


CR 2008/64 - Income tax: St George Bank Ltd - Employee Reward Share Plan - proposed merger with Westpac Banking Corporation

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Class Ruling

Income tax: St George Bank Ltd – Employee Reward Share Plan – proposed merger with Westpac Banking Corporation

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 provision(s) 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 persons who will acquire a fully paid ordinary share (share) in St George Bank Limited (St George) in November 2008 under the St George Employee Reward Share Plan (the plan). They are persons who:

- will make an election under section 139E in relation to the income year ended 30 June 2009; and
- immediately prior to the implementation of the proposed merger as described in paragraphs 18 to 21 of this Ruling:
 - will hold a share; and
 - be employed by St George or a subsidiary of St George (the group), such employment being continuous from the time a share is 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 2009 if the proposed scheme of arrangement as described in paragraphs 18 to 21 of this Ruling, is implemented.

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 following description of the scheme is based on information provided by St George (the applicant).

14. The following documents or relevant parts of them 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 request for class ruling from the applicant dated 31 July 2008;
- St George Bank Limited Employee Reward Plan – Plan Rules;
- the Draft Scheme Booklet;
- Merger Implementation Agreement between Westpac Banking Corporation and St George Bank Limited dated 8 September 2008; and

- correspondence from the applicant dated 6 August 2008, 11 September 2008, and 9 October 2008.

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.

15. The plan forms part of the St George employee remuneration framework.

16. Under the plan:

- on an annual basis participants are granted up to \$1,000 worth of shares, subject to St George meeting performance targets;
- participants are not required to pay any consideration for shares granted; and
- the present or future forfeiture of shares by participants is specifically prevented.

17. The applicant has advised that:

- it is expected that a grant of shares to participants will be made in November 2008 subject to the announcement of the St George annual results in October 2008;
- shares granted under the plan will be qualifying shares within the meaning of section 139CD; and
- in relation to shares granted in November 2008, the plan will be operated:
 - such that there will be a restriction on the disposal of the shares until the earlier of:
 - three years, commencing at the time of the acquisition of the shares; or
 - the time a participant ceases to be employed by the group within the meaning of subsection 139CE(5); and
 - on a non-discriminatory basis for the purposes of section 139CE(4).

Proposed merger of St George and Westpac

18. On 26 May 2008, St George and the Westpac Banking Corporation (Westpac) announced that they had signed a Merger Implementation Agreement for a proposed merger of the two companies.

19. The proposed merger is to be implemented by way of a scheme of arrangement which is subject to the approval of St George shareholders and the Federal Court of Australia.

20. Under the proposed scheme of arrangement, existing shares held by participants under the plan will be compulsorily acquired by Westpac in exchange for a specific number of Westpac shares (being the same offer that is available to all St George shareholders).

21. The applicant has advised that:

- it is expected that, subject to court and shareholder approval, the merger will occur on 1 December 2008;
- the proposed merger and the proposed scheme of arrangement will operate independently of the operation of the plan; and
- Westpac shares received by participants under the proposed scheme of arrangement will not be subject to disposal restrictions.

Ruling

22. Where a participant is granted shares under the plan in November 2008 and is compulsorily required to dispose of those shares on implementation of the proposed scheme of arrangement:

- the disposal will not be in breach of the subsection 139CE(3) exemption condition; and
- the discount of up to \$1000 on those shares will be excluded from the participant's assessable income, under subsection 139BA(2).

Commissioner of Taxation

22 October 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 of Part III (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 included (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 included in the taxpayer's assessable income for the 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 the restrictions on disposal contained in section 139CE 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 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. Therefore, 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 specifically contains rules preventing the present or future forfeiture of shares by participants. Further, the compulsory acquisition of a participant's shares under the proposed scheme of arrangement for valuable consideration (Westpac shares) is not considered to constitute forfeiture.

31. Therefore, as the plan does not allow for forfeiture and because the compulsory acquisition of shares under the proposed scheme of arrangement will not result in a forfeiture of shares, the Commissioner accepts that the first exemption condition will be satisfied.

Disposal restrictions

32. The applicant has advised that the plan will be operated so that no participant will be permitted to dispose of shares prior to the end of the period of 3 years after the time they acquire them, other than in circumstances which will involve a cessation of employment within the meaning of subsection 139CE(5). That is, where the participant is no longer employed by the company that was their employer at the time the shares were acquired, unless the participant, on cessation of that employment is then employed with the group. Therefore, it is accepted that the plan will be operated up to the time of the implementation of the proposed scheme of arrangement, in a manner that will satisfy the second exemption condition.

33. Where shares are then disposed of pursuant to the implementation of the proposed scheme of arrangement, the Commissioner accepts that such a disposal is not a breach of the disposal restrictions in section 139CE, 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 will be 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 exemption condition will be satisfied.

Continuing exclusion of discount from assessable income

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

36. Therefore, the discount of up to \$1,000 in relation to the shares acquired under the plan will be excluded from the participant's assessable income under subsection 139BA(2) in the year of income that the shares are acquired (being the income year ending 30 June 2009).

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

- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139CC(2)
- ITAA 1936 139CD

Subject references:

- employee share scheme & options
- share discounts on employee share schemes
- takeovers & mergers

- 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

Legislative references:

- ITAA 1936
 - ITAA 1936 Pt III Div 13A
 - ITAA 1936 Pt III Div 13A Subdiv B
-

ATO references

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