CR 2005/20 - Income tax: Westpac Banking Corporation Employee (Share) Performance Plan

Class Ruling

Income tax: Westpac Banking Corporation Employee (Share) Performance Plan

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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****,* ***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 laws

2. The tax laws dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CB of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139DD of the ITAA 1936;
- section 139E of the ITAA 1936;
- sections 139FA to FF of the ITAA 1936;
- sections 139FJ to FN of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 109-5 of the ITAA 1997;

- section 110-25 of the ITAA 1997;
- section 112-15 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 115-10 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 115-100 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 134-1 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies is all Australian resident employees of the Westpac Group (the Group) listed below who participate in the Westpac Banking Corporation Performance Plan (the WPP) as described 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. The Group comprises:

- Westpac Banking Corporation (Westpac);
- 1925 (Commercial) Limited;
- M.A.C. Nominees Pty Limited;
- Mazbond Pty Limited;
- Palaver Pty Limited;
- Reveille Pty Limited;
- Brenmar Holdings Pty Limited;
- Runkelli Pty Limited;
- 1925 (Industrial) Limited;
- A.C.N 001 231 027 Pty Limited;
- Personaldirect Limited;
- A.C.N 007 552 454 Limited;
- Colmso Pty Limited;
- Colmtea Pty Limited;
- Como Properties Pty Limited;
- Autodirect Pty Limited;
- 1925 (Insurance Premium Funding) Limited;
- 1925 (Properties) Limited;

- 1925 House Limited;
- Ormiston Pty Limited;
- Hesse Pty Limited;
- Pranbrooke Pty Limited;
- 1925 Advances Limited;
- General Credits Holdings Limited;
- General Credits Limited;
- G.C.L. Investments Limited;
- Island Princess Holdings Pty Limited;
- Reef International Pty Limited;
- Bill Acceptance Corporation Limited;
- Mortgage Management Limited;
- Biralo Pty Limited;
- CBA Limited;
- Westpac Properties – Vic – Limited;
- Westpac Properties – NSW – Pty Limited;
- Westpac Matching Gifts Limited;
- Huben Holdings Pty Limited;
- Hull 4381 and 4382 Leasing Pty Limited;
- Partnership Pacific Limited;
- Westpac Administration Pty Limited;
- Carseldine Pty Limited;
- Glenunga Pty Limited;
- Maliny Pty Limited;
- Partnership Pacific Securities Limited;
- Wistow Pty Limited;
- The Mortgage Company;
- Piccadilly of Sydney Pty Limited;
- Jaunty Pty Limited;
- Pitco Pty Limited;
- Sarnia Pty Limited;
- Sixty Martin Place (Holdings) Pty Limited;
- Claremont Bond Pty Limited;
- Comserv (No. 3011) Pty Limited;

- Enfield Downs Pty Limited;
- Westpac Equipment Finance (No. 1) Pty Limited;
- Ivaness Pty Limited;
- Oakjet Pty Limited;
- Westpac Direct Equity Investments Pty Limited;
- Teuton Pty Limited;
- Loy Yang B Agencies Pty Limited;
- Westpac Asian Lending Pty Limited;
- Westpac Debt Securities Pty Limited;
- Westpac Equipment Finance Limited;
- Westpac Equipment Finance (Vic) Pty Limited;
- Infrastructure Australia (No. 1) Limited;
- Infrastructure Australia (No. 2) Limited;
- Infrastructure Australia (No. 3) Limited;
- Infrastructure Australia (No. 4) Limited;
- Packaging Properties 1 Pty Limited;
- Packaging Properties 2 Pty Limited;
- Packaging Properties 3 Pty Limited;
- EHM Investco Pty Limited;
- Westpac Group Investments Australia Pty Limited;
- Howlong Pty Limited;
- Westpac Infrastructure Management Limited;
- WIML Services Pty Limited;
- Westpac Alpha Pty Limited;
- Westpac Investment Vehicle Pty Limited;
- Westpac Resources and Infrastructure Pty Limited;
- Westpac Structured Investments Limited;
- Pacific Structured Funding Limited;
- Vicpac Chatswood Pty Limited;
- Westpac Structured Products Limited;
- Net Nominees Limited;
- Westpac Securities Limited;
- Westpac Equity Holdings Pty Limited;
- Belliston Pty Limited;

- Westpac Financial Consultants Limited;
- Westpac Information Technology Services Pty Limited;
- Westpac Training Services Pty Limited;
- Westpac Private Equity Pty Limited;
- Westpac Retirement Plan Pty Limited (ex Torlane P/L);
- Westpac Securitisation Management Pty Limited;
- Westpac Financial Services Group Limited;
- Westpac Financial Services Limited;
- Westpac Insurance Services (Brokers) Limited;
- Westpac Equity Pty Limited;
- A.F.G. Insurances Limited (in vol liq);
- Westpac General Insurance Limited;
- Westpac Investment Management Pty Limited;
- Westpac Securities Administration Limited;
- The Wales Nominees (Vic) Pty Limited;
- Westpac Custodian Nominees Limited;
- Westpac Insurance Services Superannuation Fund Limited;
- Westpac Nominees – Canberra – Pty Limited;
- Westpac Nominees – SA – Pty Limited;
- Westpac Lenders Mortgage Insurance Limited;
- Westpac Life Insurance Services Limited;
- Westpac Funds Management Limited;
- Westpac Finance Pty Limited;
- Westpac Investment Holdings Pty Limited;
- Westpac Leasing Nominees Pty Limited;
- Westpac Leasing Nominees – Vic – Pty Limited;
- Westpac Leasing Pty Limited;
- Westpac OMG Holdings Pty Limited;
- Qvalent Pty Limited;
- Westpac Structured Management Pty Limited;
- Westpac Overseas Funding Pty Limited;
- Westpac Overseas Holdings Pty Limited;
- Altitude Rewards Pty Ltd;

- Altitude Administration Pty Ltd;
- Westpac Altitude Rewards Trust;
- Westpac Properties Limited;
- Collins Wales Pty Limited;
- Westpac Institutional Holdings Pty Limited;
- Westpac Property Investments Pty Limited;
- Westpac Syndications Management Pty Limited;
- Westpac Tasman No. 1 Pty Limited;
- Westpac Tasman No. 2 Pty Limited;
- BLE Capital Pty Limited;
- BLE Capital Investments Pty Limited;
- BLE Development Pty Limited;
- BLE Holdings Pty Limited;
- Westpac Funding Holdings Pty Limited;
- Challenge Limited;
- Challenge Finance Limited;
- Challenge Funds Management Limited;
- Challenge Information Technology Pty Limited;
- RESI-Statewide Mortgage Corporate Limited;
- RESI-Statewide Nominees Limited;
- RESI-Statewide Corporation Limited;
- Maracorp Financial Services Pty Limited;
- Salmoor Pty Limited;
- S.A.L. Financial Services Pty Limited;
- MFS Services Pty Limited;
- 52 Collins St Pty Limited;
- Sagitta Wealth Management Limited;
- Sagitta Investment Management Limited;
- Hargrave Investments Pty Limited;
- BT (Queensland) Pty Ltd;
- BT Australia Corporate Services Pty Ltd;
- BT Australia Pty Ltd;
- BT Finance & Investments Pty Ltd;
- BT Finance Pty Ltd;

- BT Financial Group Limited;
- BT Funds Management Ltd;
- BT Life Ltd;
- BT Nominees Pty Ltd;
- BT Portfolio Services Ltd;
- BT Securities Ltd;
- BT Wealth Management Pty Ltd;
- Chifley Services Pty Ltd;
- Oniston Pty Ltd;
- Hastings Funds Management Limited; and
- QVI Pty Ltd.

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 9 to 23.

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.

Date of effect

8. This Ruling applies to years commencing both before and after its date of issue. 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, this 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 taxation laws are not amended.

Arrangement

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

- the Westpac Banking Corporation Performance Plan Rules (the WPP Rules);
- the application for Class Ruling dated 27 February 2003;
- facsimile from Westpac dated 30 June 2003;
- letter from Westpac dated 9 October 2003;
- letter from Westpac dated 17 December 2003; and
- letter from Westpac dated 19 February 2004.

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

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

10. The WPP was established as part of the employee share strategy of Westpac. The WPP commenced in the year ending 30 June 2003 and is administered by the Board of Westpac (the Board).

11. The Board will invite eligible employees to apply to acquire options and/or share rights.

12. The options will be granted over ordinary Westpac shares with an exercise price that exceeds $1 per share, and the share rights will be granted over ordinary Westpac shares with an exercise price of nil or not more than $1 per share. Hereinafter, options and share rights are referred to as rights.

13. Upon acceptance of the application, eligible employees will become participating employees.

14. Participating employees will not provide any consideration for the acquisition of the rights.

15. Details of rights will be recorded in a register and each participating employee will be advised the date rights are issued to them.

16. Rights become exercisable when they vest in accordance with the WPP Rules.

17. Rights cannot be exercised more than 10 years after issue.

18. Rights will lapse upon the happening of particular events specified in the WPP Rules.

19. Where there has been a mistake or error in the granting of rights to a participating employee (the mistaken employee) the employee's interest in the rights may be made null and void under the WPP.

20. Rights will not confer a dividend entitlement.

21. At no time will a participating employee be in a position to hold a legal or beneficial interest in more than 5% of the shares of Westpac. Also at no time will a participating employee be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of Westpac.

22. Rights are transferable with the approval of the Board.

23. The Rights will not be listed for quotation on any stock exchange.

Ruling

All provisions mentioned hereinafter relate to the ITAA 1936 unless stated otherwise.

24. Under the WPP a participating employee will acquire a qualifying right (for the purposes of section 139CD) when the Board grants a right to the participating employee.

Where an employee makes an election

25. Where a participating employee makes an election under section 139E, the discount given in relation to the right acquired under the WPP will be included in their assessable income in the year of income in which the right is acquired, pursuant to subsection 139B(2).

26. The discount to be included in the participating employee's assessable income is equivalent to the market value of the right at the time they acquired it. The market value of the right at this time is determined under section 139FC or section 139FE.

27. Where the right has an exercise price, the market value of the right will be the greater of:

- the market value of Westpac shares (on the day the right was granted) less the lowest amount that must be paid to exercise the right; and
- the value determined in accordance with the table in sections 139FJ to 139FN which use an accepted methodology for valuing rights.

28. Where the right has a nil exercise price, the market value of the right will be equal to the market value of a Westpac share on the day the right was granted. The market value of a share at this time is determined under section 139FA.

29. Where a participating employee exercises the right and acquires a share in Westpac, the share will not be acquired under an employee share scheme for the purposes of Division 13A of Part III (Division 13A).

Capital gains tax

30. Where a participating employee acquires a right under the WPP they acquire a right for capital gains tax (CGT) purposes, pursuant to section 109-5 of the ITAA 1997.

31. When the right, or the share acquired as a result of the exercise of the right is subsequently disposed of, the participating employee will make a capital gain if the capital proceeds from disposal are more than the cost base of the right, or the cost base of the share acquired as a result of the exercise of the right. Conversely a capital loss will arise if the reduced cost base exceeds the capital proceeds. No capital gain or loss arises when the right is exercised.

32. The cost base of the right will be an amount comprising the market value of the right, calculated under section 139FC of the ITAA 1936 or section 139FE of the ITAA 1936 at the time of grant, (refer to paragraphs 26 to 28 of this Ruling) plus any other amounts identified in accordance with section 110-25 of the ITAA 1997. The cost base of any share acquired as a result of exercising the right will be an amount comprising the market value of the right (as above), the amount paid to exercise the right plus any other amounts identified in accordance with section 110-25 of the ITAA 1997.

33. Where the right, or the share acquired as a result of the exercise of the right, is disposed of 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain for the purposes of Subdivision 115-A of the ITAA 1997.

Where an employee does not make an election

34. Where a participating employee does not make an election under section 139E, the discount given in relation to a right will be included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

35. The cessation time for a right will be the earliest of:

- the time when the participating employee disposes of the right;
- the time when the participating employee ceases employment with their employer or a group company, pursuant to subsection 139CB(2);
- the time when the participating employee exercises the right; or
- the end of the 10 year period starting when the participating employee acquired the right.

Disposal within 30 days

36. Where the participating employee does not exercise the right and they dispose of the right, in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount of consideration received on the disposal of the right.

37. Where the participating employee exercises the right and the share acquired as a result of the exercise of the right is disposed of in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount of consideration received on disposal of the share less any amount paid to exercise the right.

Capital gains tax

38. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

39. Where the right is not exercised at the cessation time and the right is subsequently disposed of by the participating employee more than 30 days after the cessation time, or in a non-arm's length transaction, the discount will be the market value of the right at the cessation time calculated in accordance with section 139FC or section 139FE (refer to paragraphs 26 to 28 of this Ruling). For CGT purposes the first element of the cost base of the right will be the market value of the right at the cessation time, as calculated above.

40. Where the right is not exercised at the cessation time and the right is subsequently exercised and the share acquired as a result of the exercise of the right is disposed of by the participating employee more than 30 days after the cessation time, or in a non-arm's length transaction, the discount will be the market value of the right at the cessation time, as calculated in paragraph 39. For CGT purposes the first element of the cost base of the share will be the market value of the right at the cessation time, as calculated above, plus the amount paid to exercise the right.

41. Where the cessation time occurs on exercise of the right and the share acquired as a result of the exercise of the right is disposed of by the participating employee more than 30 days after the cessation time, or in a non-arm's length transaction, the discount will be the market value of the share at the cessation time, calculated in accordance with section 139FA, less any amount paid to exercise the right. For CGT purposes the first element of the cost base of the share will be the market value of the share at the cessation time, as calculated above.

Capital gains tax

42. On disposal of the right, or the share acquired as a result of the exercise of the right, a participating employee will make a capital gain if the capital proceeds exceed the cost base, or a capital loss if the reduced cost base exceeds the capital proceeds.

43. Any gain or loss made by the participating employee upon exercise of the right is disregarded, pursuant to subsection 134-1(4) of the ITAA 1997.

44. Where the right, or any share acquired as a result of the exercise of the right, is disposed of 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain for the purposes of Subdivision 115-A of the ITAA 1997.

Where a right lapses

45. Where a right lapses in accordance with the WPP Rules, a participating employee will not be assessable on the discount given in relation to the right. Where prior to the right lapsing any discount has been included under Division 13A in respect of the right, this will be excised where the participating employee requests an amended assessment, pursuant to section 139DD. For CGT purposes the participating employee will not make a capital gain or capital loss.

Rights mistakenly granted

46. Where under the WPP a right is mistakenly granted to a participating employee and the employee's interest in the right is subsequently made null and void, any amount included in the mistaken employee's assessable income under Division 13A will be excised where the employee requests an amended assessment, pursuant to section 139DD. For CGT purposes the mistaken employee will not make a capital gain or capital loss.

Explanation

47. A right will be acquired under an employee share scheme, pursuant to Division 13A, if it is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of an employee pursuant to subsection 139C(1); and
- acquired for less than market value, pursuant to subsection 139C(3).

48. Section 139G provides that an employee will acquire a right in several circumstances, including when another person creates the right in the employee or they acquire a legal interest in the right from another person.

49. Under the WPP Rules the Board grants rights to participating employees. Thus a participating employee will acquire the right within the meaning of section 139G when the right is granted.

50. The WPP Rules note that the WPP has been established as an initiative for creating a stronger link between employee performance and reward and increasing shareholder value. As such, any right acquired under the WPP is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

51. As no consideration is paid or given by a participating employee for the acquisition of the right, the participating employee will acquire the right for less than market value, pursuant to subsection 139C(3).

52. A right will be a qualifying right for the purposes of Division 13A if the conditions specified in section 139CD are satisfied. As the conditions in section 139CD are satisfied, a right acquired under the WPP will be a qualifying right for the purposes of Division 13A.

53. Where an employee acquires a right under an employee share scheme, pursuant to subsection 139B(1), the assessable income of the employee, includes the discount given in relation to the right.

54. Where the right is a qualifying right the year of income in which the discount is included and the amount of the discount depend on whether the employee has made a section 139E election in relation to the acquisition of that right.

Where an employee makes an election

55. An employee can elect under section 139E that subsection 139B(2) apply in respect of all rights acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a right is included in the employee's assessable income in the year of income in which the right is acquired.

56. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount being the market value of the right at the time it is acquired by the employee.

57. Subdivision F of Division 13A contains special provisions to determine the market value of a right on a particular day. As the right will not be quoted on an approved stock exchange, the market value of the right will be determined in accordance with section 139FC or section 139FE.

58. Where the right has an exercise price, the market value of the right will be the greater of:

- the market value (determined under section 139FA) of a Westpac share (on the day the right was granted) less the lowest amount that must be paid to exercise the right; and
- as the right cannot be exercised more than 10 years after the date the right was acquired, the value determined in accordance with the tables in sections 139FJ to 139FN. These tables use an accepted methodology for valuing a right.

59. Where the right has a nil exercise price, the market value of the right will be equal to the market value (determined under section 139FA) of a Westpac share on the day the right was granted, pursuant to subsection 139FE(1).

60. As Westpac shares are listed on the Australian Stock Exchange (ASX), section 139FA provides that their market value will be:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition – 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 week up to and including the date of acquisition – the last price at which an offer was made on the ASX in that period to buy such a share, or if no offer was made, the value as determined under section 139FB.

61. An employee will not acquire a share under an employee share scheme if the employee acquires the share as a result of exercising a right that the employee acquired under an employee share scheme, pursuant to subsection 139C(4).

Capital gains tax

62. Where a company issues rights or options to a person, the person will acquire the rights or options, pursuant to section 109-5 of the ITAA 1997. Thus where an employee is issued a right under an employee share scheme they acquire the right for CGT purposes.

63. A capital gain will arise if the capital proceeds from the disposal of a CGT asset (which includes rights or shares) exceed the CGT asset's cost base and a capital loss will arise if the reduced cost base exceeds the capital proceeds, pursuant to subsection 104-10(4) of the ITAA 1997.

64. Thus where an employee disposes of a right, or any share acquired as a result of the exercise of the right, a capital gain or loss may arise.

65. The cost base of a CGT asset consists of 5 elements. Where an employee makes an election under section 139E of the ITAA 1936, and disposes of the right without exercising it, the first element of the cost base of the right will be its market value (worked out under section 139FA to 139FF of the ITAA 1936) at the acquisition time, pursuant to subsection 130-80(2) of the ITAA 1997.

66. Where an employee makes an election under section 139E of the ITAA 1936, and disposes of the share acquired as a result of exercising the right, item 1 of the table in section 134-1 of the ITAA 1997 indicates that the first element of the cost base of the share is what they paid for the right plus any amount paid to exercise it. Note 3 to that table further indicates that the rule in Item 1 is modified by section 112-15 of the ITAA 1997 and Subdivision 130-D of the ITAA 1997. Thus what an employee paid for the right is taken to be its market value as determined under subsection 130-80(2) of the ITAA 1997, being the market value (worked out under section 139FA to 139FF of the ITAA 1936) at the acquisition time.

67. Where in respect of a right, or share acquired as a result of exercising the right, an employee incurs incidental acquisition or disposal costs, non-capital holdings costs, capital expenditure to increase the value or to establish, preserve or defend their title to the right or share, these amounts are also included in the cost base, pursuant to section 110-25 of the ITAA 1997.

68. Where an employee disposes of a right, or share acquired as a result of the exercise of the right, any gain arising will be a discount capital gain if it satisfies the requirements of section 115-10 of the ITAA 1997. Thus, pursuant to item 8 of the table in subsection 115-30(1) of the ITAA 1997, any gain the employee makes on the disposal of:

- the right – will be a discount capital gain if the disposal occurs 12 months or more after acquisition; or
- the share acquired as a result of the exercise of the right – will be a discount capital gain if the disposal occurs 12 months or more after exercise,

and the discount percentage for the employee will be 50%, pursuant to section 115-100 of the ITAA 1997.

Where an employee does not make an election

69. Where an employee acquires a qualifying right and does not make an election under section 139E, the discount given in relation to the right is included in the employee's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

70. The cessation time is determined in accordance with subsection 139CB(1). Because a share acquired by a participating employee (as a result of exercising a right acquired under the WPP) is not subject to disposal restrictions, nor subject to forfeiture, the cessation time will be the earlier of:

- the time when the participating employee disposes of the right (other than by exercising it);
- the time when the participating employee ceases employment with their employer or a group company, pursuant to subsection 139CB(2);
- the time when the participating employee exercises the right; and
- the end of the 10 year period starting when the participating employee acquired the right.

71. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the right, or any share acquired as a result of the exercise of the right, is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

72. Where an employee disposes of a right, or any share acquired as a result of the exercise of the right, in an arm's length transaction within 30 days of the cessation time, the discount to be included in assessable income is determined in accordance with subsection 139CC(3).

73. Where an employee disposes of the right without exercising it, the discount will be the amount or value of any consideration they receive for the disposal.

74. Where an employee exercises the right and disposes of the share acquired as a result of the exercise of the right, the discount will be the amount or value of any consideration they receive for the disposal less the amount of any consideration they have paid or given to exercise the right.

Capital gains tax

75. Any capital gain or loss made as a consequence of such a disposal is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

76. Where an employee disposes of a right, or any share acquired as a result of the exercise of the right, more than 30 days after the cessation time, or in a non-arm's length transaction, the discount in respect of the right is determined under subsection 139CC(4) of the ITAA 1936. For CGT purposes the first element of the cost base of the right, or any share acquired as a result of the exercise of the right is determined in accordance with subsection 130-83(3) of the ITAA 1997.

77. Where the right is not exercised at the cessation time and the right is subsequently disposed of, the discount included in the employee's assessable income is the market value of the right at the cessation time. Where the right is not listed on an approved stock exchange, the market value of the right is calculated in accordance with section 139FC or section 139FE (refer to paragraphs 57 to 60 of this Ruling). For CGT purposes the first element of the cost base of the right is the market value of the right at the cessation time, worked out under section 139FC or section 139FE.

78. Where the right is not exercised at the cessation time and the right is subsequently exercised and the share acquired as a result of the exercise of the right is disposed of, the discount included in the employee's assessable income is the market value of the right at the cessation time, as calculated in paragraph 77. For CGT purposes the first element of the cost base of the share will be what the employee paid for the right plus any amount they paid to exercise the right, pursuant to Item 1 of the table in section 134-1 of the ITAA 1997. Note 3 to that table further indicates that the rule in Item 1 is modified by section 112-15 of the ITAA 1997 and Subdivision 130-D of the ITAA 1997. Thus what an employee paid for the right is taken to be its market value worked out at the cessation time, as in paragraph 77, plus the amount of any consideration paid or given by the employee to exercise the right.

79. Where the cessation time occurs on exercise of the right and the share acquired as a result of the exercise of the right is subsequently disposed of, the discount included in the employee's assessable income is the market value of the share at the cessation time, less any amount paid to exercise the right. Where the share is listed on the ASX, the market value is calculated under section 139FA. For CGT purposes the first element of the cost base of the share is the market value of the share at the cessation time, as calculated under section 139FA.

Capital gains tax

80. Where an employee disposes of a right, or any share acquired as a result of the exercise of the right, more than 30 days after the cessation time, or in a non-arm's length transaction, a capital gain or loss may arise (refer to paragraphs 63 and 64 of this Ruling).

81. Where the employee makes a capital gain or capital loss from exercising the right (option), it is disregarded pursuant to subsection 134-1(4) of the ITAA 1997.

82. Where a participating employee disposes of the right, or share acquired as a result of the exercise of the right 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain as it meets the requirements set out in section 115-5 of the ITAA 1997.

Where a right lapses

83. Where a right to acquire a share in a company is lost without the employee ever having exercised it, and the company is the employer of the employee or a holding company of the employer, the right to acquire a share in the company is never acquired for the purposes of Division 13A. Thus where a participating employee's right lapses in accordance with the WPP Rules, the discount given in relation to the right will not be included in the participating employee's assessable income, pursuant to subsection 139B(1). Where prior to the right lapsing any discount has been included under Division 13A in respect of the right, the Commissioner will apply section 139DD, to the extent that section 170 does not prevent an amendment, to remove any discount included in the participating employee's assessable income.

Capital gains tax

84. For CGT purposes, the lapse of a participating employee's right in accordance with the WPP Rules will constitute the ending of an intangible CGT asset (CGT event C2). Thus, pursuant to subsection 104-25(3) of the ITAA 1997, the participating employee may make a capital gain or a capital loss on the lapse of a right.

85. However, as the participating employee's lapsed right is deemed never to have been acquired for the purposes of Division 13A (pursuant to section 139DD of the ITAA 1936) Subdivision 130-D of the ITAA 1997 has no application and any gain or loss is determined under Part 3-1 of the ITAA 1997.

86. The first element of the right's cost base will be nil as a participating employee does not provide any consideration for the acquisition of the right. The market value substitution rule has no application, pursuant to Item 5 in the table in subsection 112-20(3) of the ITAA 1997.

87. Whilst a participating employee will not receive any capital proceeds from the lapse of the right, the market value substitution rule will not apply as it is accepted that the lapse of the right (in accordance with the WPP Rules) constitutes expiry, pursuant to subsection 116-30(3) of the ITAA 1997.

88. Thus a participating employee will not make a capital gain where a right lapses in accordance with the WPP Rules.

Right mistakenly granted

89. Under the WPP Rules, a participating employee's interest in a right that has been mistakenly granted to them may be made null and void in order to correct such an error or mistake.

90. Where a mistaken employee's interest is made null and void, the Commissioner accepts that that employee never acquires such a right. Further, where the mistaken employee has included in their assessable income the amount of any discount in relation to such a right granted in error, the Commissioner will apply section 139DD to the extent that section 170 does not prevent an amended assessment to remove such an amount.

Capital gains tax

91. For CGT purposes an employee will acquire a right if they become the owner. Where a right is granted in error and the interest in that right is made null and void under the WPP, the mistaken employee does not acquire an interest in the right and thus will never own the right. In these circumstances the mistaken employee is taken never to acquire the right for CGT purposes.

92. As the mistaken employee is taken never to have acquired the right and thus never owned the right, there can be no CGT event C1 or CGT event C2, pursuant to subsections 104-20(1) and 104-25(1) of the ITAA 1997. As no other CGT event is considered to happen in relation to the mistaken employee, they will not make a capital gain or loss upon their interest in the right being made null and void.

Detailed contents list

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

Commissioner of Taxation
13 April 2005

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:

- acquisition of shares
- capital gains tax
- CGT discount
- CGT cost base
- CGT events
- cost base
- dismissal of employees
- disposal of shares
- employee share ownership
- employee share schemes & options
- employees
- forfeiture of rights & entitlements
- income
- resignation of employees
- share discounts on employee share schemes
- shareholders
- shares

Legislative references:

- TAA 1953 Pt IVAAA
- Copyright Act 1968
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139C(4)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)
- ITAA 1936 139CB(2)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139DD
- ITAA 1936 139E
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139FA
- ITAA 1936 139FAA
- ITAA 1936 139FB
- ITAA 1936 139FC
- ITAA 1936 139FD
- ITAA 1936 139FE
- ITAA 1936 139FE(1)
- ITAA 1936 139FF
- ITAA 1936 139FJ
- ITAA 1936 139FK
- ITAA 1936 139FL
- ITAA 1936 139FM
- ITAA 1936 139FN
- ITAA 1936 139G
- ITAA 1936 170
- ITAA 1997 Pt 3-1
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 104-20(1)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 109-5
- ITAA 1997 110-25
- ITAA 1997 112-15
- ITAA 1997 112-20
- ITAA 1997 112-20(3)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-5
- ITAA 1997 115-10
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 115-100
- ITAA 1997 116-30
- ITAA 1997 116-30(3)
- ITAA 1997 Subdiv 130-D
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- ITAA 1997 134-1
- ITAA 1997 134-1(4)

ATO references

NO: 2005/4564
ISSN: 1445-2014