

CR 2004/15 - Income tax: AMP Limited Demerger - AMP Employee Share Ownership Plan

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2003*



Class Ruling

Income tax: AMP Limited Demerger — AMP Employee Share Ownership 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**, **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

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;
- 139CD of the ITAA 1936;
- 139CE of the ITAA 1936;
- 139E of the ITAA 1936;
- 139FA of the ITAA 1936;
- 139G of the ITAA 1936;
- 139GF of the ITAA 1936;
- 102-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- 104-10 of the ITAA 1997;

- 104-25 of the ITAA 1997;
- 109-10 of the ITAA 1997;
- 110-25 of the ITAA 1997;
- 112-25 of the 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;
- 116-20 of the ITAA 1997;
- 116-30 of the ITAA 1997;
- 130-80 of the ITAA 1997;
- 974-75 of the ITAA 1997.

Class of persons

3. The class of persons to whom this Ruling applies consists of the Australian resident employees of the following companies in the AMP Group:

- AMP Limited (AMP);
- AMP Services Limited;
- AMP Bank Limited;
- Commercial & Industrial Management Pty Ltd; and
- AMP Henderson Global Investors Limited (now known as AMP Capital Investors Limited);

who had, as at the date of the demerger of the AMP Group:

- acquired shares in AMP by participating in offers made under the AMP Employee Share Ownership Plan (the 'ESOP') as described in the arrangement part of this Ruling; and
- made an election under section 139E of the ITAA 1936 to be taxed on their shares in the year of acquisition.

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 25 of this Ruling.
6. 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

8. This Ruling applies to the income year ended 30 June 2004. However, this 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 June 2004. The Ruling continues to apply, in respect of the tax

law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of this Ruling is described below. This description is based on a number of 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:

- The application letter from PricewaterhouseCoopers dated 1 September 2003 requesting a Class Ruling on behalf of AMP;
- AMP Limited ESOP – Australia and New Zealand Plan Rules (Plan Rules);
- ESOP – Australian Offer Booklet;
- Correspondence dated 26 November 2003 and 28 November 2003 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office (ATO). The following documents accompanied that response and form part of it:
 - Documentation confirming that the conditions in section 139CD of ITAA 1936 relating to qualifying shares are satisfied;
 - A list of entities who, as principals, are involved in carrying out the ESOP and forms consenting to the Class Ruling application from the entities mentioned in paragraph 3 of this Class Ruling; and
- A statement dated 23 January 2004 from AMP to the effect that following the demerger on 23 December 2003, the Human Resources committee continues to operate the Employee Share Ownership Plan (ESOP) in a manner that conforms to the exemption conditions in section 139CE of the ITAA 1936.

The Employee Share Ownership Plan (ESOP)

11. The ESOP commenced operation in November 2001, therefore the ESOP shares subject to this Ruling were acquired after 19 September 1985.

12. The ESOP operates as follows:

- The ESOP is administered by the Human Resources committee (HR committee) which is a committee of the directors of AMP as defined in Rule 2.1 of the Plan Rules (and now known as the AMP Board Remuneration Committee);
- The HR committee invites eligible employees as defined in Rule 2.1 of the Plan Rules to acquire shares pursuant to the ESOP;
- Eligible employees apply to acquire shares under the offer pursuant to the ESOP rules;
- If the application is accepted by the HR committee, the employee is allotted a parcel of ordinary shares worth up to \$1,000 in AMP. The employee does not pay any consideration for the acquisition of these shares; and
- The shares acquired are registered in the name of the employee.

13. Rule 3.1 of the Plan Rules states that shares acquired under the ESOP shall satisfy the exemption conditions of section 139CE of the ITAA 1936 so as to permit the application of section 139BA of the ITAA 1936.

14. Rule 3.1 also states that the Plan shall be operated on a non-discriminatory basis within the meaning of subsection 139CE(4) and 139GF of the ITAA 1936.

15. Rule 7.2 of the Plan Rules prohibits the transfer, disposal of or otherwise dealing in the ESOP shares for the 'trading lock period'. The 'trading lock period' is the earlier of:

- the period ending three years after the date of acquisition in respect of the relevant ESOP shares or any other such date as determined by the HR committee to ensure that the exemption conditions under section 139CE of ITAA 1936 are satisfied; and
- the day after the date in which the employee ceases to be employed by the employer within the meaning of paragraph 139CE(3)(b) and subsection 139CE(5) of the ITAA 1936.

16. There are no forfeiture conditions imposed on the AMP shares under the Plan Rules.

17. Rule 9.1 of the Plan rules states that the HR committee may at any time amend any of the Plan rules, or waive or modify the application of the Rules in relation to any participant provided that any amendment does not adversely affect the then existing rights.

18. The shares acquired under the ESOP satisfy the qualifying share conditions of section 139CD of the ITAA 1936.

19. Employees who acquire the AMP shares under the ESOP are able to take advantage of a tax exemption of up to an amount no greater than \$1000 under section 139BA, if they make an election under section 139E to be taxed on their shares in the year of acquisition.

20. Following the demerger on 23 December 2003, the HR committee (renamed the AMP Board Remuneration Committee) continues to operate the ESOP in a manner that conforms to the exemption conditions in section 139CE of the ITAA 1936.

The Demerger

21. The demerger involved AMP separating its interests in the United Kingdom businesses from those it holds in its Australian and other businesses. The mechanics of the demerger are described in Class Ruling CR 2003/107 *Income tax: AMP Limited: Demerger, Capital Adjustment and Scheme of Arrangement* (CR 2003/107) at paragraphs 10 to 33. The end result of the demerger process was the creation of two independent listed companies. Consequently, AMP shareholders, including the employee shareholders, hold shares in each of the following demerged groups:

- AMP which continues to own AMP's Australian and New Zealand businesses (the AMP Group); and
- HHG PLC (HHG) which owns AMP's United Kingdom businesses (the HHG Group).

22. The demerger was effected on 23 December 2003 by way of a Capital Adjustment and Scheme of Arrangement. Both the Capital adjustment and Scheme of Arrangement were conditional upon each other.

23. The Capital Adjustment involved:

- The cancellation of a certain number of AMP shares held by each of the AMP shareholders calculated in accordance with a formula; and

- A share split of the remaining AMP shares held by each AMP shareholder so that each AMP shareholder held the same number of AMP shares they held before the cancellation.

24. Under the Scheme of Arrangement, each AMP shareholder was issued with a Cancellation Entitlement (a receivable) equal to the capital distribution made to AMP shareholders in consideration for the cancellation of their shares in AMP. By order of the Court the receivable was applied to subscribe for the issue of HHG shares equal in number to the number of AMP shares originally held.

25. As stated in CR 2003/107, the demerger arrangement did not qualify as a 'demerger' for the purposes of Division 125 of the ITAA 1997. AMP was not a 'head entity' for the purposes of the demerger rules as another member of the AMP Group owned shares in AMP (subsection 125-65(3) of the ITAA 1997). Accordingly, the roll-over relief provided for in section 125-55 of the ITAA 1997 was not available.

Ruling

AMP shares held under the ESOP

26. The AMP shares are acquired by an employee for Capital Gains Tax (CGT) purposes, at the time a contract was entered into for the allotment of the shares or, if there was no contract, when the shares are allotted to the employee (section 109-10 of the ITAA 1997).

27. As the employee has made an election under section 139E of the ITAA 1936 to be taxed in the year of acquisition of the AMP shares, the first element of the employee's cost base of the shares is the market value of the shares (as determined by section 139FA of the ITAA 1936) at the date of acquisition of those shares (section 130-80 of the ITAA 1997).

Cancellation of the AMP shares

28. CGT event C2 happened when a portion of the employee's AMP shares held in the ESOP were cancelled under the demerger (section 104-25 of the ITAA 1997).

29. The capital gain (or capital loss) made due to CGT event C2 is the difference between the capital proceeds received from the cancellation and the cost base of the cancelled AMP shares.

30. Where the employee has held the AMP shares for at least 12 months from the date of acquisition of the shares until prior to the

cancellation of the shares, any capital gain is a discount capital gain (section 115-5 of the ITAA 1997).

31. The cancellation of the AMP shares due to the demerger does not affect the satisfaction of the exemption conditions under section 139CE of the ITAA 1936. Therefore, the employee's entitlement to the \$1,000 tax exemption under subsection 139BA of the ITAA 1936 in respect of qualifying shares acquired under the ESOP is unaffected by the cancellation of the shares due to the demerger.

HHG shares

32. The employee does not acquire the shares in the HHG Group (HHG shares) in respect of the employee's employment or services provided by the employee and, therefore, does not acquire the shares under an employee share scheme for the purpose of subsection 139C(1) or subsection 139C(2) of the ITAA 1936.

33. Therefore the HHG shares have no impact on the satisfaction of the exemption conditions under section 139CE of the ITAA 1936 in relation to the AMP shares acquired under the ESOP.

34. The employee acquires the HHG shares for CGT purposes at the time a contract is entered into for the allotment of the shares or, if there is no contract, when the shares are allotted to the employee (section 109-10 of the ITAA 1997).

35. The first element of the employee's cost base of the HHG shares is the total of the consideration paid to acquire the HHG shares (subsection 110-25(2) of the ITAA 1997).

36. CGT event A1 happens when the employee disposes of the HHG shares (section 104-10 of the ITAA 1997).

37. The capital gain (or capital loss) made when CGT event A1 happens will be the difference between the capital proceeds of the disposal and the cost base of the HHG shares.

38. Where the employee has held the HHG shares for at least 12 months from the date of acquisition of the shares prior to the disposal of the shares, any capital gain will be a discount capital gain (section 115-5 of the ITAA 1997).

Share split of AMP shares

39. The share split of the AMP shares due to the demerger does not affect the satisfaction of the exemption conditions under section 139CE of the ITAA 1936. Therefore, the employee's entitlement to the \$1,000 tax exemption under section 139BA of the ITAA 1936 in respect of qualifying shares acquired under the ESOP is unaffected by the share split due to the demerger.

40. The share split in relation to the AMP shares does not constitute a CGT event (section 112-25 of the ITAA 1997).

41. Each element of the cost base and reduced cost base of the original AMP shares is apportioned in a reasonable way to each new AMP share (subsection 112-25(3) of the ITAA 1997).

42. Following the share split, the new AMP shares allotted or transferred to the employee have, for CGT purposes, the same date of acquisition as the original AMP shares to which they relate.

Explanation

AMP shares held under the ESOP

Date of acquisition of AMP shares

43. Division 109 of the ITAA 1997 sets out the ways in which a taxpayer can acquire a CGT asset and the time of acquisition. Item 2 in the table in section 109-10 states that where a company issues or allots equity interest in the company to a taxpayer, the taxpayer acquires the equity interest at the time the contract is entered into for the allotment of the equity interest to the taxpayer or, if there is no contract, when the equity interest is allotted to the taxpayer.

44. A share, which represents an interest in a company as a member or stockholder of the company, is an equity interest in the company (Item 1 in the table in subsection 974-75(1) of the ITAA 1997).

45. In accordance with section 109-10 of the ITAA 1997, an employee is taken to have acquired the AMP shares under the ESOP for CGT purposes at the time the contract was entered into for the allotment of those shares. Alternatively, if there was no contract, the employee is taken to have acquired the AMP shares at the time of allotment of the shares to the employee.

Cost Base of the AMP shares

46. Under subsection 110-25(1) of the ITAA 1997, the cost base of the employee's AMP shares consists of five elements.

47. Section 130-80 of the ITAA 1997 states that, where a share or right is acquired at a discount under an employee share scheme, the first element of the cost base and reduced cost base of the share or right is its market value at the time the share or right is acquired. The market value for the purposes of section 130-80 is calculated under section 139FA to section 139FF of the ITAA 1936.

48. The first element of the cost base of the AMP shares acquired by the employee is determined in accordance with section 130-80 of the ITAA 1997. This is the market value of the shares (as determined by section 139FA of the ITAA 1936) at the date of acquisition of those shares.

49. In addition to the first element of the cost base, the other elements of the cost base, as determined under section 110-25 of the ITAA 1997, may have to be taken into account in working out the cost base of the employee's AMP shares.

Cancellation of AMP shares held under the ESOP

CGT event C2: Cancellation of AMP shares

50. When an intangible CGT asset is cancelled or redeemed, CGT event C2 happens when the taxpayer's ownership of the intangible asset ends (section 104-25 of the ITAA 1997).

51. The cancellation of a portion (in accordance with a specified ratio) of AMP shares held by the employee constitutes the happening of CGT event C2 as the employee's ownership of those shares ends.

52. The employee was issued with a Cancellation Entitlement (a receivable) equal to the capital distribution made to the employee (as an AMP shareholder) in consideration for the cancellation of the employee's AMP shares held under the ESOP. The receivable was used to subscribe for the HHG shares.

53. The capital gain or capital loss made from the cancellation is calculated in accordance with subsection 104-25(3) of the ITAA 1997. The employee makes a capital gain if the capital proceeds received from the cancellation of the shares are more than the cost base of the AMP shares acquired under the ESOP. If the capital proceeds are less than the asset's reduced cost base, the employee makes a capital loss.

54. Under section 116-20 of the ITAA 1997, the capital proceeds from the cancellation of the AMP shares will be the total of the money and the market value of any property that the employee received or was entitled to receive in respect of CGT event C2 worked out at the time of the event.

55. Since the consideration received from the cancellation of the AMP shares was equal to the market value of the AMP shares at the date of cancellation, the market value substitution rule under subsection 116-30(2) of the ITAA 1997 does not apply.

56. The employee will therefore make a capital gain equal to the difference between the receivable amount that the employee was entitled to and the cost bases of the cancelled AMP shares.

57. Alternatively, the employee will make a capital loss equal to the difference between the cost bases of the cancelled AMP shares and the value of the receivable issued to the employee.

Discount capital gain on disposal of the AMP shares

58. Under sections 115-5 and 115-100 of the ITAA 1997, a capital gain made by an individual is a discount capital gain with a discount percentage of 50% where:

- (a) the capital gain results from a CGT event happening after 11.45 a.m. on 21 September 1999 (section 115-15);
- (b) the cost base used in determining the capital gain was not indexed (section 115-20); and
- (c) the CGT event happens at least 12 months after the relevant CGT asset was acquired (section 115-25).

59. As the CGT event C2 happened after 21 September 1999, the condition outlined in (a) is satisfied. Indexation of the cost base of the shares is not available because the ESOP commenced after 21 September 1999; therefore, condition (b) is satisfied. The condition outlined in (c) is satisfied where CGT event C2 happens at least 12 months after the date the cancelled AMP shares were acquired by the employee (that is, the date the contract was entered into for the allotment of the shares or, if there was no contract, the date the shares were allotted to the employee).

60. If CGT event C2 happened at least 12 months after the date the cancelled AMP shares were acquired by the employee, all the conditions in Subdivision 115-A will have been met, and any capital gain made by the employee is a discount capital gain which is reduced by the discount percentage (that is, 50%) under step 3 of the method statement in subsection 102-5(1).

Effect of share cancellation on the exemption conditions

61. Under subsection 139B(2) of the ITAA 1936, a taxpayer who acquires qualifying shares under an employee share scheme and makes an election under section 139E of the ITAA 1936 includes in assessable income in an income year the value of the discount given in relation to each share acquired in that year. Section 139BA of the ITAA 1936 provides that the amount of the discount assessable under subsection 139B(2) is only assessable to the extent that it is greater than \$1000 if the exemption conditions in section 139CE of the ITAA 1936 are satisfied.

62. The \$1000 tax exemption under section 139BA of the ITAA 1936 will be available to employees as long as the operation of the ESOP continues to satisfy the exemption conditions of section 139CE of the ITAA 1936.

63. Section 139CE contains three exemption conditions. These are:

- the scheme does not contain any conditions which could result in recipients forfeiting ownership of the shares that were acquired under the scheme (subsection 139CE(2));
- the scheme is operated so that no recipient would be permitted to dispose of shares acquired under the scheme until three years after the acquisition or until the recipient ceases to be an employee of the employer—whichever event occurs earlier (subsection 139CE(3)); and
- the employee share scheme and any financial assistance scheme in respect of the acquisition of shares under the employee share scheme is operated on a non-discriminatory basis (subsection 139CE(4)).

Forfeiture of ownership (subsection 139CE(2))

64. The *Macquarie Dictionary* (1997, Third Edition) defines 'forfeit' as 'something to which the right is lost by the commission of a crime or misdeed, the neglect of a duty, a breach of a contract etc.' The context in which 'forfeiting' is used in subsection 139CE(2) connotes a meaning somewhat broader than the legal definition—taking in a 'relinquishing', or a 'loss', without due recompense.

65. Rule 9.1 of the Plan Rules provides that the HR committee of AMP may amend any of the Plan Rules or waive or modify the application of the Rules in relation to any participant. However, Rule 9.1 also prohibits any amendment to the ESOP that would result in the then existing rights of the participants being adversely affected.

66. Additionally, Rule 3.1 states that:

The Plan (in its terms and operation), and shares acquired by eligible employees under the Plan, shall satisfy the exemption conditions [under section 139CE] so as to permit the application of section 139BA of the Tax Act to Participants who are residents in Australia.

67. As the exemption conditions referred to in Rule 3.1 include the requirement that there will not be any forfeiture conditions, the ESOP therefore does not contain any conditions which could result in the AMP shares acquired by employees being forfeited.

68. Under the Scheme of Arrangement, each AMP shareholder was issued with a Cancellation Entitlement (a receivable) equal to the capital distribution made to AMP shareholders in consideration for the cancellation of their shares in AMP. By order of the Court, the receivable was applied to subscribe for the issue of HHG shares equal in number to the number of AMP shares originally held. The value of the consideration did not differ between participants in the ESOP and other shareholders. An entitlement to that consideration precludes a finding that the cancelled shares had been 'forfeited'.

69. The exemption condition in subsection 139CE(2) of the ITAA 1936 therefore remains satisfied upon the cancellation of the AMP shares.

Restrictions on disposal (subsection 139CE(3))

70. Rule 7.1 and Rule 7.2 of the ESOP prohibit the disposal of shares allocated to an employee under the ESOP before the earlier of:

- the period ending three years after the date of acquisition in respect of those shares or any other such date as determined by the HR committee to ensure that the exemption conditions under section 139CE are satisfied; and
- the day after the date on which the employee ceases employment with AMP within the meaning of paragraph 139CE(3)(b) and subsection 139CE(5) of the ITAA 1936.

71. In addition, a trading lock is imposed to enforce the above stated disposal restriction. Accordingly, the operation of the ESOP does not enable the employee to dispose of the shares prior to the earlier of three years after the shares were acquired or cessation of employment.

72. Under the demerger, the cancellation of the AMP shares was subject to AMP shareholder approval and not as a result of an amendment to the Plan Rules. Pursuant to the demerger transaction, the cancellation of a proportion of AMP shares applied equally to all AMP shareholders on the same basis so as to satisfy legislative requirements of the *Corporations Act 2001*. It follows that the shares held under the ESOP by employees were cancelled on the same basis as those held by other shareholders.

73. The decision by AMP to undertake a share cancellation of shares acquired by the employees was outside the control of the employees and those administering the ESOP. The implementation of the demerger depended on shareholder approval at a general meeting and was also subject to other conditions including Court approval.

Notwithstanding the ability of the employees, as shareholders, to vote at company meetings, the voting power of the employees in regard to the demerger and the resulting share cancellation is not significant enough to influence the end result. The HR committee (defined in Rule 2.1 of the Plan Rules as the committee of the directors of AMP and now known as the AMP Board Remuneration Committee) could not directly influence whether shareholder approval for the demerger was given. They could only influence that decision by exercising their right to vote as a shareholder (where applicable).

74. Therefore, while the share cancellation under the demerger is an early disposal of the shares, such a disposal is considered to be outside the operation of the ESOP. There is effectively no connection between the disposal of the shares (via the share cancellation under the demerger transaction) and the operation of the ESOP.

75. The exemption condition in subsection 139CE(3) of the ITAA 1936 therefore remains satisfied upon the cancellation of the AMP shares.

Non-discriminatory operation (subsection 139CE(4))

76. The third condition as per subsection 139CE(4) of the ITAA 1936 is that both the ESOP and any scheme for the provision of financial assistance to acquire shares under the ESOP must be operated on a non-discriminatory basis.

77. The ESOP has been operated on a non-discriminatory basis. Rule 3.1 of the Plan Rules provides that the ESOP shall be operated on a non-discriminatory basis within the meaning of that expression in subsections 139CE(4) and section 139GF of the ITAA 1936.

78. The exemption condition in subsection 139CE(4) of the ITAA 1936 therefore remains satisfied upon the cancellation of the AMP shares.

79. Since the three exemption conditions in section 139CE are not affected by the cancellation of AMP shares under the demerger, section 139BA of the ITAA 1936 continues to apply to employees in respect of qualifying shares acquired under the ESOP. Provided the ESOP continues to be operated in a manner that satisfies the exemption conditions, employees will continue to benefit from the tax exemption under subsection 139B(2) which provides that the discount is only assessable to the extent that it is greater than \$1,000.

HHG shares***HHG shares not acquired in respect of employment***

80. Section 139C of the ITAA 1936 provides that a taxpayer acquires shares under an employee share scheme if the shares are acquired:

- in respect of, or for or in relation directly or indirectly to, any employment of the taxpayer or an associate of the taxpayer; or
- in respect of, or for or in relation directly or indirectly to, any services provided by the taxpayer or an associate of the taxpayer.

81. Upon the demerger, a portion of AMP shares acquired by each employee under the ESOP was cancelled and, in consideration for the cancelled shares, the employee was credited with a receivable which was applied to subscribe for the HHG shares issued. Accordingly, the employees who acquired AMP shares under the ESOP received an allotment of HHG shares. These employees have acquired the shares under the definition in paragraph 139G(b) of the ITAA 1936.

82. The issue of whether an allotment of shares was made in respect of, or for or in relation directly or indirectly to, any employment of a taxpayer for it to be subject to Division 13A has been considered in Class Ruling 2002/78 (CR 2002/78). CR 2002/78 expresses the view at paragraph 96 that:

it is relevant to ask whether the benefit granted is a consequence of any employment of the taxpayer in the sense of it being a product or incident of the employment. In answering this question it is relevant to enquire how and why the benefit was granted.

83. Employees who originally acquire shares pursuant to the ESOP do so as a consequence of their employment. However, the allotment of the HHG shares was made to all AMP shareholders on a similar basis, regardless as to whether they were ordinary shareholders or employee shareholders participating in the ESOP. Therefore, the employees acquired the HHG shares as a direct result of their ownership of the AMP shares, and not as a result of their employment with AMP, or having provided services to AMP.

84. Accordingly, the HHG shares were not acquired by the employees under an employee share scheme for the purposes of section 139C of the ITAA 1936, but rather in that employee's capacity as an ordinary shareholder of AMP.

85. Thus, the HHG shares acquired by the employees are not subject to the operation of the ESOP. As a result, there is no requirement for the HHG shares to be subject to the disposal

restrictions provided for under the ESOP or under section 139CE of the ITAA 1936.

86. The absence of a disposal restriction on the HHG shares does not impact on the satisfaction of the exemption conditions in relation to the AMP shares acquired under the ESOP.

Date of acquisition of the HHG shares

87. Division 109 of the ITAA 1997 sets out the ways in which a taxpayer can acquire a CGT asset and the time of acquisition. Item 2 in the table in section 109-10 states that where an equity interest in a company is allotted to a taxpayer, the taxpayer acquires the equity interest at the time the contract is entered into for the allotment of the equity interest or, if there is no contract, when the equity interest is allotted to the taxpayer. The term 'equity interest' is defined in Item 1 in the table of subsection 974-75(1) and includes shares in a company.

88. Thus, the employee acquired the HHG shares for CGT purposes at the time the contract was entered into for the allotment of the shares or, if there was no contract, at the time the shares were allotted to the employee.

Cost base of the HHG shares

89. Under subsection 110-25(1) of the ITAA 1997, the cost base of the employee's HHG shares consists of five elements.

90. Subsection 110-25(2) of the ITAA 1997 states that the first element of the cost base of a CGT asset is the total of any money paid, or required to be paid, and the market value of any other property given in respect of acquiring the asset.

91. Accordingly, the first element of the cost base of the HHG shares is the consideration paid to acquire the HHG shares (that is, the value of the receivable that was applied by way of Court order to the acquisition of the HHG shares).

92. In addition to the first element of the cost base, the other elements of the cost base as determined under section 110-25 of the ITAA 1997 may have to be taken into account in working out the cost base of the employee's HHG shares.

Disposal of the HHG shares

93. CGT event A1 happens when the employee disposes of the HHG shares (section 104-10 of the ITAA 1997). A disposal occurs if there is a change of ownership from the employee to another entity.

94. On the happening of CGT event A1, the employee makes a capital gain or a capital loss.

95. The employee makes a capital gain if the capital proceeds from the disposal of the HHG shares are more than the cost bases of those shares.

96. Alternatively, if the capital proceeds are less than the reduced cost base of the HHG shares, the employee will make a capital loss.

Discount capital gain on disposal of the HHG shares

97. Under Subdivision 115-A of the ITAA 1997, a capital gain is a discount capital gain if:

- the taxpayer is an individual, a trust or a complying superannuation fund (section 115-10);
- a CGT event happens in relation to an asset the taxpayer owns;
- the CGT event happened after 11.45 a.m. on 21 September 1999 (section 115-15);
- the taxpayer did not choose to use the indexation method (section 115-20);
- the taxpayer acquired the asset at least 12 months before the CGT event (section 115-25).

98. If all the conditions outlined above are satisfied, any capital gain made by the employee when CGT event A1 happens is a discount capital gain. Any discount capital gain that the employee makes is reduced by a discount percentage of 50% under step 3 of the method statement in subsection 102-5(1) of the ITAA 1997.

99. Therefore, provided all conditions above are satisfied, the employee can apply the discount method, as set out in Subdivision 115-A of the ITAA 1997 to calculate their net capital gain.

Share split of AMP shares

Impact of the share split on the exemption conditions

100. The share split undertaken in relation to shareholders' AMP shares resulted in the original AMP share being split into a larger number of shares without there being any change to the overall value of the shareholding.

101. The share split did not involve the disposal of the original AMP shares acquired under the ESOP, and the new AMP shares

resulting from the share split are subject to the 3 year disposal restriction under the ESOP.

102. Therefore, the share split in relation to the AMP shares does not breach the exemption conditions under section 139CE of the ITAA 1936.

Share split not a CGT event

103. Section 112-25 of the ITAA 1997 states that where a CGT asset (the original asset) is split into 2 or more assets (the new assets), and the taxpayer is the beneficial owner of the original and each new asset, the splitting is not a CGT event.

104. Accordingly, as the employee is the owner of the AMP shares (original asset) held by the employee under the ESOP and the owner of the split AMP shares, the share split does not constitute a CGT event.

Cost base of the AMP shares after the share split

105. Section 112-25 of the ITAA 1997 applies to attribute a proportionate cost base to the new assets. Under subsection 112-25(3), each element of the cost base and reduced cost base of the original asset is apportioned in a reasonable way to each new asset as at the time of the share split.

106. Therefore, in accordance with subsection 112-25(3) of the ITAA 1997, the cost base and reduced cost base of each new AMP share resulting from the share split is equal to an appropriate portion of the cost base or reduced cost base of the original AMP shares.

Date of acquisition of the AMP shares after the share split

107. As the AMP share split was not a CGT event, the employee is taken to have acquired the new AMP shares when the employee acquired the original AMP shares to which they relate. That is, the date of acquisition of the new AMP shares is the same as the time the contract was entered into for the allotment of the original AMP shares or, if there was no contract, at the time the original AMP shares were allotted to the employee.

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