CR 2012/12 - Income tax: AMP Limited Equity Incentive Plan

Class Ruling

Income tax: AMP Limited Equity Incentive Plan

Contents Para

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 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 83A of the ITAA 1997;
- section 83A-10 of the ITAA 1997;
- Subdivision 83A-B of the ITAA 1997
- section 83A-25 of the ITAA 1997;
- section 83A-35 of the ITAA 1997;
- Subdivision 83A-C of the ITAA 1997;
- section 83A-105 of the ITAA 1997;
- section 83A-110 of the ITAA 1997;

- section 83A-120 of the ITAA 1997;
- section 83A-330 of the ITAA 1997; and
- section 83A-340 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is employees of AMP Limited (AMP) and its subsidiaries (the AMP Group) who:

- accept or are deemed to have accepted an invitation to participate in the AMP Limited Equity Incentive Plan (the Plan);
- have been or will in future be granted an award of rights under the Plan, pursuant to which each right granted (Right) is a right to acquire one fully paid ordinary share in AMP (AMP Share) or, at the discretion of the Board, to receive a cash payment in lieu of an AMP share; and
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936*.

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 arrangement 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 9 to 20 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.

Date of effect

8. This Ruling applies from 1 July 2010. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling Application dated 12 October 2011;
- AMP Limited Equity Incentive Plan Rules (the Rules) adopted 17 August 2011 by the Board (as defined in the Rules);
- AMP's Long-Term Incentive: 2011 Terms of Offer (Terms of Offer); and
- communications with the applicant

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

10. AMP operates the Plan as part of its long term reward and retention strategy. The operation of the Plan is governed by the Rules.

11. Rights awarded under the Plan are awarded for no consideration.

12. A Right awarded to a participant under the Plan is a right to acquire an AMP Share for no consideration or, at the discretion of the Board, to receive a cash payment in lieu of an AMP Share, subject to the participant's continued employment with AMP or its subsidiaries (Service Condition) and, where applicable, a performance condition as described in the Rules (Performance Condition).

13. The Service Condition requires the participant to remain employed with AMP for a minimum of twelve months. When a Performance Condition applies, AMP will determine an appropriate performance metric. The Performance Condition in the 2011 Terms of Offer compares the total shareholder return (TSR) performance of AMP over the three year service period with the TSR performance of each of the entities in a comparative group of companies over the same period. Different Performance Conditions may apply in future years.

14. Rights will vest in a participant upon satisfaction of the Service Condition and any applicable Performance Condition. Any Rights which do not vest will lapse.

15. Upon vesting a participant will be allocated one AMP Share for each Right or a cash payment in lieu of an allocation of an AMP Share, at the discretion of the Board. This discretion gives flexibility to the Board in circumstances where it would be more appropriate to satisfy a participant's entitlement in cash rather than in AMP Shares.

16. A participant is not required to pay an amount or take action to effect the allocation of AMP Shares upon vesting of their Rights.

17. Rights will lapse where a participant ceases employment with AMP or the AMP Group prior to the vesting date due to resignation, termination for poor performance or termination for cause, unless otherwise determined by the Board. The applicant has indicated that the Board's discretion to determine otherwise in these circumstances will not be exercised on a routine basis.

18. If a participant ceases employment prior to vesting of any awarded Rights due to death, total and permanent disablement, redundancy, retirement or termination by agreement then, unless determined otherwise by the Board, their Rights will not lapse and will continue to be held by the participant, subject to the Rules and any Performance Condition except that the Service Condition will be deemed to have been waived. Participants in these circumstances are referred to as 'good leavers'.

19. Immediately after the acquisition of the Rights through the Plan, no AMP employee holds a beneficial interest in more than 5% of the shares in AMP and no AMP employee is in a position to cast or control the casting of more than 5% of the votes that may be cast at a general meeting of AMP.

20. The predominant business of AMP is not the acquisition, sale or holding of shares, securities or other investments, whether directly or indirectly through one or more companies, partnerships or trusts.

Ruling

Where Rights are settled with shares

21. Section 83A-340 applies to Rights granted to participants under the Plan if those Rights are satisfied by the issue of AMP Shares.

22. Rights satisfied in AMP Shares will be Employee Share Scheme (ESS) interests acquired under an ESS for the purposes of Division 83A.

Subdivision 83A-C: real risk of forfeiture

23. The Commissioner accepts that Rights acquired by participants under the Plan are at real risk of forfeiture and that where section 83A-340 applies to the Rights, Subdivision 83A-C also applies to the Rights.

24. No amount will be included in a participant's assessable income until the ESS deferred taxing point occurs.

25. The ESS Deferred taxing point for the Rights of a participant who has ceased employment as a good leaver and has retained their Rights that are satisfied in AMP Shares will be determined in accordance with section 83A-120.

Where Rights are settled with cash

26. Where a participant's Rights are satisfied in cash upon vesting then the cash payment will be included in the assessable income of the participant in the year in which it is received under section 6-5.

27. Where a participant has ceased employment as a good leaver and retains Rights which are satisfied in cash upon vesting then the cash payment will be included in the assessable income of the participant in the year in which it is received under section 6-5.

Commissioner of Taxation
15 February 2012

Appendix 1 – Explanation

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.

Where Rights are settled with shares

ESS interests

28. For the purposes of Division 83A, an ESS interest in a company is either a beneficial interest in a share in the company or a beneficial interest in a right to acquire a beneficial interest in a share in the company – subsection 83A-10(1).

29. Under the Plan, participants are granted Rights which are rights to acquire AMP Shares for no consideration, subject to the satisfaction of the Service Condition and where applicable, a Performance Condition. Upon satisfaction of these condition(s), the Rights will vest. However, the Board has the discretion to satisfy a participant's entitlement with a cash payment in lieu of AMP Shares.

30. Therefore, at the time Rights are granted to a participant under the Plan, it is unclear whether their entitlement will be satisfied in AMP Shares or cash. Accordingly, participants will not be considered to have acquired a beneficial interest in a right to acquire a beneficial interest in an AMP Share (an ESS interest) at the time the Rights are granted to them.

Indeterminate rights

31. Section 83A-340 provides that where an employee acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

32. Section 83A-340 is to be interpreted by considering the ordinary meaning of the text having regard to its legislative context and purpose.

33. *The Macquarie Dictionary* , [Multimedia], version 5.0.0, 1 October 2010 defines 'become' as 'to come or grow to be' and relevantly defines 'come' as 'to turn out to be'.

34. The ordinary meaning of 'becomes' in section 83A-340 covers a right that turns out to be a right to acquire a share because the right ultimately results in receipt of a share. The right effectively operates as a right to a beneficial interest in a share upon the receipt of an actual share.

35. This interpretation is supported by the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the Explanatory Memorandum), which explains the purpose of the provision at paragraphs 1.367 to 1.369:

> At the time of acquisition it may be unclear whether a right to an employment benefit will result in the receipt of an ESS interest, or it may be unascertainable how many ESS interests will be received. In such circumstances, that right will be considered to have been an ESS interest from the time that the original right to an employment benefit was acquired, if and when it becomes clear that the right to the employment benefit will result in the receipt of a definite number of ESS interests. ***[Schedule 1, item 1, section 83A-340]***
>
> This is to ensure that employment benefits provided in the form of discounted shares or rights are taxed consistently and appropriately under the employee share scheme rules.
>
> This provision will apply, for example, to an employment benefit that is a right to an indeterminate number of shares, or to a benefit that may be received in shares, in cash or in some other form.

36. In order for section 83A-340 to apply:

- the right acquired must be capable of becoming a right to acquire a beneficial interest in a share; and
- the right must become a right to acquire a beneficial interest in a share.

37. Section 83A-340 provides examples of rights which later become rights to acquire a beneficial interest in a share

> **Example 1:**
>
> You acquire a right to acquire, at a future time:
>
> a. shares with a specified total value, rather than a specified number of shares; or
>
> b. an indeterminate number of shares.
>
> **Example 2:**
>
> You acquire a right under which the provider must provide you with either ESS interests or cash, whichever the provider chooses.

38. The Rights acquired by participants under the Plan are as described in Example 2.

39. Therefore where the Rights granted to a participant under the Plan are satisfied by the issue of AMP Shares on vesting, section 83A-340 will apply to the Rights. Division 83A will then apply to the Rights as if they had always been rights to acquire a beneficial interest in a share (an ESS interest). The Rights, being ESS interests, will also then be taken to have been acquired under an employee share scheme under section 83A-10 as the Rights were granted to a participant in relation to their employment as an employee of AMP or the AMP Group.

Subdivision 83A-C: real risk of forfeiture

40. As Rights are awarded to employees for no consideration under the Plan, the Commissioner accepts that the Rights will be acquired at a discount.

41. Subsection 83A-25(1) in Subdivision 83A-B requires that assessable income for the income year in which the ESS interest is acquired includes the discount in relation to the interest. However, Subdivision 83A-B does not apply if Subdivision 83A-C applies.

42. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to a beneficial interest in a right to acquire a beneficial interest in a share is not included in an employee's assessable income when they acquire the interest. Instead, under section 83A-110 the assessable income of the employee will include at a later time (the deferred taxing point) the market value of the interest at the deferred taxing point reduced by the cost base of the interest. The conditions to be satisfied for the interest to be eligible for a deferred taxing point are listed at subsection 83A-105(1).

43. The first condition is that Subdivision 83A-B would, but for subsection 83A-105(1), have applied to the interest (subsection 83A-105(1)(a)).

44. The second condition is that the interest be an interest in the company that employed the employee, or the holding company of that company (subsection 83A-35(3)).

45. The third condition is that all interests available under the employee share scheme must relate to ordinary shares (subsection 83A-35(4)).

46. The fourth condition is that:

- the predominant business of the company in which the interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly); and
- the employee is not employed by that company and also a subsidiary of that company or a holding company of that company, or a subsidiary of the holding company (subsection 83A-35(5)).

47. The fifth condition is that immediately after the interest is acquired the employee will not hold a beneficial interest in greater than five per cent of the shares, or be in a position to control the casting of greater than five per cent of the votes that might be cast at a general meeting of the company (subsection 83A-35(9)).

48. The Commissioner accepts for the purposes of Subdivision 83A-C, that in relation to Rights acquired by a participant under the Plan, the first five conditions have been satisfied.

49. The sixth and final condition that must be satisfied is that there must be a real risk, under the scheme rules, when the interest is acquired, of the participant

- forfeiting or losing the interest, other than by disposing of it, exercising the right or letting the right lapse; or
- forfeiting or losing the beneficial interest in the share that was acquired on exercise of the right, other than by disposing of it (paragraph 83A-105(3)(b)).

50. If the Plan provides a real risk of forfeiture that satisfies the sixth condition, then the discount in relation to the Right is not included in a participant's income when they acquire it. Instead, the assessable income of the participant at the deferred taxing point will include the market value of the interest at the deferred taxing point reduced by the cost base of the interest.

Real risk of forfeiture

51. The Explanatory Memorandum, which inserted Division 83A, explains the real risk of forfeiture test at paragraph 1.156 as follows:

> The 'real risk of forfeiture test' does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, real is regarded as something more than a mere possibility. Something is not a real risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

52. It is further explained at paragraph 1.158 of the Explanatory Memorandum that the 'real risk of forfeiture' test is intended to provide for deferral of tax when there is a real alignment of interests between the employee and employer, through the employee's benefits being at risk.

53. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

54. 'Real' is defined in *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne as 'actually existing as a thing or occurring in fact' and 'genuine; rightly so called; not artificial or merely apparent'.

55. When considering whether a condition in a scheme imposes a real risk of forfeiture, the Commissioner will have regard to whether a reasonable person would consider that there is a genuine connection between the forfeiture condition and aligning the interests of the employee and employer.

56. Real risk of forfeiture in a scheme may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment. In cases where an employee share scheme has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test.

57. Where there is some doubt whether a condition will satisfy the 'real risk of forfeiture' test then the other condition will also be examined.

58. Rights granted to participants under the Plan will vest in accordance with the Rules and Terms of Offer, but in any event, at least 12 months from their grant date. Unvested Rights may be forfeited if the participant ceases employment with AMP or the AMP Group during the vesting period. Rights can only vest and be exercised if the Service Condition and, where applicable, a Performance Condition, have been achieved by the vesting date and the Board has decided to satisfy the Rights with AMP Shares in lieu of a cash payment. The Rights will lapse to the extent that the Service Condition and any applicable Performance Condition are not achieved.

59. As the minimum employment period before vesting is at least twelve months from the grant date, then subject to the discussion below regarding the discretion of the Board, it is accepted that the 'real risk of forfeiture' test is met for Rights granted under the Plan.

'Special circumstances' – good leaver conditions

60. The Plan rules provide that AMP has a discretion to allow participants to retain their unvested Rights when they cease employment due to:

- retirement;
- redundancy;
- death;
- total and permanent disability; or
- other limited exceptional circumstances.

61. If an employee share scheme has good leaver conditions that allow ESS interests to be retained in the event of death, invalidity or bona fide redundancy the Commissioner accepts those conditions do not prevent the interests being at a real risk of forfeiture provided that the scheme is operated in accordance with the conditions. Furthermore, employees must not routinely receive the interests regardless of their reason for ceasing employment.

62. These exceptions are outside the control of a participant and will not prevent the risk of forfeiture for the participant from being real if they cease employment with AMP in normal circumstances.

63. Under the Plan there is no prescribed retirement age, or automatic vesting on retirement. No participant will know at the time they acquire their Rights whether they will receive their unvested Rights if they retire during the vesting period as no participant can predict with confidence whether AMP will exercise its discretion favourably at the time of their retirement.

64. The applicant has advised that the discretion will not be exercised on a routine basis to allow participants voluntarily ceasing employment to receive their unvested Rights.

65. As the Board's discretion is not routinely exercised to allow a participant to retain their Rights, the Commissioner does not consider that the availability of a discretion in the 'special circumstances' as described will prevent the Rights from being at real risk of forfeiture. This discretion is consistent with the purpose of the scheme to align the interests of employees with the interests of shareholders.

66. Therefore, as there is a real risk that a participant will forfeit or lose their Rights, other than by disposing of them, the sixth condition is satisfied. Subsection 83A-105(3) will apply to the Rights acquired by a participant under the Plan.

67. As a result, Subdivision 83A-C applies to the Rights, and Subdivision 83A-B does not apply. The taxation of Rights received under the Plan will be deferred until a deferred taxing point occurs.

ESS deferred taxing point

68. As Subdivision 83A-C applies to the Rights granted under the Plan and Subdivision 83A-B does not apply, participants in the Plan will need to include in their assessable income the market value of the Rights at the deferred taxing point reduced by the cost base of the Rights in the income year in which the deferred taxing point occurs in accordance with section 83A-110.

69. Section 83A-120 provides that the 'ESS deferred taxing point' for rights to acquire shares occurs at the earlier of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4));
- when the participant ceases the employment in respect of which they acquired the rights within the meaning of section 83A-330 (subsection 83A-120(5));
- seven years after the participant acquired the rights (subsection 83A-120(6));
- when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share (subsection 83A-120(7));

70. However, if the participant disposes of the Rights (or the AMP Shares acquired on exercise of the Rights) within 30 days of the time which would otherwise be the deferred taxing point, the deferred taxing point will instead be the time of disposal (subsection 83A-120(3).

71. Therefore, where a participant ceases employment (within the meaning of that term in section 83A-330) with AMP or the AMP Group as a good leaver prior to the vesting date and retains their Rights which are settled in AMP Shares at the Board's discretion, the participant will include the discount on their Rights in their assessable income for the year in which they ceased employment unless subsection 83A-120(3) applies and the participant disposes of the Right (or the AMP Share acquired on exercise of the Rights) in a later income year. This is because the cessation of employment must be the first time mentioned in subsections 83A-120 (4) to (7).

72. Where the date of cessation of employment occurs in an income tax year prior to the year in which the Board exercises their discretion to satisfy the Rights in AMP Shares, the employee may need to lodge an amended income tax return to include an amount under subsection 83A-110(1) in their assessable income.

Where Rights are settled with cash

73. Where a participant ceases employment (within the meaning of that term in section 83A-330) with AMP or the AMP Group as a good leaver and the Rights are satisfied in cash, section 83A-340 will not apply to the Rights, the Rights will not be considered an ESS interest under subsection 83A-10(1) and Division 83A will not apply to the Rights.

74. Where a participant's indeterminate rights are ultimately satisfied with cash instead of AMP Shares, the granting of the rights:

- will be viewed as one of a series of steps in the payment of salary or wages; and
- will not be viewed as a separate benefit to the payment of salary or wages which are excluded from the definition of fringe benefit by paragraph 136(1)(f) of the *Fringe Benefits Tax Assessment Act 1986*.

75. Subsection 6-5(2) provides that the assessable income of an Australian resident taxpayer includes ordinary income derived directly or indirectly from all sources during the income year. Ordinary income includes salary and wages.

76. Therefore, the participant will need to include the cash payment in their assessable income for the year in which the cash is received under subsection 6-5(2).

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2011/19

Subject references:

- employee share schemes and rights

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-25
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-35
- ITAA 1997 83A-35(3)
- ITAA 1997 83A-35(5)
- ITAA 1997 83A-35(9)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(1)(b)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-105(3)(b)
- ITAA 1997 83A-110
- ITAA 1997 83A-120
- ITAA 1997 83A-120(2)
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-330
- ITAA 1997 83A-340
- FBTAA 1986 136(1)(f)
- TAA 1953
- Copyright Act 1968

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009
- The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne
- The Macquarie Dictionary, [Multimedia], version 5.0.0, 1 October 2010

ATO references

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