

# ***CR 2005/2 - Income tax: Warrnambool Cheese and Butter Factory Holdings Company LTD - Heritage Participation Shares***

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## Class Ruling

# Income tax: Warrnambool Cheese and Butter Factory Holdings Company LTD – Heritage Participation Shares

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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 laws dealt with in this Ruling are:

- section 21A of the *Income Tax Assessment act 1936* (ITAA 1936);
- paragraph 26(e) of the ITAA 1936;
- Division 13A of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 10-5 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- Division 109 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 118-20 of the ITAA 1997;

- Subdivision 130-A of the ITAA 1997; and
- subsection 974-75(1) of the ITAA 1997.

## **Class of persons**

3. The class of persons to which this Ruling applies is the Australian resident eligible suppliers (suppliers) to the Warrnambool Cheese and Butter Factory Holdings Company Ltd (WCBF) who were allotted Heritage Participation Shares (HPS). The class also includes share farmers who acquire HPS through a share farming arrangement with a supplier.

## **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 36.

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

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8. This Ruling applies from 1 July 2003. 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 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.

## Withdrawal

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9. This Class 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 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 the withdrawal of the Ruling. This is subject to there being no change in the arrangement or the persons' involvement in the arrangement.

## Arrangement

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10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents which are attached to the file record maintained by the Tax Office for this ruling. 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 Class Ruling dated 5 May 2004;
- Record of telephone conversations between representatives of the applicant and officers of the ATO on 26 June 2004, 17 August 2004, 30 August 2004, 8 September 2004, 13 October 2004 and 15 October 2004;
- Correspondence from Applicant dated 6 September 2004 and 10 December 2004; and
- Company Announcements lodged with and available at the Australian Stock Exchange (ASX) including initial admission to the official list and pre quotation disclosure documents.

11. WCBF is a public company whose business includes the manufacture of cheese, butter, milk powder and other dairy products.

12. On 14 January 2004, WCBF sent a Notice of Meeting to its shareholders. At the meeting it was proposed to seek approval from WCBF shareholders to adopt a new constitution which would allow the WCBF to:

- list its shares on the ASX; and
- create and issue shares for nil consideration.

13. If the new constitution was adopted the WCBF proposed to introduce a Heritage Package whereby HPS would be offered to suppliers for nil consideration.

14. At a general meeting held on 16 February 2004 WCBF shareholders passed a special resolution adopting the new constitution.

15. On 24 February 2004 WCBF wrote to their suppliers outlining its purpose in offering the HPS and the Terms and Conditions upon which suppliers could apply for HPS. This letter stated:

It is with great pleasure that in recognition of your services and commitment to the Company the Board offers [the supplier] the opportunity to apply for up to 1,000 Heritage Participation Shares.

The Heritage Participation Share Offer addresses the concerns many Suppliers and Share Farmers have expressed about maintaining the strength of Supplier influence and participation in the Company. The Board's objective, through the Heritage Participation Share Offer, is to give all Suppliers a voice in the Company (including the right to vote) and an opportunity to participate in its profitability by way of dividends.

16. The HPS offer closed on 11 March 2004.

17. WCBF was admitted to the official list of ASX on 24 May 2004 with official quotation of their shares commencing 27 May 2004.

18. The HPS were issued on 11 June 2004 to suppliers and share farmers who made application to WCBF for the HPS.

19. The closing price on the ASX for an ordinary WCBF share on 11 June 2004 was \$3.00.

20. The HPS were listed with the ASX on 17 June 2004.

## **The HPS Offer**

21. The HPS were offered to each supplier who appeared, as at 1.00pm on 16 February 2004, on the register of suppliers maintained by WCBF.

22. The Terms and Conditions of the HPS provided that the offer was made:

- 1.1 ... in recognition for their services and commitment to the Company.

23. The relevant Terms and Conditions of the HPS offer were as follows:

- the suppliers may each apply for up to 1,000 HPS (cl 1.2);
- no consideration was payable in respect of the HPS (cl 1.3);
- suppliers can allocate some of all of their HPS to one or more share farmers with whom they have a milk supply agreement (cl 1.5);
- 'Share farmer' is defined as 'a person who has entered into an agreement with a supplier in respect of a share farming arrangement, notice of which has been received by WCBF (Defined Terms Section);
- no person who, if the HPS offer were accepted, would hold a legal or beneficial interest in more than 5% of the shares on issue may receive HPS (cl 2);
- the making and acceptance of the HPS offer would not constitute a legally binding commitment by the Company to issue the HPS except on issue of those shares (cl 3.6);
- an allotment of HPS may only be made to suppliers who remain a supplier of milk to WCBF at both the date of invitation and date of allotment (cl 4.1); and
- the HPS were to rank equally with all existing shares in respect of all rights issues, bonus share issues and dividends made or declared after the allotment date of the HPS (cl 4.4).

24. The Terms and Conditions also provide that the following restrictions will apply to the HPS:

- for 12 months after the allotment date the HPS will not be transferable and holders of these shares cannot grant any security interest over or otherwise dispose or deal with the HPS (cl 5.1); and
- a Holding Lock will be applied to the HPS for the 12 months after the allotment date (cl 5.2).

25. The Holding Lock is to be administered by the Securities Clearing House.

26. The HPS can be cancelled in the following circumstances:

- where the HPS are held by a supplier who ceases to supply WCBF in order to supply a competitor of WCBF during the 12 months after the allotment date the HPS can be cancelled at the WCBF Board's discretion (cl 6.1 and 6.2).

27. Neither the HPS offer nor the allotment of HPS is made in substitution for the payment for milk supplied to WCBF.

28. The HPS are fully paid ordinary shares carrying the right to vote at all general meetings of WCBF at one vote per share.

## **The suppliers**

29. With one exception the suppliers are not employees of WCBF.

30. The supplier who is also an employee was offered the HPS in their capacity as a supplier not as a result of their employment.

31. The suppliers are Australian residents for taxation purposes.

32. The suppliers are those persons actively supplying milk directly or indirectly through another party to WCBF (Terms and Conditions, defined terms).

33. Some suppliers have a share farming arrangement under which the share farmers supply milk or a right to milk to those suppliers.

34. The suppliers each carry on a dairy farming business to produce and sell milk to their customers, including WCBF.

35. Up to the time at which the milk is provided to WCBF the suppliers have responsibility for preserving, storing and packaging the milk.

36. The suppliers and share farmers are not responsible for providing any services to WCBF after the milk has been provided to WCBF.

## **Ruling**

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### **Division 13A**

37. Division 13A of the ITAA 1936 will not apply in respect of the issue of the HPS to the suppliers and sharefarmers.

### **Ordinary income**

38. The receipt of the HPS will be treated as income under ordinary concepts and will be assessable income of the suppliers and share farmers under section 6-5 of the ITAA 1997.

39. The value of the HPS as at the date of allocation determined under section 21A of the ITAA 1936 will be the amount included as assessable income under section 6-5 of the ITAA 1997. Under subsection 21A(5) the Commissioner will accept the list price for ordinary WCBF shares at the date the HPS were allocated as being the value of the HPS shares.

**Capital Gains Tax**

40. The first element of the supplier's and share farmer's cost base of the HPS is nil (item 5 of the table in subsection 112-20(3) of the ITAA 1997).

41. If CGT events A1 or C2 subsequently happen to the suppliers or share farmers in relation to the HPS, any capital gain made by the suppliers or share farmers when CGT event A1 or C2 happens can be reduced by the amount from the receipt of the HPS that was included in the supplier's or share farmer's assessable income under section 6-5 of the ITAA 1997 (section 118-20 of the ITAA 1997).

**Explanation**

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**Division 13A**

42. Division 13A of the ITAA 1936 deals with the taxation treatment of shares and rights acquired under an 'employee share scheme'.

43. A share will be acquired by a taxpayer under an 'employee share scheme' for the purposes of the application of Division 13A of the ITAA 1936 if it is:

- acquired in respect of, or for or in relation directly or indirectly to, any employment of the taxpayer (subsection 139C(1) of the ITAA 1936);
- acquired in respect of, or for or in relation directly or indirectly to, any services provided by the taxpayer or an associate of the taxpayer (subsection 139C(2) of the ITAA 1936).

44. Neither the suppliers nor share farmers are employees of WCBF and therefore the conditions required by subsection 139C(1) of the ITAA 1936 are not satisfied.

45. The relevant question is whether the HPS have been acquired in respect of, directly or indirectly, any services provided by the suppliers or share farmers.

46. There have been a number of instances where the Courts have, in various contexts, looked at the meaning of 'services provided' or the 'rendering of services'.

47. The Court in *Revesby Credit Union Co-operative Ltd v. FC of T* (1965) 112 CLR 564 considered the question of what is meant by the 'rendering of services' in the context of a Co-operative. McTiernan J at CLR 578 stated that:

I consider that 'the rendering of services' should consist of the doing of an act for the benefit of another, which is more than the mere making of a contract and which goes beyond the performance of an obligation undertaken in the course of an ordinary commercial contract.

48. This reasoning was applied in *FC of T v. Cooke and Sherden* (1980) 29 ALR 202; 80 ATC 4140; (1980) 10 ATR 696 (Cooke and Sherden) which involved an arrangement between a manufacturer and retailer. One sold and the other bought bottles of soft drinks, the retailer paid to the manufacturer a price for those drinks. The court in looking at the application of paragraph 26(e) of the ITAA 1936 needed to consider whether the arrangement in place between the parties gave rise to 'services rendered by' the retailer to the manufacturer.

49. In deciding that there were no services rendered by the retailer to the manufacturer the court said as follows at ATC page 4151:

Although the successful conduct of the retailers' respective businesses enhanced the sales by the manufacturers to the retailers, and added to the notoriety of the manufacturer's products, the conduct of the retailers' businesses was not a service rendered to the manufacturers. The businesses were conducted for the benefit of the retailer, and the advantages which thereby accrued to the manufacturers were not the product of services rendered to the manufacturers. Advantages accrued to the manufacturers because the retailers, independently of any obligation owed to the manufacturers, conducted their businesses in a way which yielded advantages to both. ...

The relationship was essentially one of seller and buyer. The taxpayers did not render services to the companies with which they had contracted.

50. It is clear from this that in order for there to be a provision of services there must be something more than the provision of goods under an existing contractual arrangement.

51. Further services that are performed by the provider of those goods in order to enable them to fulfil that contract do not in themselves qualify as the provision of services to the recipient of the goods.

52. The suppliers contract to provide milk to WCBF. In the course of carrying out their obligations under these contracts they perform certain activities, including preserving, storing and packaging the milk.

53. These are activities carried out by the suppliers and share farmers in the course of carrying on their businesses. Although WCBF may have benefited from those activities, in terms of the quality of the milk provided, those activities were not services provided to WCBF by the suppliers or by the share farmers to the suppliers.

54. The relationship between WCBF and their suppliers is one of a buyer and a seller of goods and not an arrangement for the provision of services.

55. The relationship between the suppliers and their share farmers is not an arrangement for the provision of services.

56. The requirements of subsection 139C(2) of the ITAA 1936 are not met as the HPS have not been acquired by the suppliers or share farmers in respect of, or for or in relation directly or indirectly to any services provided by the supplier or share farmer.

57. The HPS have therefore not been issued as part of an employee share scheme and Div 13A of the ITAA 1936 has no application.

### **Ordinary income**

58. Under section 6-5 of the ITAA 1997 a taxpayer's assessable income includes income according to ordinary concepts, which is called ordinary income.

59. Some of the provisions listed in section 10-5 of the ITAA 1997 vary or replace the rules that would otherwise apply for certain kinds of ordinary income. One of the provisions listed in section 10-5 of the ITAA 1997 is section 21A of the ITAA 1936 which deals with non-cash business benefits.

60. The effect of subsection 21A(1) of the ITAA 1936 is that a non-cash business benefit may be treated as ordinary income even if it is not convertible into cash, provided it is otherwise of an income nature.

61. The effect of subsection 21A(2) of the ITAA 1936 is that where a non-cash business benefit (whether convertible to cash or not) is in the nature of income, the recipient is required to include in their assessable income the arm's length value of the benefit, reduced by any recipient's contribution.

62. If the benefit is not convertible to cash, any conditions which prevent or restrict the conversion of the benefit to cash are to be disregarded in determining the arm's length value (paragraph 21A(2)(b) of the ITAA 1936).

### ***Are the HPS a non-cash business benefit?***

63. A non-cash business benefit is defined in subsection 21A(5) of the ITAA 1997 to mean:

Property or services provided after 31 August 1988:

- (a) wholly or partly in respect of a business relationship; or
- (b) wholly or partly for or in relation directly or indirectly to a business relationship.

64. The HPS were property provided after 31 August 1988 by WCBF to its suppliers and share farmers wholly or partly in respect of or in relation to its business relationship with those suppliers and share farmers. The HPS were provided to the suppliers and share farmers in their capacity as a milk supplier or sharefarmer and in recognition of that business relationship.

65. Therefore the HPS were a non-cash business benefit.

***Was the non-cash business benefit of an income nature?***

66. The question becomes therefore whether that non-cash business benefit, even if it is not convertible to cash, is otherwise of an income nature.

67. The HPS were received by the suppliers and share farmers because they were in the business of dairy farming (including share farming in the case of share farmers) and specifically because of the supplier's business relationship as a milk supplier to WCBF.

68. In the case of *FC of T v. Squatting Investment Co Ltd* (1954) 10 ATD 361 the Privy Council decided that voluntary distributions made under the *Wool Realisation (Distribution of Profits) Act 1948* to a person carrying on a grazing business were part of their assessable income. In reaching that decision the Privy Council quoted the following passage from *Richie v. Trustees Executors & Agency Co Ltd* (1951) 84 CLR 553 which had dealt with a similar issue:

They [the payments] constitute receipts resulting from the operations of wool-growing. As possible or contingent receipts they were in contemplation when the appraisements were made. The title to receive them when in the end it is placed on a legal basis consists in the submission of shorn wool for appraisal for the purposes of the Wool Purchase Arrangement. ... They are receipts resulting from the operations of growing wool.

69. The Privy Council then went on to say:

The respondents were in business as wool suppliers at all material times, and the payment was made to them, not because of any personal qualities, but because they, among others, supplied participating wool. They supplied the wool in the course of their trade and this further payment was made to them because they supplied it. In the present case the respondents were still trading when the payment was made. It was in their hands a trade receipt of an income nature.

70. In *FC of T v. Myer Emporium Ltd* 87 ATC 4363 the Full Court of the High Court said at p 4367:

A receipt may constitute income, if it arises from an isolated business operation or commercial transaction entered into otherwise in the ordinary course of the carrying on of the taxpayer's business, so long as the taxpayer entered into the transaction with the intention or purpose of making a relevant profit or gain from the transaction.

71. In *FC of T v. Cooling* 90 ATC 4472 the issue was whether lease incentives were of an income character. Hill J at 4484 said, in deciding that they were of an income character:

Where a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises occupied are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income. Once this is accepted, the evidence established that in Queensland in 1985 it was an ordinary incident of leasing premises in a new city building, at least where the premises

occupied were of substantial size, to receive incentive payments of the kind in question. Why then should a profit received during the course of business where the making of such a profit was an ordinary incident or part of the business activity of the firm not be seen to be income in ordinary concepts?

...

In my view the transaction entered into by the firm was a commercial transaction; it formed part of the business activity of the firm and a not insignificant purpose of it was the obtaining of a commercial profit by way of the incentive payment.

72. From these cases we can say that an amount will be ordinary income where:

- it arises as a natural incident of business activities; or
- it arises from an isolated business operation or commercial transaction and the taxpayer had the intention or purpose of making a profit or gain from that operation or transaction.

73. The HPS were offered and allocated to the suppliers and share farmers as a result of their business relationship with WCBF. The stated purpose of the HPS offer was to give all suppliers a voice in the Company and an opportunity to participate in its profitability by way of dividends. The HPS offer was made to address concerns over the WCBF needing to preserve the influence, reward the loyalty and encourage the suppliers to participate in the ownership of WCBF.

74. The HPS offer was a commercial opportunity that arose out of the suppliers' and share farmers' business activities. In accepting the HPS offer the suppliers and share farmers have entered into a commercial transaction.

75. As the HPS were offered for no consideration the suppliers and share farmers were entering into that transaction with a reasonable expectation of and with a view to making a profit. Therefore the receipt of those shares was a receipt of an income nature derived at the date the HPS were allocated to the suppliers and share farmers.

***Is the benefit convertible to cash?***

76. Subject to the operation of section 21A of the ITAA 1936, in order for an amount to be ordinary income it must be money or something capable of being converted into money.

77. This principle arose from *Tennant v. Smith* (1892) 3 TC 158. In that case an employee had, as a result of their employment, a right to occupy a house. They did not however have any right to sub-let or otherwise deal with their interest in that house. The House of Lords found that, in these circumstances, the benefit they enjoyed was not convertible to cash and therefore not assessable to the employee.

78. In *Cooke and Sherden* the taxpayers received a free holiday as a result of their business activities. The holiday was non-transferable and could not be cashed in. The Federal Court held that the holiday was not taxable as income and in reaching this decision said at 80 ATC at page 4148:

If a taxpayer receives a benefit which cannot be turned into pecuniary account, he has not received income as that term is understood according to ordinary concepts and usages.

79. The HPS were acquired by the suppliers and share farmers at the date of allotment. They are however subject to a Holding Lock for the first 12 months after the allotment. The suppliers and share farmers are, during this Holding Lock period, unable to transfer or otherwise dispose of the shares. In addition they are not to grant any security interest over the HPS.

80. At the time of the acquisition of the HPS it is accepted that they were subject to such restrictions that resulted in the HPS not being convertible to cash.

### ***Operation of section 21A of the ITAA 1936***

81. As stated earlier, subsection 21A(1) of the ITAA 1936 provides that a non cash business benefit that is not convertible to cash will be treated as if it were convertible to cash.

82. Therefore the HPS, although not convertible to cash will be treated as if they were convertible to cash.

83. The HPS will therefore form part of the suppliers' and share farmers' ordinary income.

84. Subsection 21A(2) of the ITAA 1936 provides that the arm's length value of the benefit is included in the supplier's and share farmers assessable income.

85. In determining the arm's length value of the HPS any conditions that would prevent or restrict the conversion of the benefit to cash are to be disregarded (paragraph 21A(2)(b) of the ITAA 1936).

86. The term 'arm's length value' is defined in subsection 21A(5) of the ITAA 1936. It is the amount that the recipient could reasonably be expected to have been required to pay to obtain the benefit, if it had been an arm's length transaction.

87. As the HPS were listed on the ASX the suppliers and share farmers could reasonably be expected to have acquired the HPS at the list price as at the date the HPS were allocated to them. The operation of paragraph 21A(2)(b) of the ITAA 1936 means that the Holding Lock can be disregarded in determining the arm's length value.

88. Therefore the receipt of the HPS will be treated as the ordinary income of the suppliers and share farmers. The value of the HPS as at the date of allocation determined under section 21A of the ITAA 1936 will be included in their assessable income under section 6-5 of the ITAA 1997.

**Capital Gains Tax*****Date of acquisition of HPS***

89. 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 of 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 of the table in subsection 974-75(1) and includes shares in a company.

90. The suppliers and share farmers will therefore acquire the HPS for CGT purposes at the time the contract is entered into for the allotment of the shares or, if there is no contract, at the time the shares are allotted to the supplier or share farmer.

***Cost base of the HPS***

91. Under subsection 110-25(1) of the ITAA 1997 the cost base of the supplier's or share farmer's HPS consists of five elements.

92. 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.

93. WCBF issued the HPS to the suppliers and share farmers for 'no cost' and 'no consideration'. Accordingly, the suppliers and share farmers did not pay, were not required to pay nor give anything to acquire the HPS.

94. If a taxpayer does not incur expenditure in acquiring a CGT asset, subsection 112-20(1) of the ITAA 1997 may modify, in certain circumstances, the first element of the cost base so that the first element of the cost base is the market value of the CGT asset at the time of acquisition.

95. However, item 5 of the table in subsection 112-20(3) of the ITAA 1997 states that the market value substitution rule in subsection 112-20(1) will not apply if the CGT asset is a share in a company and the company issued or allotted the share to a taxpayer and they did not pay or give anything for it.

96. Accordingly, as the suppliers and share farmers did not pay, were not required to pay nor give anything to acquire the HPS, the first element of the cost base of the HPS is nil.

97. The rules in Subdivision 130-A of the ITAA 1997 dealing with bonus equities will not apply to suppliers or share farmers that were existing shareholders of WCBF. WCBF issued the HPS to the suppliers or share farmers in their capacity as suppliers or share farmers and not in relation to their original shares.

98. 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 supplier's or share farmer's HPS.

### ***Anti-overlap provisions***

99. CGT event A1 will happen when the supplier or share farmer disposes of the HPS (section 104-10 of ITAA 1997). A disposal occurs if there is a change of ownership from the supplier or share farmer to another entity.

100. If the HPS is cancelled or redeemed, CGT event C2 will happen to the supplier or share farmer when their ownership of the HPS ends by the cancellation or redemption (section 104-25 of the ITAA 1997).

101. On the happening of CGT event A1 or C2, the supplier or share farmer will make a capital gain or a capital loss. The supplier or share farmer will make a capital gain if the capital proceeds from CGT event A1 or C2 are more than the cost base of the HPS.

102. Because the first element of the cost base of the HPS is nil and the receipt of the HPS will be included as assessable income under section 6-5 of the ITAA 1997, potential double taxation could arise for the supplier or share farmer if CGT event A1 or C2 happens to the supplier or share farmer in relation to their HPS. Potential double taxation is avoided by the operation of the anti-overlap provisions in section 118-20 of the ITAA 1997.

103. Under section 118-20 of the ITAA 1997, a capital gain that a taxpayer makes from a CGT event is reduced if the capital gain includes an amount that is also included in their assessable income under a non-CGT provision. The effect of the provision is to reduce the capital gain by the amount that is also assessable under the non-CGT provision.

104. Accordingly, as the receipt of the HPS will be included in the supplier's or share farmer's assessable income under section 6-5 of the ITAA 1997, the supplier or share farmer, in working out their net capital gain when CGT event A1 or C2 happens in relation to the HPS, can reduce the amount of the capital gain by the amount assessable under section 6-5.

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## Detailed contents list

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**Commissioner of Taxation**

19 January 2005

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

CR 2001/1; TR 92/1; TR 92/20;  
TR 97/16

*Subject references:*

- capital gains tax
- cost base
- employee share scheme
- non cash business benefits
- ordinary income

*Legislative references:*

- ITAA 1936 21A
- ITAA 1936 21A(1)
- ITAA 1936 21A(2)
- ITAA 1936 21A(2)(b)
- ITAA 1936 21A(5)
- ITAA 1936 26(e)
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(2)
- ITAA 1997 6-5
- ITAA 1997 10-5
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 Div 109
- ITAA 1997 109-10
- ITAA 1997 110-25

- ITAA 1997 110-25(1)

- ITAA 1997 110-25(2)

- ITAA 1997 112-20

- ITAA 1997 112-20(1)

- ITAA 1997 112-20(3)

- ITAA 1997 118-20

- ITAA 1997 Subdiv 130-A

- ITAA 1997 974-75(1)

- Copyright Act 1968

- TAA 1953 Pt IVAAA

- Wool Realisation (Distribution of Profits) Act 1948

*Case references:*

- FC of T v. Cooke and Sherden (1980) 29 ALR 202; 80 ATC 4140; (1980) 10 ATR 696
- FC of T v. Cooling 90 ATC 4472
- FC of T v. Myer Emporium Ltd 87 ATC 4363
- FC of T v. Squatting Investment Co Ltd (1954) 10 ATD 361
- Revesby Credit Union Co-operative Ltd v. FC of T (1965) 112 CLR 564
- Richie v. Trustees Executors & Agency Co Ltd (1951) 84 CLR 553
- Tennant v. Smith (1892) 3 TC 158

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ATO references

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