



# ***CR 2004/137 - Income tax: TAB Limited - Employee Performance Share Plan - disposal of shares pursuant to takeover***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2004*



## Class Ruling

### Income tax: TAB Limited – Employee Performance Share Plan – disposal of shares pursuant to takeover

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#### **Preamble**

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **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:
- Section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Section 139BA of the ITAA 1936;
  - Section 139CE of the ITAA 1936;
  - Section 139E of the ITAA 1936; and
  - Section 139GF of the ITAA 1936.

#### **Class of persons**

3. The class of persons to which this Ruling applies is the Australian resident employees of TAB Limited (TAB), Sky Channel Pty Ltd and 2KY Broadcasters Pty Ltd (collectively, the TAB Group) who have acquired shares in TAB under the TAB Employee Performance Share Plan (EPSP) and have made elections pursuant to section 139E of the ITAA 1936, in respect of the shares.

4. They are persons who will have transferred their shares to TABCORP Investments No.4 Pty Ltd (TABCORP) pursuant to the takeover offer referred to in the Arrangement part of this Ruling. In this Ruling a person belonging to this class of persons is referred to as a participating employee.

## Qualifications

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

6. 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 in paragraphs 11 to 19.

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

- 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
- this Ruling may be withdrawn or modified.

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## Date of effect

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9. This Ruling applies to the year of income ended 30 June 2005. 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Withdrawal

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10. This Ruling is withdrawn and ceases to have effect after 30 June 2005. The Ruling continues to apply, in respect of the tax laws ruled upon to all persons within the specified class who enter into a specified arrangement during the term of the Ruling. Thus the Ruling continues to apply to persons, even following its withdrawal, for arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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11. The Arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case maybe, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of arrangement are:

- Class Ruling request from Greenwoods & Freehills Pty Limited, dated 17 February 2004;
- TAB Employee Performance Share Plan – Plan Rules (plan rules) dated 23 June 1999;
- Copy of the ASX Company Announcement dated 2 April 2004 concerning TABCORP bidder's statement;
- Copy of ASX Company Announcement dated 4 May 2004 concerning TABCORP supplementary bidder's statement; and
- Correspondence from Greenwoods and Freehills dated 12 May 2004, 1 June 2004 and 3 September 2004.

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

12. On 23 February 2004 TABCORP announced its intention to make a takeover offer for all of the issued shares in TAB.

13. TAB shareholders included participating employees who held shares acquired under the EPSP.

14. The EPSP is administered by the TAB board through a plan committee and is run in accordance with plan rules.

15. Shares acquired under the EPSP were registered in the names of participating employees but were subject to a holding lock which prevented participating employees from dealing with their shares for three years, unless they ceased to be employed in the TAB Group.

16. The plan rules specify that shares acquired under the EPSP shall satisfy the exemption conditions so as to permit the application of section 139BA of the ITAA 1936, to participating employees. The plan rules further specify that the EPSP shall be operated on a non-discriminatory basis within the meaning of that expression in sections 139CE and 139GF of the ITAA 1936.

17. After acquiring 90% of TAB shares, TABCORP invoked Chapter 6 of the Corporations Law and compulsorily acquired all remaining shares, including shares that had been held by participating employees for less than 3 years. The takeover was completed on the 20 September 2004.

18. All shareholders, including participating employees, who disposed of shares to TABCORP, pursuant to the TABCORP takeover offer, received consideration from TABCORP in accordance with TABCORP's bidder's statement and supplementary bidder's statement.

19. The plan rules were not altered to allow participating employees to dispose of their shares within three years of acquisition.

## Ruling

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**Note:** *All subsequent references are to the Income Tax Assessment Act 1936 unless otherwise specified.*

20. The compulsory acquisition of a participating employee's share due to the takeover by TABCORP does not give rise to a forfeiture for the purposes of the exemption condition in subsection 139CE(2).

21. Further, the disposal of a share by a participating employee under the compulsory acquisition does not result in a breach of the disposal restriction contained in the exemption condition in subsection 139CE(3).

22. Consequently, any disposal of shares pursuant to a compulsory acquisition by TABCORP will not result in those shares originally acquired by a participating employee under the EPSP, failing to satisfy the exemption conditions set out in section 139CE.

## Explanation

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23. Where, in a year of income, an employee acquires qualifying shares under an employee share scheme, the discount given in relation to the shares is included in the employee's assessable income, pursuant to section 139B.

24. Where the employee makes an election under section 139E that subsection 139B(2) apply for the year of income, the assessable income of the employee, subject to section 139BA, will include the discount given in relation to the qualifying shares.

25. Where the exemption conditions specified in section 139CE are satisfied in relation to the qualifying shares, the total amount included in the employee's assessable income for the year of income, in respect of the shares, is only included to the extent that it is greater than \$1,000, pursuant to section 139BA.

### **The exemption conditions**

26. Section 139CE contains the following exemption conditions:

- the scheme does not have any conditions that could result in any employee forfeiting ownership of shares acquired under it;
- the scheme was operated so that no employee would be permitted to dispose of a share acquired under it until the earlier of three years after the acquisition or the employee ceased their employment within the meaning of subsection 139CE(5); and
- that both the employee share scheme and any scheme for the provision of financial assistance in respect of acquisitions of shares under the employee share scheme are operated on a non discriminatory basis within the meaning of section 139GF.

27. Whilst the plan rules state that shares acquired under the EPSP shall satisfy the exemption conditions so as to permit the application of section 139BA to participating employees, the TABCORP takeover has resulted in participating employees shares being compulsorily acquired, and in some instances participating employees disposing of shares within three years of acquisition.

### **Forfeiture**

28. The compulsory acquisition of a participating employee's shares due to the takeover by TABCORP does not give rise to a forfeiture for the purposes of subsection 139CE(2) as valuable consideration was provided for the disposal of the shares which did not differ between employees and other shareholders. Further, as the plan rules did not contain any forfeiture provisions, the exemption condition in subsection 139CE(2) is satisfied.

### **Disposal restrictions**

29. The plan rules prohibit the disposal of shares acquired by participating employees under the EPSP, before the earlier of three years of acquisition or the time at which an employee ceased to be employed within the TAB Group.

30. The compulsory acquisition of shares following a takeover bid is regulated by the Corporations Law. The Corporations Law allows a bidder acquiring 90% of any class of shares to compulsorily acquire the remaining shares in that class.

31. The early disposal of shares acquired under the EPSP through the compulsory acquisition of shares by TABCORP is considered to have had no connection with the operation of the EPSP and was outside the control of the TAB board. Therefore, it is concluded that the EPSP was operated so that no participating employee could dispose of the shares acquired under the plan before the time set out in subsection 139CE(3). Accordingly, the exemption condition in subsection 139CE(3) is satisfied.

### **Non-discriminatory basis**

32. The exemption condition requiring the EPSP to be operated on a non-discriminatory basis, pursuant to section 139GF, is not considered to be affected by the TABCORP takeover. As the plan rules specify that the EPSP shall be operated on a non-discriminatory basis within the meaning of that expression in sections 139CE and 139GF, the third exemption condition will remain satisfied.

33. Thus, the disposal of EPSP shares by a participating employee within 3 years of acquisition, pursuant to a compulsory acquisition by TABCORP under the Corporation Law, would not result in the shares acquired by the participating employee failing to satisfy the exemption conditions set out in section 139CE.

## **Detailed contents list**

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

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**Commissioner of Taxation**1 December 2004

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<i>Previous draft:</i>	- ITAA 1936 139CE
Not previously issued as a draft	- ITAA 1936 139CE(2)
	- ITAA 1936 139CE(3)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CE(5)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 139E
TR 97/16	- ITAA 1936 139GF
	- TAA 1953 Pt IVAAA
<i>Legislative references:</i>	- Copyright Act 1968
- ITAA 1936 139B	- Corporations Law Ch 6
- ITAA 1936 139B(2)	
- ITAA 1936 139BA	

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## ATO references

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