

# ***CR 2005/57 - Income tax: Promina Group Limited - Employee Share Purchase Plan (Exemption 2003)***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2002*



## Class Ruling

### Income tax: Promina Group Limited – Employee Share Purchase Plan (Exemption 2003)

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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 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-5 of the ITAA 1997;

- section 110-25 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

## **Class of persons**

3. The class of persons to whom this Ruling applies is Australian resident employees of Promina Group Limited (PGL) and Australian Associated Motor Insurers (AAMI) who participate in the 'PGL Employee Share Purchase Plan (Exemption 2003)' described in the Arrangement section of this Ruling. In this Ruling, this class of person is referred to as a 'participating employee'.

## **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 20.

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 the 2002-2003 year of income. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement dispute agreed to before the date of this Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Withdrawal

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9. This Ruling is withdrawn and ceases to have effect from 1 July 2005. The Ruling, however, continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who entered 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 the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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10. The arrangement that is the subject of the 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:

- Application for Class Ruling for the PGL Employee Share Purchase Plan (the Plan) dated 20 August 2004;
- The PGL Employee Share Purchase Plan Rules (the Rules);
- The PGL Employee Share Purchase Plan Management Agreement (the Custody Agreement);
- Letter from PGL dated 25 October 2004;
- Letter from PGL dated 8 November 2004;
- Letter from PGL dated 15 March 2005; and
- Letter from PGL dated 19 May 2005.

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

11. The Plan has been established by the board of management of PGL to allow eligible employees of PGL and AAMI (the Promina Group) to acquire fully paid ordinary shares in PGL.

12. The Plan will be administered by Computer Share Plan Managers (the Custodian).

13. Promina Group will pay amounts to the Custodian to fund the purchase of PGL shares on market or by subscription. Such amounts may include amounts salary sacrificed (in accordance with paragraphs 19 to 23 of Taxation Ruling TR 2001/10) by eligible employees.

14. Under the Plan, eligible employees of the Promina Group may receive offers of free PGL shares or they may be invited to acquire shares in PGL by salary sacrificing up to \$900 per annum towards the cost of those shares. PGL will contribute up to \$1,000 per annum (made up of the amount salary sacrificed and up to \$100 per annum being the discount) for each participating employee.

15. The applicant has advised that it is not contemplated that participating employees will be asked to make contributions directly towards the acquisition of shares under the Plan.

16. Shares purchased by the Custodian are acquired for and registered in the names of eligible employees who then become participating employees.

17. The Rules provide for participating employees to dispose of shares acquired under the Plan within 3 years of acquisition. In particular, clause 10.3.2 of the Rules may allow a participating employee to accept an offer made pursuant to a bidder's statement in accordance with Division 2 of Part 6.5 of the *Corporations Act 2001*.

18. However, the applicant has advised that the Plan will be operated such that under no circumstances will a participating employee be permitted to dispose of their shares before the earlier of:

- three years after their acquisition; or
- the time when the participating employee ceases to be an employee of PGL or AAMI.

19. The Rules provide for PGL to enforce the above disposal restrictions by doing all things necessary, including by applying a holding lock or by refusing to register the transfer of participating employee's shares.

20. The applicant has advised that shares acquired under the Plan are qualifying shares for the purposes of section 139CD of the ITAA 1936 and, further, that they will satisfy the exemption conditions specified in section 139CE of the ITAA 1936.

## Ruling

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*[All legislative references are to the ITAA 1936 unless stated otherwise.]*

21. Under the Plan, a participating employee acquires a qualifying share, for the purposes of section 139C, when the Custodian of the Plan acquires and registers a share in the employee's name.

**Where an employee makes an election**

22. Where a participating employee makes an election under section 139E, the discount on each share acquired under the Plan is included in the participating employee's assessable income in the year of income in which the share is acquired, in accordance with subsection 139B(2).

23. The amount of the discount included in the participating employee's assessable income will be equivalent to the market value at the time of acquisition. The market value of the share at this time is determined under Subdivision F of Division 13A of Part III (Subdivision F of Division 13A).

24. As the exemption conditions in section 139CE are satisfied, only the amount of discount in any year of income in excess of \$1,000 (if any) is included in the participating employee's assessable income.

**Capital gains tax (CGT)**

25. Where a participating employee acquires a share under the Plan, they also acquire the share for CGT purposes. They acquire the share for CGT purposes at the time the Custodian purchases the share on their behalf and registers the share in the participating employee's name.

26. Where the share is disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss will arise where the capital proceeds are less than the reduced cost base.

27. The first element of the cost base of the share will be the market value of the share at the time of acquisition, as determined under Subdivision F of Division 13A.

**Where an employee does not make an election**

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

29. The cessation time for a share will be the earliest of the following (in accordance with subsection 139CA(2)):

- the time when the share is disposed of;
- the time when the disposal restrictions are lifted; or
- the time when the participating employee ceases to be employed by their employer or a company in the Promina Group.

### ***Disposal within 30 days***

30. Where the participating employee subsequently disposes of the share in an arm's length transaction at, or within 30 days of, the cessation time, the discount included in assessable income at the cessation time will be the amount of the consideration received on the disposal of the share, as calculated under subsection 139CC(3).

### ***Capital gains tax***

31. Any capital gain or loss made as a consequence of such a disposal will be disregarded in accordance with subsection 130-83(2) of the ITAA 1997.

### ***Disposal after 30 days***

32. Where the participating employee does not dispose of the share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the market value of the share at that time, as calculated under subsection 139CC(4). The market value of the share is determined under Subdivision F of Division 13A.

### ***Capital gains tax***

33. A capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss will arise where the capital proceeds are less than the reduced cost base.

34. The first element of the cost base, or reduced cost base, will be the market value of the share at cessation time, as required under subsection 130-83(3) of the ITAA 1997. The market value of the share is determined under Subdivision F of Division 13A.

## **Explanation**

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### **Employee share schemes**

35. Division 13A provides for the taxation treatment of shares acquired under employee share schemes.

36. Section 139C sets out the requirements for an employee share scheme. If a taxpayer has acquired a share or right under an employee share scheme, the assessable income of the taxpayer includes the discount given in relation to the share or right.

37. Section 139CD sets out conditions that must be met for shares or rights to be considered qualifying shares or rights. If those conditions are met an employee who acquires such shares or rights may receive the benefit of concessional treatment. One of these concessions flows from the application of the exemption conditions in section 139CE.

38. For the purposes of this Ruling, the Commissioner accepts the applicant's statements that shares issued under the Plan are qualifying shares and that they satisfy the conditions in section 139CE.

39. Section 139G provides that a person acquires a share under an employee share scheme in several circumstances, including by acquiring a legal or beneficial interest in the share from another person or having a share allotted to them by another person.

40. The Rules provide for the shares in PGL to be acquired on behalf of a participating employee and registered in the name of the participating employee. For the purposes of Division 13A, the participating employee acquires a share when it is registered in the name of the participating employee by the Custodian.

41. The Custodian will be issued shares or purchase shares from funds contributed by the Promina Group, including amounts contributed under an effective salary sacrifice arrangement (refer to paragraphs 19 to 23 of Taxation Ruling TR 2001/10). For the purposes of Division 13A, any reference to consideration paid or given by an employee to acquire shares does not include amounts sacrificed under an effective salary sacrifice arrangement.

42. A participating employee in the Plan acquires shares under an employee share scheme and the discount given is included in their assessable income, pursuant to Division 13A. When the discount is included in assessable income will depend on whether or not a participating employee makes an election under section 139E.

#### **Where an employee makes an election**

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

44. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount being the market value of the share at the time it was acquired by the employee less any consideration paid to acquire a share.

45. Accordingly, a participating employee in the Plan who has made an election under section 139E includes the discount given on their shares in their assessable income in the income year when the shares were acquired.

46. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. If a share is quoted on an approved stock exchange on the particular day section 139FA provides that its market value is:

- if there is at least one transaction on the approved stock market in shares of that class during the week up to and including that day – the weighted average of the prices at which those shares were traded on that stock market during that week;
- if there was no such transaction in that one week period up to and including the acquisition day – the last price at which an offer was made on that stock market during that week to buy a share; or
- if there was no transaction in, or offer made to buy shares on that stock market in the specified period – the value as determined under section 139FB.

If the share is not quoted on an approved stock exchange on that day, the market value of the share is determined under section 139FB.

47. Section 139CE contains exemption conditions that must be satisfied by a scheme before employees have access to the \$1,000 tax free threshold provided for in subsection 139BA(2).

48. The Commissioner accepts that the Plan will satisfy the exemption conditions. Thus, section 139BA will apply so that only the discount greater than \$1,000 will be included in a participating employee's assessable income.

### ***Capital gains tax***

49. Where a share is issued to an employee or purchased on-market and allocated to an employee the employee acquires the share for CGT purposes, pursuant to section 109-5 of the ITAA 1997.

50. In accordance with subsection 104-10(4) of the ITAA 1997, where the share is subsequently disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss will arise if the reduced cost base exceeds the capital proceeds.

51. The cost base of a CGT asset consists of five elements. Where an employee makes an election under section 139E, the first element of the cost base of the share will be its market value (as determined under Subdivision F of Division 13A) at the acquisition time, as provided for under subsection 130-80(2) of the ITAA 1997.

52. Where the employee incurs incidental acquisition or disposal costs, non-capital holding costs, capital expenditure to increase the value of the share, or to establish, preserve or defend their title to the share, these amounts are also included in the cost base under section 110-25 of the ITAA 1997.

**Where an employee does not make an election**

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

54. As the Plan contains no forfeiture provisions and provides for disposal after three or more years, the cessation time will be determined under subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share;
- the time when the disposal restrictions are lifted; or
- the time when pursuant to subsection 139CA(3) the participating employee ceases employment with their employer or a Promina Group company.

55. 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 share is disposed of in an arm's length transaction within 30 days of the cessation time.

***Disposal within 30 days***

56. Subsection 139CC(3) provides that where an employee disposes of a share in an arm's length transaction at, or within 30 days of, the cessation time the discount to be included in assessable income is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

***Capital gains tax***

57. Subsection 130-83(2) of the ITAA 1997 provides that if the share is a qualifying share, an election is not made under section 139E and CGT event A1, C2, E1, E2 or E5 happens in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time, any capital gain or capital loss the participating employee makes on the disposal is disregarded.

58. Therefore, if the share is disposed of in an arm's length transaction at, or within 30 days of, the cessation time, no capital gain or loss will arise in relation to that share.

***Disposal after 30 days***

59. Subsection 139CC(4) provides that where the employee does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

***Capital gains tax***

60. Where a participating employee does not make an election under section 139E and the share is not so dealt with at, or within 30 days of, the cessation time, the effect of section 130-83 of the ITAA 1997 is that the first element of the cost base or reduced cost base of the share is the market value at the cessation time. The market value at this time is determined under Subdivision F of Division 13A, as set out in paragraph 46 of this Ruling.

61. If the capital proceeds from the CGT event exceed the cost base of the share, the participating employee will make a capital gain. Conversely, the participating employee will make a capital loss if the capital proceeds are less than the reduced cost base of the share.

**Detailed contents list**

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

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**Commissioner of Taxation**

29 June 2005

<i>Previous draft:</i>	- ITAA 1936 139CA(2)
Not previously issued as a draft	- ITAA 1936 139CA(3)
	- ITAA 1936 139CC
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CC(2)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 139CC(3)
TR 97/16; TR 2001/10	- ITAA 1936 139CC(4)
	- ITAA 1936 139CD
	- ITAA 1936 139CE
<i>Subject references:</i>	- ITAA 1936 139E
- capital gains tax	- ITAA 1936 Pt III Div 13A Subdiv F
- election	- ITAA 1936 139FA
- employee share scheme	- ITAA 1936 139FB
	- ITAA 1936 139G
<i>Legislative references:</i>	- ITAA 1997 104-10
- TA1953 Pt IVAAA	- ITAA 1997 104-10(4)
- Copyright Act 1968	- ITAA 1997 109-5
- Corporations Act 2001Pt 6.5 Div 2	- ITAA 1997 110-25
- ITAA 1936 Pt III Div 13A	- ITAA 1997 130-80
- ITAA 1936 139B	- ITAA 1997 130-80(2)
- ITAA 1936 139B(2)	- ITAA 1997 130-83
- ITAA 1936 139B(3)	- ITAA 1997 130-83(2)
- ITAA 1936 139BA	- ITAA 1997 130-83(3)
- ITAA 1936 139BA(2)	
- ITAA 1936 139C	
- ITAA 1936 139CA	

## ATO references

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