suncorp shares received by participating employees under the proposed scheme of arrangement will not be subject to disposal restrictions under the Plan Rules.

Ruling

25. Where the proposed scheme of arrangement is implemented and a participating employee receives cash and Suncorp shares for their PGL shares:

- the discount previously excluded from the participating employee's assessable income in relation to PGL shares acquired under the Plan will continue to be excluded from their assessable income, pursuant to subsection 139BA(2); and

- for capital gains tax (CGT) purposes, the first element of the cost base of PGL shares disposed of under the proposed scheme of arrangement will be their market value (determined under Subdivision F of Division 13A of Part III of the ITAA 1936) at the time they were acquired, pursuant to subsection 130-80(2) of the ITAA 1997.

26. Where the proposed scheme of arrangement is implemented and a participating employee subsequently disposes of their Suncorp shares before the earlier of:

- three years from the date the PGL shares were acquired; or
- the time when the participating employee ceases employment with PGL, any subsidiary of PGL or the company which employed the participant at the time of acquisition,

the discount previously excluded from their assessable income in relation to PGL shares acquired under the Plan will continue to be excluded from their assessable income, pursuant to subsection 139BA(2).

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

27. Where a taxpayer acquires qualifying shares under an employee share scheme, the discount in relation to the shares is included in their assessable income in accordance with Subdivision B of Division 13A of Part III (Division 13A).

28. Where the taxpayer makes an election under section 139E in relation to the shares, the amount of the discount, subject to section 139BA, is the market value of the shares (calculated under Subdivision F of Division 13A) less any consideration paid or given by the taxpayer as consideration for the acquisition of the shares (subsection 139CC(2)).

29. In accordance with section 139BA, where a taxpayer has made an election under section 139E for a year of income and the exemption conditions in section 139CE are satisfied in relation to shares covered by the election, the total amount of discount otherwise included in the taxpayer's assessable income for a year of income in respect of those shares is only included to the extent that it is greater than \$1,000.

30. Where the scheme of arrangement is implemented and as a consequence participating employees receive cash and Suncorp shares for their PGL shares, the discount previously excluded from their assessable income in relation to PGL shares acquired under the Plan will continue to be excluded from their assessable income in accordance with section 139BA, provided the exemption conditions in section 139CE continue to be satisfied.

The exemption conditions

31. The exemption conditions contained in section 139CE that must be satisfied require that the employee share scheme:

- not have any conditions that could result in an employee forfeiting ownership of shares acquired under it;
- be operated so that no employee would be permitted to dispose of a share acquired under it, before the earlier of:
 - the end of the period of 3 years after the time of the acquisition of the employee share scheme share; or
 - the time when the employee ceases, or first ceases, to be employed by their employer (within the meaning of subsection 139CE(5)); and
- be operated on a non-discriminatory basis (within the meaning of section 139GF).

32. Thus, for the first \$1,000 of a discount to continue to be excluded from an employee's assessable income, the employee share scheme needs to continue to be operated in a manner that satisfies these exemption conditions.

Forfeiture

33. The Plan rules do not specifically provide for the forfeiture of PGL shares. Further, the compulsory acquisition of a participating employee's PGL share under the proposed scheme of arrangement for valuable consideration (cash and Suncorp shares) is not considered to constitute forfeiture. Therefore, the Commissioner accepts that the first condition is satisfied, as the Plan does not have any conditions that could result in a participating employee forfeiting ownership of shares acquired under it.

Disposal restrictions

34. The Plan Rules do not permit participating employees to dispose of their PGL shares before the earlier of:

- the end of the period of 3 years after the time of the acquisition; or
- the time when the participating employee ceases employment with PGL, any subsidiary of PGL or the company which employed them at the time of acquisition, (that is, within the meaning of subsection 139CE(5)).

35. Therefore, the Commissioner accepts that where PGL shares are disposed of pursuant to the proposed scheme of arrangement, such a disposal will not be a breach of this condition as the compulsory acquisition of the PGL shares under the proposed scheme of arrangement is considered to have no connection with the operation of the Plan.

36. Further, whether the Suncorp shares acquired by participating employees under the proposed scheme of arrangement are continuing shares or not continuing shares for the purposes of section 139DQ, the Commissioner considers that the second condition in subsection 139CE(3) is either satisfied, is no longer relevant or does not apply.

37. Where the Suncorp shares are continuing shares for the purposes of section 139DQ, in accordance with subsection 139CE(3A), there is no requirement that the Suncorp shares be subject to disposal restrictions. Therefore, the second condition does not apply.

38. Where the Suncorp shares are not continuing shares for the purposes of section 139DQ, the Commissioner considers that the second condition will either continue to be satisfied or is no longer relevant as the Suncorp shares will not have been acquired under the Plan.

Non-discriminatory basis

39. As the applicant has previously advised that all offers to acquire shares under the Plan are made on a non-discriminatory basis within the meaning of subsection 139CE(4), the Commissioner accepts that the third condition is satisfied.

Continuing exclusion of discount from assessable income

40. In summary, if the proposed scheme of arrangement is implemented, the various exemption conditions in section 139CE will either:

- continue to be satisfied;
- no longer be relevant; or
- no longer apply,

such that, for the purposes of the continuing application of section 139BA, the exemption conditions will be satisfied.

41. Therefore, the discount previously excluded from a participating employee's assessable income in relation to PGL shares acquired under the Plan will continue to be excluded from their assessable income, pursuant to section 139BA.

42. Further, this will continue to be the case if any of the Suncorp shares acquired under the proposed scheme of arrangement are disposed of before the earlier of:

- three years from the date the PGL Shares were acquired; or
- the time when the participating employee ceases employment with PGL, any subsidiary of PGL or the company which employed the participant at the time of acquisition.

Capital gains tax

43. Where a person acquires a share at a discount (within the meaning of Subdivision C of Division 13A of the ITAA 1936) under an employee share scheme, for CGT purposes the first element of the cost base and reduced cost base of the share is its market value (determined under Subdivision F of Division 13A of the ITAA 1936) when they acquired it (subsection 130-80(2) of the ITAA 1997).

44. For CGT purposes, a person will acquire a share when they become the legal owner of the share. Thus, a participating employee will acquire a PGL share under the Plan when the Custodian registers the PGL share in their name and they become the legal owner of the share.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- elections
- employee share schemes
- restructure

Legislative references:

- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv B
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 Pt III Div 13A Subdiv C
- ITAA 1936 139CC(2)
- ITAA 1936 139CD

- ITAA 1936 139CE
 - ITAA 1936 139CE(3)
 - ITAA 1936 139CE(3A)
 - ITAA 1936 139CE(4)
 - ITAA 1936 139CE(5)
 - ITAA 1936 139DQ
 - ITAA 1936 139E
 - ITAA 1936 Pt III Div 13A Subdiv F
 - ITAA 1936 139GF
 - ITAA 1997 130-80
 - ITAA 1997 130-80(2)
 - ITAA 1997 995-1(1)
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - Corporations Act 2001 411
 - Copyright Act 1968
-

ATO references

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