

CR 2012/39 - Income tax: SABMiller plc Executive Share Award Plan 2008

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Class Ruling

Income tax: SABMiller plc Executive Share Award Plan 2008

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ⓘ 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 the Ruling are:

- Division 83-A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 83A-10 of the ITAA 1997;
- Division 83A-25 of the ITAA 1997;
- Division 83A-340 of the ITAA 1997; and
- Division 960-50 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is employees of SABMiller plc (SABMiller) and its Australian resident subsidiary companies who:

- are granted a provisional allocation of shares in SABMiller under the Executive Share Award Plan 2008 (Award Plan);
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- are not 'temporary residents' within the meaning of that expression in section 995-1(1) of the ITAA 1997.

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 the 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 24 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 from 1 July 2011 to 30 June 2015. The Ruling continues to apply after 30 June 2015 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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:

- The application for a Class Ruling dated 4 April 2012; and
- The trust deed of the SABMiller Employees' Benefit Trust.

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. SABMiller is a public limited company incorporated and headquartered in the United Kingdom and is a non-resident of Australia for the purposes of the ITAA 1936 and the ITAA 1997. Shares in SABMiller are listed on the London and Johannesburg Stock Exchanges.

11. SABMiller is the ultimate holding company of the SABMiller group of international companies (SABMiller Group). The SABMiller Group operates the Award Plan through the SABMiller Employees' Benefit Trust (SABMiller Trust).

12. In 2011, SABMiller entered into a Scheme of Arrangement with the Foster's Group Limited group of companies (Fosters), pursuant to which SABMiller acquired all of the issued share capital of Fosters.

13. Following the acquisition of Fosters by the SABMiller Group, Fosters became part of the SABMiller Group and participation in the Award Plan was extended to certain employees who were previously employed by Fosters but who, following completion of the Scheme of Arrangement, became employees of the SABMiller Group.

Award Plan

14. Participation in the Award Plan is open to SABMiller employees, who are defined in the Rules of the SABMiller plc Executive Share Award Plan (Plan Rules) as any employee or director of any member of the SABMiller Group.

15. Under the Plan Rules, the Grantor (defined in the Plan Rules as either the Trustee/s from time to time of the SABMiller Employees' Benefit Trust (Trust) or SABMiller) may in its absolute discretion grant participants a provisional share award allocation (Provisional Allocation).

16. The Provisional Allocations relate to listed ordinary shares in SABMiller.

17. Under the Plan Rules, a Provisional Allocation does not constitute the acquisition by a participant of an interest in SABMiller shares or the acquisition of a right to acquire SABMiller shares. Neither does it entitle a participant to claim any interest in the Trust or to compel the Trustee/s to pay or apply the capital or income comprised in the Trust to or for the benefit of a participant. Accordingly, the Plan Rules make it clear that a participant will have:

- no interest in the shares until they are released following the Release Date (as defined in the Plan Rules);
- no entitlement to dividends or distributions, and no right to vote, in respect of the shares unless and until they are released following the Release Date; and
- no right to vote in respect of any shares covered by a Provisional Allocation unless and until they are released to them.

18. Provisional Allocations will be granted to participants on the Award Date specified by SABMiller in the letter informing them of the grant of a Provisional Allocation. The letter also addresses other matters relevant to the grant such as the form of the Provisional Allocation, the number of shares over which the Provisional Allocation is granted, any objective performance conditions and the date the shares may be released to the participant.

19. Participants are not required to provide any consideration for the acquisition of the Provisional Allocations or for the release of the shares following the Release Date. Once the shares have been released to participants, they are not subject to any conditions which would result in the participant forfeiting the shares.

20. Shares will only be released to participants following the Release Date if SABMiller determines in its absolute discretion on the Release Date that:

- the participant is an employee of the SABMiller Group; and
- any performance conditions have been satisfied.

21. However, SABMiller has discretion to waive any performance conditions if it considers appropriate. Even where the participant meets the above conditions, SABMiller retains discretion under the Plan Rules as to whether to release the shares to the participants.

22. Where a participant ceases employment with the SABMiller Group as a good leaver prior to a determination being made by the Grantor to release shares, the Grantor, at its discretion, may still make a determination to release shares to the participant after the Release Date. Whether all or a pro-rata number of shares are released will be based on an assessment, on the Release Date, of any relevant performance hurdles attaching to the Provisional Allocation.

23. In the case of participants who cease employment with the SABMiller Group otherwise than as good leavers, prior to the Grantor making a determination to release shares after the Release Date, their Provisional Allocations will lapse and no shares will be released to them unless the Grantor determines otherwise, in which case a pro-rata number of shares may be released to the participant.

24. Any provisional allocations in respect of which the shares are not released will lapse.

Ruling

25. Where a participant is granted a Provisional Allocation by the Grantor, the participant will not acquire an ESS interest (subsection 83A-10(1); section 83A-340).

26. A participant will acquire ESS interests in relation to the Provisional Allocation at the time shares which were previously provisionally allocated to the participant are released (subsection 83A-10(1)).

27. For the income year in which the provisionally allocated shares are released to the participant, the assessable income of the participant will include the discount given in relation to the shares (subsection 83A-25(1)).

28. The discount given in relation to the shares is the market value of the shares at the time of the release, expressed in Australian currency (section 960-50).

Commissioner of Taxation

13 June 2012

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.***

ESS interests

29. Under subsection 83A-10(1), an ESS interest in a company is either a beneficial interest in a share in the company, or a right to acquire a beneficial interest in a share in the company.

30. Under the terms of the trust deed, a participant to whom a Provisional Allocation has been made is not entitled to any interest in the trust fund, nor is the participant able to compel the trustee to pay or apply any of the capital or income of the trust fund for the participant’s benefit.

31. The release of shares following a Provisional Allocation takes place at the absolute discretion of the Grantor. Unless and until the shares are released, the participant does not have a beneficial interest in a share nor does the participant have a beneficial interest in a right to acquire a share. Thus at the time of Provisional Allocation the participant will not acquire an ESS interest.

Indeterminate rights

32. Section 83A-340 provides that where you acquire 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.

33. At the time of the Provisional Allocation a participant does not have a right to acquire a beneficial interest in a share. However, the participant does have a right to require the proper exercise of the Trustee’s absolute discretion (to release the shares) and due administration of the trust.

34. In order for section 83A-340 to apply, the right must be capable of becoming a right to acquire a beneficial interest in a share, and in fact become such a right.

35. 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.

36. In both examples the right is a right to receive property but the precise extent or nature of that property has not yet been determined at the time of acquisition of the right. Such rights are capable of becoming a right to acquire a beneficial interest in a share because the capacity to acquire property is inherent in the nature of the right originally acquired. It merely remains to be determined whether the original right ultimately becomes a right to acquire a specific number of shares or some other form of property, such as cash.

37. A participant's right to require the proper exercise of the trustee's absolute discretion and due administration of the trust is not considered to be a right of the kind provided for by section 83A-340. The participant's right is discrete and fully determined at the time it is created or acquired. It is not capable of becoming a right to acquire property.

38. In *Gartside v. Inland Revenue Commissioners* [1968] AC 553, Lord Reid described such an entitlement of a beneficiary in a discretionary trust in the following way:

'...a right to require the trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered; you get it only because the trustees have decided to give it to you'.

39. Where the Grantor in its absolute discretion determines to release provisionally allocated shares, it is not the case that the right to require the proper exercise of the Trustee's discretion has become a right to acquire a beneficial interest in a share. Nor has the participant acquired the shares by reason of having a right to require the Trustee to properly exercise his discretion to release the provisionally allocated shares.

40. Therefore, where a participant acquires a right as a result of a provisional allocation, the participant has not acquired a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share. Consequently, section 83A-340 does not apply.

Provisional Allocation

41. At the time of the Provisional Allocation, the participant does not acquire an ESS interest within the meaning of section 83A-10; and as any rights which are acquired at the time are not capable of becoming rights to acquire a beneficial interest in a share as provided for by section 83A-340, the participant is not treated for the purposes of Division 83A as having acquired an ESS interest at the time of Provisional Allocation.

Release of Provisional Allocations

42. When the Grantor determines to release Provisionally Allocated shares to a participant, the participant acquires a beneficial interest in a share in a company, that is, an ESS interest within the meaning of paragraph 83A-10(1)(a).
43. The ESS interest is acquired under an employee share scheme (subsection 83A-10(2)) as the shares are provided to employees in relation to their employment.
44. The shares are acquired at a discount as no consideration is payable for their acquisition.
45. As the shares are acquired under an employee share scheme at a discount, Subdivision 83A-B will apply to the ESS interests unless Subdivision 83A-C applies (subsection 83A-20(1)).
46. In this case Subdivision 83A-C does not apply as the released shares are not acquired under a salary sacrifice arrangement nor are the shares subject to a real risk of forfeiture at the time of their release (subparagraph 83A-105(1)(c)(ii)).
47. Where in an income year an employee acquires an ESS interest at a discount, the employee's assessable income for the income year of the acquisition will include the discount given in relation to the ESS interest (subsection 83A-25(1)). This income year will be later than the income year a participant ceases employment where the ESS interest is acquired in an income year after the income year in which the participant ceased employment (as a good leaver or otherwise).
48. The discount received is the market value of the ESS interest at the time it was acquired by the employee **less** any consideration paid or given by the participant for the acquisition.
49. As a participant is not required to pay or give any consideration for the acquisition of a share under the Award Plan, the discount will be equal to the market value of the share at the acquisition time.
50. Where the conditions in section 83A-35 are met an employee is able to reduce the total amount included in their assessable income under subsection 83A-25(1) by up to \$1,000.
51. As a participant's released shares are not subject to a minimum holding period the condition in subsection 83A-35(8) is not met and therefore section 83A-35 cannot apply.
52. In relation to participants who cease employment with the SABMiller Group prior to the Grantor making a determination to release shares after the Release Date and whose Provisional Allocations lapse as a consequence, no ESS interest is acquired, and as such no amounts in respect of any of the lapsed Provisional Allocations will be required to be included in their assessable income.

Conversion to Australian dollars

53. Subsection 960-50(1) requires that an amount in a foreign currency is to be translated into Australian currency.
54. Subsection 960-50(4) requires that in applying this section:
- (a) First, translate any amounts that are elements in the calculation of other amounts; and
 - (b) then, calculate the other amounts.
55. This indicates that the amounts that are elements in calculating the discount are to be translated into Australian currency prior to calculating the discount.
56. The market value of the share is an amount for purposes of section 960-50 (paragraph 960-50(2)(h)) and is an element in the calculation of the discount determined under subsection 83A-25(1). Therefore, the market value of the share should be translated first, before calculating the discount.
57. In this circumstance the market value is equal to the discount as the shares are acquired for no consideration.
58. As the participant is required to include in assessable income the market value of the shares (that is, the discount) acquired at the time shares are released, it is reasonable that the market value be converted to Australian currency at the exchange rate applicable at that time.
59. The Australian Taxation Office (ATO) website <http://www.ato.gov.au> provides daily exchange rates. The ATO obtains the daily average telegraphic transfer exchange rates from the Commonwealth Bank. However, participants may use the daily rates provided by other banks.

Appendix 3 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(a)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-35
- ITAA 1997 83A-35(8)

- ITAA 1997 83A-105(1)(c)(ii)
- ITAA 1997 83A-340
- ITAA 1997 83A-B
- ITAA 1997 83A-C
- ITAA 1997 960-50
- ITAA 1997 960-50(1)
- ITAA 1997 960-50(4)
- ITAA 1997 960-50(2)(h)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

Case references:

- Gartside v. Inland Revenue Commissioners [1968] AC 553; [1968] 1 All ER 121; [1968] 2 WLR 277; [1967] TR 309

ATO references

NO: 1-3UV6ZKZ

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ employee share schemes