


# ***CR 2003/23 - Income tax: Employee Share Scheme: ABB Grain Limited***

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## Class Ruling

### Income tax: Employee Share Scheme: ABB Grain Limited

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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

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' 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');
- 139C of the ITAA 1936;
- 139CA of the ITAA 1936;
- 139CC of the ITAA 1936;
- 139CD of the ITAA 1936;
- 139E of the ITAA 1936
- 139FA of the ITAA 1936;
- 139FB of the ITAA 1936; and
- 130-83 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

**Class of persons**

3. This Ruling applies to the employees of ABB Grain Ltd (ABB Grain), who participate in the ABB Grain Deferred Employee Share Plan ('the Plan'). This Ruling only applies to those employees who do not make an election under section 139E of the ITAA 1936 to be assessed on the discount in the year in which the shares were acquired by the employee for the purposes of Division 13A of Part III of the ITAA 1936.

**Qualifications**

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 9 to 16 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- 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- b) this Ruling may be withdrawn or modified.

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8. The Commissioner accepts that B Class shares acquired by participants under the plan are:

- shares acquired under an employee share scheme under section 139C for the purposes of Division 13A of Part III of the ITAA 1936; and
- ordinary shares of ABB Grain.

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## Date of effect

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9. 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 a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore the ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

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## Arrangement

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10. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. 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 of the arrangement are:

- Application for a Class Ruling dated 10 April 2002;
- Further correspondence by facsimile received by the Australian Taxation Office from Thomson Playford dated 23 April 2002 and 8 May 2002;
- Correspondence from Company Secretary and Chief Financial Officer of ABB Grain to Thomson Playford dated 8 April 2002;
- The ABB Grain Ltd Deferred Employee Share Plan - Plan Rules (DRAFT);
- The Company Constitution of ABB Grain ('the Constitution');
- A Press Release issued by ABB Grain on 4 February 2002 announcing its intention to list on the Australian Stock Exchange Limited ('ASX');
- An excerpt from Section 2 of the ABB Grain Ltd Policy Manual ('ABB Grain Policy Manual') on the trading in shares of ABB Grain;

- Further correspondence by facsimile received by the Australian Taxation Office from Thomson Playford dated 26 June 2002; and
- Further correspondence received by the Australian Taxation Office from Thomson Playford dated 12 November 2002.

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

### **Features of the Plan**

11. ABB Grain has listed its B Class shares on the Australian Stock Exchange Limited (ASX). The B Class shares are the ordinary shares of the company. They are not preference shares and they are the only shares issued to the public. In contrast the other class of shares (A Class) are preferential in certain respects and their ownership is restricted.

12. ABB Grain will make an offer under the Plan, to eligible employees of ABB Grain, to acquire B Class shares of ABB Grain pursuant to the Plan Rules. As per the Plan Rules, 'eligible employees' are persons appointed as a Director and employees who at a date determined by the Board, have completed 12 months continuing service with ABB Grain in which that person had standard working hours equivalent to or exceeding 20 hours per week."

13. A participant is an eligible employee who accepts an offer, who is allotted B Class shares and who agrees to be bound by the Plan Rules.

14. At least 75% of permanent employees will be entitled to participate under the scheme. That is, at least 75% of permanent employees will be entitled to acquire B class shares under the Plan.

15. The issue of B Class shares will be fully funded by way of an effective salary sacrifice arrangement within the meaning of paragraphs 19 to 23 of Taxation Ruling TR 2001/10. Participants will not be required to contribute any other funds in order to acquire the B Class shares.

16. At no time will the number of shares acquired or held by a participant exceed 5% of the total number of shares issued by ABB Grain. At no time is a participant in a position to cast or control the casting of more than 5% of the number of votes that may be cast at a general meeting of the company.

17. The B Class shares offered to Eligible Employees will be subject to forfeiture while the employee remains with an Employing Company, meaning ABB Grain or an Associated Company as per the Plan Rules.

## **Ruling**

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18. Where a participant does not make an election under section 139E the discount given in relation to each share is included in the assessable income of the participant under subsection 139B(3) in the year in which the cessation time occurs.

19. As there are restrictions and forfeiture conditions on the shares under the Plan, the cessation time will be determined under subsection 139CA(2).

20. In accordance with subsection 139CA(2), the cessation time for a share under the Plan, will be the earliest of:

- The time when the participant disposes of the shares;
- The time when the participant ceases to be employed by ABB Grain or a subsidiary company; or
- 10 years from when the eligible employee acquires the shares.

21. If a participant disposes of the share in an arm's length transaction at the cessation time or within 30 days of the cessation time, the discount assessable under subsection 139B(3) will be the amount calculated under subsection 139CC(3).

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

23. If a participant does not dispose of the share in an arm's length transaction at the cessation time or within 30 days of the cessation time, the discount assessable under subsection 139B(3) will be the market value of the share at the cessation time calculated under subsection 139CC(4). The market value will be worked out under section 139FA.

24. The cost base of such shares upon a capital gains tax (CGT) event happening will be their market value at the cessation time pursuant to subsection 130-83(3). The market value will be worked out under section 139FA.

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## **Explanations**

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25. Where, as under this arrangement, shares are issued to employees under an effective salary arrangement for the purposes of Taxation Ruling TR 2001/10 there is an acquisition of shares under an employee share scheme as defined in section 139C. The discount given in relation to the acquisition is included in assessable income in accordance with section 139B. It is either included in the income year in which the share is acquired (subsection 139B(2) or in the income year in which the cessation time for the share occurs (subsection 139B(3)).

26. So far as the acquisition of shares under the Plan is concerned, the time at which the income is assessable depends on two material factors. The first is whether the shares are 'qualifying shares' within the meaning of that term in section 139CD. The second is whether the taxpayer has made an election under section 139E to be assessed on the discount in the year of the acquisition.

27. It is accepted that having regard to the conditions under section 139CD the shares acquired by participants in the Plan are qualifying shares.

28. An employee who acquires qualifying shares under an employee share scheme is able to make an election under subsection 139E(1) that subsection 139B(2) applies in relation to a year of income for each qualifying share or right acquired during that year. The effect of an election is that the discount with respect to each qualifying share acquired in the income year by the participant is included in assessable income in the year of acquisition (subsection 139E(1) and section 139B). Having regard to the class of persons to which this ruling applies (refer paragraph 3 above), the ruling does not deal with the taxation implications of making an election under section 139E.

### **No election made under Section 139E**

29. If a participant does not make an election under subsection 139E(1) that subsection 139B(2) applies for a year of income, then the discount given in relation to a share, being a qualifying share, is included by subsection 139B(3) in the participant's assessable income for the year in which the cessation time occurs. As the shares acquired under the Plan will have restrictions on their disposal and be subject to forfeiture conditions subsection 139CA(2) will determine the cessation time.

30. Pursuant to subsection 139CA(2) the cessation time will be the earliest of:

- (a) the time when the taxpayer disposes of the share;
- (b) the later of:
  - i. the time when any restriction preventing the taxpayer from disposing of the share ceases to have effect; and
  - ii. the time when any condition that could result in the taxpayer forfeiting ownership of shares ceases to have effect;
- (c) the time when the employment in respect of which the share was acquired ceases;
- (d) the end of the 10 year period starting when the taxpayer acquired the share.

31. Under Clause 7 of the Plan Rules shares acquired under the Plan will be subject to forfeiture throughout the period the participant remains employed by an Employing Company. The cessation time will therefore be the earliest of paragraphs 139CA(2)(a), (c) or (d) as outlined above.

32. Subsection 139CC(3) calculates the discount to be included in assessable income where the participant, in an arm's length transaction within 30 days of cessation time, disposes of the shares. Where no consideration has been given by the employee for the shares, the entire proceeds received by the employee on disposal of the shares will be included in assessable income.

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

34. Where shares are not disposed of by the participant in an arm's length transaction within 30 days of cessation time, the participant will have the discount included in their assessable income calculated in accordance with subsection 139CC(4). This is the market value of the share at cessation time less any consideration paid by the taxpayer to acquire the share.



35. As the shares are listed on an approved stock exchange the market value of the shares for the purposes of paragraph (a) of subsection 139CC(4) will be determined in accordance with section 139FA. The market value of an ordinary share under section 139FA is:

- if there was at least one transaction on the ASX in those shares in the week up to and including the cessation date – the weighted average of the prices at which those shares were traded on the ASX during that week; or
- if there were no such transactions in the period – the last price at which an offer was made on the ASX in that period to buy such a share, or if no such offer was made, the value of the share determined as if section 139FB applied to the share.

36. The cost base of the shares for the purposes of the capital gains tax provisions in Part 3-3 ITAA 1997 will be determined in accordance with subsection 130-83(3), the first element being the market value of the shares worked out under section 139FA at cessation time.

## **Detailed contents list**

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

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**Commissioner of Taxation**

19 March 2003

*Previous draft:*

Not previously released in draft form

*Related Rulings/Determinations:*TR 92/1; TR 92/20; TR 97/16;  
CR 2001/1; TR 2001/10*Subject references:*

- Employee Share Scheme
- Election
- No Election
- Capital Gains Tax
- Cost Base
- Market value
- Cessation Time
- Discount

*Legislative references:*

- ITAA 1936 Part III Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(2)

- ITAA 1936 139B(3)
- ITAA 1936 139C
- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(2)(a)
- ITAA 1936 139CA(2)(c)
- ITAA 1936 139CA(2)(d)
- ITAA 1936 139CC
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1936 139E(1)
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1997 Part 3-3
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- TAA 1953 Part IVAAA
- Copyright Act 1968

ATO References

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