

CR 2005/58 - Income tax: Promina Group Limited - Senior Management Performance Share Plan

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Class Ruling

Income tax: Promina Group Limited – Senior Management Performance Share 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**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

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

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD 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 109-5 of the *Income Tax Assessment Act* (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 Limited (AAMI) who participate in the PGL Senior Management Performance Plan as described in the Arrangement section of this Ruling. In this Ruling, a person belonging to this class of persons 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 21.

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

- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies 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

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

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 Senior Management Performance Share Plan (the Plan) dated 20 August 2004;
- The PGL Senior Management Performance Share Plan Trust Deed (the Trust Deed);
- The Rules of the 'PGL Senior Management Performance Share Plan (2003)' (the Rules);
- Letter from PGL dated 25 October 2004;
- Letter from PGL dated 8 November 2004; and
- Letter from PGL dated 15 March 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 directors of PGL (the Board) to reward eligible employees of PGL and AAMI (the Promina Group) for the achievement of PGL's objectives.

12. Under the Plan, eligible employees are offered shares in PGL and invited to apply to become participants of the Plan. Shares offered under the Plan may be subject to performance criteria.

13. Where the Board resolves to grant offered shares to an eligible employee they become a participating employee.

14. To acquire and hold shares for the benefit of participating employees, the Board established the PGL Senior Management Performance Share Plan Trust (the Trust). CPU Share Plan Pty Limited has been appointed as the trustee (the Trustee).

15. PGL contributes funds to the Trust which the Trustee uses to acquire ordinary shares in PGL.

16. Shares acquired by the Trustee are allocated and held for the benefit of named participating employees.

17. Upon satisfaction of any performance criteria prescribed in an offer, a participating employee may at any time request the Board to allow the Trustee to:

- transfer the shares to them; or
- sell the shares and transfer the net proceeds to them.

18. If the performance criteria are not satisfied, the Rules state that a participating employee's rights in relation to the offered shares lapse and the participating employee is treated for the purposes of the Plan as never having held any right or interest in the offered shares.

19. Whilst a participating employee's shares are held by the Trustee, they are subject to forfeiture in accordance with the Rules.

20. The applicant has advised that shares acquired under the Plan will be qualifying shares within the meaning of section 139CD of the ITAA 1936.

21. Participating employees are not required to pay for shares acquired under the Plan.

Ruling

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

22. Under the Plan, a participating employee acquires a qualifying share when the Trustee acquires the share and allocates it to the participating employee.

Where an employee makes an election

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

24. The discount included in the participating employee's assessable income will be an amount equivalent to the market value of the share 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).

Capital gains tax (CGT)

25. Where a participating employee acquires a share under the Plan they will acquire the share for CGT purposes when they become absolutely entitled to the share.

26. Where the share is subsequently disposed of by, or on behalf of, the participating employee the participating employee makes a capital gain where the capital proceeds from the disposal are more than 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 or reduced cost base of the share is the market value of the share at the time the Trustee allocates the share to the participating employee that is, when the participating employee acquires a beneficial interest in the share. The market value of the share at this time is determined under Subdivision F of Division 13A.

Forfeiture

28. Where a participating employee acquires a share under the Plan and the share is subsequently forfeited, the amount of the discount assessable to the participating employee, in accordance with paragraph 24, cannot be excised from the participating employee's assessable income.

29. For CGT purposes, if the participating employee forfeits the share before they become absolutely entitled to the share, they will not make a capital gain or capital loss in relation to their forfeiture of the share.

Where an employee does not make an election

30. Where a participating employee has not made 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).

31. The cessation time will be the earliest of the following times:

- the time when the participating employee forfeits their interest in the share;
- the time when the Trustee transfers the share to the participating employee or sells the share and transfers the net proceeds to the participating employee;
- the time when the participating employee ceases to be employed by their employer or any Promina Group company; or
- the end of the 10 year period starting when the participating employee acquired the share.

Disposal within 30 days

32. Where the participating employee disposes of the share in an arm's length transaction at, or within 30 days of, the cessation time, the discount assessable at the cessation time will be the amount or value of any consideration received on the disposal of the share, in accordance with subsection 139CC(3).

33. 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

34. 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 the cessation time, in accordance with subsection 139CC(4). The market value of the share is determined under Subdivision F of Division 13A.

35. For CGT purposes, a capital gain or capital loss will arise when the participating employee disposes of the share. In determining the gain or loss, the first element of the cost base, or reduced cost base of the share will be the market value of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value of the share is determined under Subdivision F of Division 13A.

Forfeiture of shares

36. Where a participating employee forfeits a share acquired under the Plan in respect of which no section 139E election has been made, and the forfeiture triggers the cessation time (or the forfeiture happens within 30 days of the cessation time) no amount is included in assessable income under subsection 139B(3).

37. For CGT purposes, if the participating employee forfeits the share before they become absolutely entitled to it, they will not make a capital gain or capital loss in relation to their forfeiture of the share.

Explanation

38. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

39. For the purposes of this Ruling, the Commissioner accepts the statement by the applicant that shares acquired under the Plan are qualifying shares for the purposes of section 139CD. Thus, a participating employee will acquire a qualifying share when the Trustee allocates a share to the participating employee under the Plan and the participating employee acquires a beneficial interest in the share.

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

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

Where an employee makes an election

42. 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.

43. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount is determined as the market value of the share at the time it was acquired by the employee less any consideration (if any) paid or given by the employee for the acquisition of the share.

44. 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 in accordance with section 139FB.

Capital gains tax

45. Where an employee has a beneficial interest in a share they will acquire the share for CGT purposes when they become absolutely entitled to the share as against the trustee, pursuant to section 109-5 of the ITAA 1997.

46. 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.

47. Where an employee acquires a qualifying share and makes a section 139E election, the first element of the cost base or reduced cost base of the share for CGT purposes is determined in accordance with subsection 130-80(3) of the ITAA 1997. Under subsection 130-80(3), the first element of the cost base or reduced cost base is the market value of the share at the time the employee first acquires a beneficial interest in the share. The market value of the share is determined under Subdivision F of Division 13A (refer to paragraph 45).

Forfeiture

48. Where a share acquired under the Plan is forfeited, the amount of discount included in a participating employee's assessable income under section 139B cannot be excised as Subdivision F of Division 13A of Part III does not provide any mechanism for excising the discount.

49. For CGT purposes, no capital gain or capital loss will arise in relation to the forfeited share where the participating employee has not become absolutely entitled to the share. This is because the share will not have been acquired for CGT purposes.

Where an employee does not make an election

50. 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 assessable income in the year of income in which the cessation time occurs, in accordance with subsection 139B(3).

51. As shares acquired under the Plan may be forfeited, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share (that is, where the participating employee forfeits their interest in the share);
- the time when any forfeiture condition ceases to have effect (that is, when the Board allows the Trustee to transfer the share to the participating employee or sell the share and transfer the net proceeds to the participating employee and the share is no longer subject to forfeiture);

- the time when the participating employee ceases to be employed by either their employer (being their employer at the time they acquired the shares) or a Promina Group company, pursuant to subsection 139CA(3); or
- ten years after the share was acquired.

52. 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 shares are disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

53. Where an employee disposes of a share in an arm's length transaction at, or within 30 days of, the cessation time, the amount of the discount to be included in the employee's assessable income is calculated in accordance with subsection 139CC(3). The discount 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 shares.

Capital gains tax

54. Subsection 130-83(2) of the ITAA 1997 provides that where 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 from the event is disregarded.

Disposal after 30 days

55. Where an employee does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount to be included in an employee's assessable income is calculated in accordance with subsection 139CC(4) and is 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.

56. Under the Plan, for the purposes of subsection 139CC(4), the market value of a share is determined in accordance with Subdivision F of Division 13A.

Capital gains tax

57. Subsection 130-83(3) of the ITAA 1997 provides that where CGT event A1, C2, E1, E2 or E5 does not happen in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time the first element of the cost base or reduced cost base of the share is its market value at the cessation time. The market value of the share at that time is determined under Subdivision F of Division 13A, as set out in paragraph 45.

Forfeiture of shares

58. Where a participating employee forfeits a share acquired under the Plan and the forfeiture triggers a cessation time (or the forfeiture happens within 30 days of the cessation time) the Commissioner accepts that the forfeiture will constitute an arm's length disposal. As such, the discount given in relation to the share will be determined under subsection 139CC(3). Thus, as no consideration will be received by the participating employee upon forfeiture of the share, no amount will be included in the participating employee's assessable income under subsection 139B(3).

59. If the participating employee forfeits the share before they become absolutely entitled to it, no capital gain or capital loss will arise in relation to that share. This is because the share will not have been acquired for CGT purposes.

Where performance criteria are not satisfied

60. Where performance criteria are not satisfied by a participating employee, their rights in relation to the offered shares lapse and the participating employee is treated for the purposes of the Plan as never having held any right or interest in the offered shares.

61. Where the participating employee has made an election in respect of these shares, the discount in relation to the shares is included in the participating employee's assessable income under section 139B and there is no mechanism for excising the discount.

62. Where a participating employee has not made an election in respect of these shares, no amount will be included in the participating employee's assessable income under section 139B.

63. For CGT purposes, no capital gain or capital loss will arise in relation to the share because it will not have been acquired for CGT purposes.

Detailed contents list

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<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	- ITAA 1936 139CC(4)
	- ITAA 1936 139CD
	- ITAA 1936 139E
<i>Subject references:</i>	- ITAA 1936 Pt III Div 13A Subdiv F
- capital gains tax	- ITAA 1936 139FA
- election	- ITAA 1936 139FB
- employee share scheme	- ITAA 1936 139G
	- ITAA 1997 109-5
<i>Legislative references:</i>	- ITAA 1997 130-80
- TAA 1953 Pt IVAAA	- ITAA 1997 130-80(3)
- Copyright Act 1968	- ITAA 1997 130-83
- ITAA 1936 139B	- ITAA 1997 130-83(2)
- ITAA 1936 139B(1)	- ITAA 1997 130-83(3)
- ITAA 1936 139B(2)	
- ITAA 1936 139B(3)	
- ITAA 1936 139CA	

ATO references

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