



Class Ruling

Income tax: Guinness Peat Group plc adjustment to employee share schemes due to return of capital

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	20
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	24
Appendix 2:	
Detailed contents list	39

① This publication provides you with the following level of protection:

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.

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.

2. In this Ruling, Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), as in force at the time occurring just before Schedule 1 to the *Tax Laws Amendment Act (2009 Budget Measures No.2) Act 2009* commenced is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provisions of the ITAA 1936.

Relevant provisions

3. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- former section 139CB of the ITAA 1936;
- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-A of the ITAA 1997;

- subsection 83A-10(1) of the ITAA 1997;
- Subdivision 83A-C of the ITAA 1997;
- subsection 83A-110(1) of the ITAA 1997;
- section 83A-120 of ITAA 1997;
- subsection 104-25(1) of the ITAA 1997;
- subsection 104-155(1) of the ITAA 1997;
- subsection 104-155(2) of the ITAA 1997;
- subsection 104-155(3) of the ITAA 1997;
- subsection 116-20(2) of the ITAA 1997;
- section 116-25 of the ITAA 1997;
- section 995-1 of the ITAA 1997;
- Division 83A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997); and
- subsection 83A-5(2) of the IT(TP)A 1997.

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

Class of entities

4. The class of entities to which this Ruling applies is persons who:

- were granted an option to acquire shares in Guinness Peat Group plc (GPG) under the GPG 2001 and 2002 Share Option Schemes prior to 1 July 2009;
- at that time they were Australian resident employees or directors of the GPG group of companies in Australia;
- hold the option immediately before the proposed adjustments to the option as a result of a return of capital scheme of arrangement on 19 July 2011;
- from the time of grant to the time of the proposed adjustments to the option, are residents of Australia within the meaning of subsection 6(1) of ITAA 1936, including by virtue of the operation of any double tax agreement between Australia and any other country;
- are not temporary residents within the meaning of section 995-1;

- have not made an election under former section 139E of the ITAA 1936 covering the option; and
- have not had an ESS deferred taxing point happen in relation to the option prior to the proposed adjustments to the option.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

5. Participants may rely on this Ruling provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 19 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.

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Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2012. 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:

- application for Class Ruling dated 10 August 2011 with attachments from Ernst & Young (applicant); and
- correspondence dated 13 October 2011 received in relation to the Class Ruling application.

10. GPG is an investment holding company incorporated in England and Wales and has a diversified range of strategic interests in a number of companies and businesses, mainly in the UK, Australia and New Zealand.

Employee share schemes

11. GPG operates the following two employee share option schemes:

- GPG 2001 Share Option Scheme, adopted by shareholders resolution on 20 August 2001 (the 2001 Scheme); and
- GPG 2002 Share Option Scheme, adopted by shareholders resolution on 13 November 2002 (the 2002 Scheme).

In this Class Ruling, the two share option schemes are collectively referred to as the Share Option Schemes.

12. Under the Share Option Schemes nominated GPG group employees and directors in Australia are granted options to acquire shares in GPG for no consideration.

13. Each option:

- carries a right to purchase a specified number of ordinary shares in GPG on payment of an exercise price;
- is subject to vesting conditions including satisfaction of a minimum service period during employment;
- is not exercisable earlier than the third anniversary of the date of grant;
- lapses at the 10th anniversary of the date of grant; and
- is subject to cancellation and forfeiture in specified circumstances.

14. The rules of the Share Option Schemes provide that following any reduction of the share capital of the company, the number of shares over which an option is granted and the option price thereof, shall be adjusted in such a manner that the exercise price payable in respect of each option remains unchanged.

Return of capital

15. On 19 July 2011, GPG completed a return of capital to shareholders under a court approved scheme of arrangement. The scheme of arrangement involved a cancellation of one in every eight GPG shares held by shareholders and a cash payment to shareholders out of GPG's capital reserves.

16. The payment for the cancellation of the GPG shares was less than the price of those shares at that time. Consequently, the return of capital caused the price of the remaining GPG shares to increase.

Option adjustment

17. The rules of the Share Option Schemes allow GPG to adjust the terms of an option held by a participant, so as to ensure that the participant is not advantaged nor disadvantaged by an increase in GPG share price caused by a return of capital. GPG proposes to make such an adjustment (option adjustment) to the terms of each option held by a participant.

18. An option adjustment will:

- increase the exercise price of each share subject to the option; and
- reduce the number of shares subject to the option.

19. There is no requirement under the rules of the Share Option Schemes for GPG to obtain the consent of participants in order to make the option adjustment.

Ruling

20. The option adjustment will not give rise to an ESS deferred taxing point for the purposes of section 83A-120.

Capital gains tax

CGT event C2

21. The option adjustment will not cause the ownership of an intangible CGT asset to end. Accordingly, the option adjustment will not result in CGT event C2 happening (subsection 104-25(1)).

CGT event H2

22. CGT event H2 will happen as the option adjustment is an act, transaction or event which occurs in relation to the option but does not result in an adjustment to the option's cost base or reduced cost base (subsections 104-155(1) and (2)).

23. No capital gain will be made from CGT event H2 as there are no capital proceeds from the option adjustment (subsection 104-155(3) and subsection 116-20(2), event H2) and the market value substitution rule does not apply (section 116-25).

Commissioner of Taxation

25 January 2012

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.

Assessability of rights under Subdivision 83A-C

24. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

25. Division 83A of the ITAA 1997 also applies to certain shares, rights and stapled securities acquired before 1 July 2009 under Division 83A of the IT(TP)A 1997.

26. The applicant has advised, and the Commissioner accepts for the purposes of this Class Ruling, that an option, being a right to acquire a beneficial interest in shares in a company, granted to a participant under the Share Option Schemes prior to 1 July 2009 constitutes an 'ESS interest' as defined in subsection 83A-10(1) of Subdivision 83A-A.

ESS deferred taxing point

27. Under subsection 83A-110(1), an amount will be included in the assessable income of a participant in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs.

28. The ESS deferred taxing point for a right is worked out under section 83A-120.

29. However, by reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A to the extent that it relates to the Subdivision) also applies to certain rights acquired before 1 July 2009. This would include options granted under the Share Option Schemes.

30. The ESS deferred taxing point for an option will be the cessation time determined under former section 139CB of the ITAA 1936. Under former section 139CB, the cessation time for a right is the earliest of a number of defined times.

31. The relevant cessation time for a participant is when an option adjustment occurs, if that adjustment constitutes a disposal of the option by the participant.

32. The issue of when an agreement is varied or rescinded was considered by the High Court of Australia in *Tallerman & Co Pty Limited v. Nathan's Merchandise (Vic) Pty Limited* (1957) 98 CLR 93. Justice Taylor stated at page 144 that:

It is firmly established by a long line of cases... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement. Variation, of course, may involve partial rescission as is pointed out in *Salmond and Williams on Contracts* 2nd ed. (1945) pp. 488, 489, but 'Partial rescission... does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein, with or without the substitution of new rights and obligations in their place. Partial rescission is not the extinction of the contract but the variation of it...

33. Following the option adjustment, a participant's financial position will neither be advantaged nor disadvantaged. The option adjustment is regarded as a variation of the terms of original option allowed for under the rules of the Share Option Schemes. The option adjustment therefore does not result in a new option contract or give rise to a disposal of the option.

34. Accordingly, the adjustments to the option will not give rise to an ESS deferred taxing point under section 83A-120.

35. The option held by the participants after the capital return will continue to be subject to Subdivision 83A-C.

Capital Gains Tax

CGT event C2

36. The option adjustment will not cause the ownership of an intangible CGT asset to end. Accordingly, the option adjustment will not result in CGT event C2 happening (section 104-25(1)).

CGT event H2

37. CGT event H2 will happen as the option adjustment is an act, transaction or event which occurs in relation to the option but does not result in an adjustment to the option's cost base or reduced cost base (subsections 104-155(1) and (2)).

38. No capital gain will be made from CGT event H2 as there are no capital proceeds from the option adjustment (subsection 104-155(3) and subsection 116-20(2), event H2) and the market value substitution rule does not apply (section 116-25).

Appendix 2 – Detailed contents list

39. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Relevant provisions	3
Class of entities	4
Qualifications	5
Date of effect	8
Scheme	9
Employee share schemes	11
Return of capital	15
Option adjustment	17
Ruling	20
Capital gains tax	21
<i>CGT event C2</i>	21
<i>CGT event H2</i>	22
Appendix 1 – Explanation	24
Assessability of rights under Subdivision 83A-C	24
ESS deferred taxing point	27
Capital gains tax	36
<i>CGT event C2</i>	36
<i>CGT event H2</i>	37
Appendix 2 – Detailed contents list	39

References

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes and options
- ESS interest
- ESS deferred taxing point
- Capital Gains Tax
- CGT event C2
- CGT event H2
- return of capital on share

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139CB
- ITAA 1936 139E
- ITAA 1997 Div 83A
- ITAA 1997 Subdiv 83A-A
- ITAA 1997 83A-10(1)

- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-155
- ITAA 1997 104-155(1)
- ITAA 1997 104-155(2)
- ITAA 1997 104-155(3)
- ITAA 1997 116-20
- ITAA 1997 116-20(2)
- ITAA 1997 116-25
- ITAA 1997 995-1
- IT(TP)A 1997 83A-5(2)
- TAA 1953
- Copyright Act 1968

Case references:

- Tallerman & Co Pty Limited v. Nathan's Merchandise (Vic) Pty Limited (1957) 98 CLR 93

ATO references

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