


CR 2008/13 - Income tax: Panbio Limited - Employee Share Scheme - proposed takeover by Inverness Medical Innovations Inc

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Class Ruling

Income tax: Panbio Limited – Employee Share Scheme – proposed takeover by Inverness Medical Innovations Inc

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 139BA of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- section 139CE of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who:

- are employees of Panbio Limited (Panbio);
- acquired shares in Panbio, referred to as \$1,000 Team Shares (shares), under the Panbio Employee Share Acquisition Scheme (the Plan);
- made an election under section 139E in relation to those shares; and
- immediately prior to the implementation of the proposed takeover as described in paragraphs 19 to 21 of this Ruling, will hold the shares and be employed by Panbio, such employment being continuous from the time the shares were acquired under the Plan.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 21 of this Ruling.

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

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

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Date of effect

8. This Ruling applies to the income year ended 30 June 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

13. The scheme that is the subject of this Ruling is described below. This description is based on the following 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 scheme are:

- the application for a Class Ruling from Ernst & Young dated 1 November 2007;
- a copy of the Panbio Limited Employee Share Acquisition Scheme Terms and Conditions (the Plan rules);
- a copy of the document titled 'Administration of 'Team Shares' under Employee Share Acquisition Scheme' dated 15 November 2007; and

- a copy of the Amended and Restated Scheme Implementation Agreement dated 31 October 2007.

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

14. The Plan was established in November 2001. Shares are offered to participants under the Plan in July each year, with the first offer being made in July 2002.

15. Full time employees of Panbio with at least 12 months service (excluding specified leave) may be offered shares to the value of \$1,000 for nil consideration. The directors of Panbio also have the discretion to offer shares to participants under the Plan where the 12 month service period is not satisfied.

16. Shares issued under the Plan are fully paid ordinary shares in Panbio.

17. The Plan rules contain no forfeiture provisions.

18. The applicant has advised that:

- the shares are qualifying shares for the purposes of Division 13A of Part III (Division 13A);
- the exemption conditions in section 139CE are satisfied in respect of each share issued under the Plan;
- the Plan has been operated and continues to operate so that since the acquisition of shares, no participant has been permitted to dispose of shares prior to the expiration of 3 years from the time of acquisition, other than in circumstances which involve a cessation of employment within the meaning of subsection 139CE(5); and
- the Plan has been operated on a non-discriminatory basis for the purposes of subsection 139CE(4).

Proposed takeover of Panbio by Inverness

19. On 8 October 2007, Panbio and Inverness Medical Innovations Inc (Inverness) jointly announced a proposed takeover of Panbio by Inverness, whereby Inverness will acquire 100% of the issued share capital in Panbio.

20. The announcement followed the execution of the Scheme Implementation Agreement, which proposes a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.

21. Under the scheme of arrangement, each participant will be compulsorily required to dispose of all of their shares to Inverness for \$0.65 per share.

Ruling

22. Where a participant is compulsorily required to dispose of shares on implementation of the scheme of arrangement:

- the disposal will not be in breach of the subsection 139CE(3) exemption condition; and
- the discount previously excluded from the participant's assessable income in relation to the shares, will continue to be excluded from their assessable income, pursuant to subsection 139BA(2).

Commissioner of Taxation

20 February 2008

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

23. Where a taxpayer acquires qualifying shares under an employee share scheme, the discount in relation to the shares is included in their assessable income in accordance with Subdivision B of Division 13A.

Where election made under section 139E

24. Where the taxpayer makes an election under section 139E in relation to the shares, the amount of the discount (subject to subsection 139BA) is:

- the market value of the shares (calculated under Subdivision F of Division 13A); less
- any consideration paid or given by the taxpayer as consideration for the acquisition of the shares (subsection 139CC(2)).

25. In accordance with section 139BA:

- where a taxpayer has made an election under section 139E for a year of income; and
- the exemption conditions in section 139CE are satisfied in relation to shares covered by the election,

the total amount of discount otherwise included in the taxpayer's assessable income for a year of income in respect of those shares is only included to the extent that it is greater than \$1,000.

26. The references to 'the scheme' in section 139CE are considered to be effectively a reference to the mechanism by which an employee acquires a qualifying share. Hence, the exemption conditions must initially be satisfied at least at the time that an offer under an employee share scheme is made to employees.

27. However, the purpose of subsection 139CE(3) is to ensure that qualifying shares are held for the required period, a condition that clearly extends beyond the time of the original offer or acquisition date. Therefore, the Plan needs to continue to be operated in a manner that satisfies the exemption conditions to ensure the continued exclusion of the discount (received for shares) from a participant's assessable income.

The exemption conditions

28. The exemption conditions contained in section 139CE that must be satisfied require that the employee share scheme:

- not have any conditions that could result in an employee forfeiting ownership of shares acquired under it;
- be operated so that no employee would be permitted to dispose of a share acquired under it, before the earlier of:
 - the end of the period of three years after the time of the acquisition of the employee share scheme share; or
 - the time when the employee ceases, or first ceases, to be employed by their employer (within the meaning of subsection 139CE(5)); and
- be operated on a non-discriminatory basis (within the meaning of section 139GF).

29. Thus, for the first \$1,000 of a discount to continue to be excluded from an employee's assessable income, the employee share scheme needs to continue to be operated in a manner that satisfies these exemption conditions.

Forfeiture

30. The Plan rules do not specifically provide for the forfeiture of shares. Further, the compulsory acquisition of a participant's shares under the scheme of arrangement for valuable consideration is not considered to constitute forfeiture.

31. Therefore, as the Plan rules do not provide for forfeiture and because the compulsory acquisition of shares under the scheme of arrangement will not result in a forfeiture of shares, the Commissioner accepts that the first condition will continue to be satisfied.

Disposal restrictions

32. The applicant has advised that the Plan has been operated so that no participant has been permitted to dispose of shares prior to the end of the period of 3 years after the time they acquired them, other than in circumstances which have involved a cessation of employment within the meaning of subsection 139CE(5)). Therefore, it is accepted that the Plan will be operated up to the time of the implementation of the scheme of arrangement, in a manner that will continue to satisfy the exemption condition in subsection 139CE(3).

33. Where shares are then disposed of pursuant to the implementation of the scheme of arrangement, the Commissioner accepts that such a disposal is not a breach of subsection 139CE(3), as the compulsory acquisition of the shares is considered to have no connection with the actual operation of the Plan.

Non-discriminatory basis

34. As the applicant has advised that the Plan was operated on a non-discriminatory basis for the purposes of subsection 139CE(4), which primarily relates to the offers made under the Plan, the Commissioner accepts that the third condition is satisfied.

Continuing exclusion of discount from assessable income

35. In summary, from the time that shares were acquired under the Plan up to the time the scheme of arrangement is implemented, the various exemption conditions in section 139CE were satisfied and will continue to be satisfied, for the purposes of the continuing application of section 139BA.

36. Therefore, the discount previously excluded from a participant's assessable income in relation to shares acquired under the Plan will continue to be excluded from their assessable income, pursuant to section 139BA.

Appendix 2 – Detailed contents list

37. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Subject references:

- election
- employee share scheme
- exemption conditions
- takeover

Legislative references:

- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv B
- ITAA 1936 139BA
- ITAA 1936 139BA(2)

- ITAA 1936 139CC(2)
- ITAA 1936 139CE
- ITAA 1936 139CE(3)
- ITAA 1936 139CE(4)
- ITAA 1936 139CE(5)
- ITAA 1936 139E
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139GF
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001 Pt 5.1

ATO references

NO: 2008/1986

ISSN: 1445-2014

ATOlaw topic: Income tax ~~ Assessable Income ~~ employee share schemes