


# ***CR 2018/39 - Income tax: Fermentum Pty Ltd - transfer of shares to custodian***

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## Class Ruling

### Income tax: Fermentum Pty Ltd – transfer of shares to custodian

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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.

## Summary – 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 provisions

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

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-55 of the ITAA 1997
- section 104-60 of the ITAA 1997
- section 104-75 of the ITAA 1997
- subsection 207-145(1) of the ITAA 1997
- former subsection 160APHH(6) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- former subsection 160APHM(2) of the ITAA 1936
- former section 160APHO of the ITAA 1936.

## Class of entities

3. The class of entities to which this Ruling applies is shareholders of Fermentum Pty Ltd (Fermentum) who:

- are residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- hold their Fermentum shares on capital account, that is, neither as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997)
- do not hold their Fermentum shares jointly
- transfer legal ownership of their Fermentum shares to a custodian to be held pursuant to the Custodian Deed, and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Fermentum shares.

(**Note:** Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

## Qualifications

4. The Commissioner makes his ruling 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 7 to 15 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

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7. This Ruling applies from 1 July 2018 to 30 June 2022. The Ruling continues to apply after 30 June 2022 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 *Public Rulings*).

## Scheme

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8. 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 29 June 2018
- Draft Custodian Deed (Custodian Deed)
- Draft Shareholder Agreement
- correspondence received in relation to the Class Ruling application.

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

9. Fermentum is an Australian resident private company. It is the head company of a group of companies that operate brewery and related activities.

10. As at 29 June 2018 Fermentum had 6,458,460 fully paid ordinary shares on issue held by 34 shareholders.

11. Fermentum has started a process of engaging professional share registry managers to assist in the information flow to shareholders. To simplify the share register, a custodian will be used to hold the shares for minority shareholders.

12. The custodian will hold the shares pursuant to a Custodian Deed as bare trustee on behalf of the relevant shareholder.

13. Each participating shareholder will enter into a separate deed with the custodian, creating a separate trust and will be the sole beneficiary of their trust.

14. Each separate trust will not be a unit trust.

15. Each shareholder will be allowed to transfer the legal ownership of their shares to the custodian at any time and have the custodian transfer the legal ownership back to the shareholder at any time.

16. Each beneficial owner of Fermentum shares who has their legal ownership of those shares transferred to the custodian pursuant to the Custodian Deed will at all times beneficially own and be absolutely entitled to their shares in Fermentum.

## **Assumption**

17. Fermentum shareholders or their associates will not make, be under an obligation to make, or are likely to make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in respect of dividends paid on their Fermentum shares.

## **Ruling**

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### **CGT events**

18. CGT events A1, E1 and E2 will not happen when a Fermentum shareholder transfers legal ownership of their shares to a custodian to be held pursuant to the Custodian Deed.

19. CGT event E5 will not happen when the custodian transfers legal ownership of the shares back to the Fermentum shareholder.

### **Qualified persons with respect to dividends**

20. Former subsection 160APHH(6) of the ITAA 1936 will apply for the period of time that the Fermentum shares are held by a custodian pursuant to the Custodian Deed to treat the shares as held by the Fermentum shareholder at all times.

21. A Fermentum shareholder will be a qualified person for the purposes of section 207-145 of the ITAA 1997 provided the shares are held at risk by the Fermentum shareholder for the requisite period of time during the relevant qualification period.

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**Commissioner of Taxation**

3 October 2018

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## 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.*

### CGT events

22. CGT event A1 happens if a taxpayer disposes of a CGT asset (subsection 104-10(1) of the ITAA 1997), and the disposal involves a change of ownership from the taxpayer to another entity. However, a change of ownership does not occur if the taxpayer stops being the legal owner of the asset but continues to be its beneficial owner (subsection 104-10(2) of the ITAA 1997).

23. CGT event A1 will not happen as the beneficial ownership of shares in Fermentum will remain with the relevant beneficial owner at all times.

24. CGT event E1 happens when a taxpayer creates a trust over a CGT asset by declaration or settlement (subsection 104-55(1) of the ITAA 1997). CGT event E2 happens when a taxpayer transfers a CGT asset to an existing trust (subsection 104-60(1) of the ITAA 1997). However, subsection 104-55(5) of the ITAA 1997 and subsection 104-60(5) of the ITAA 1997 respectively provide that CGT events E1 and E2 do not happen if the taxpayer is the sole beneficiary of the trust and is absolutely entitled to the asset as against the trustee (disregarding any legal disability) and the trust is not a unit trust.

25. CGT event E5 happens if a beneficiary becomes absolutely entitled to a CGT asset of a trust (except a unit trust or a trust to which Division 128 of the ITAA 1997 applies) as against the trustee (disregarding any legal disability the beneficiary is under) (section 104-75 of the ITAA 1997).

26. CGT events E1, E2 and E5 will not happen as each beneficial owner shareholder of Fermentum shares will at all times be absolutely entitled to their shares in Fermentum.

### Qualified persons with respect to dividends

#### ***Former subsection 160APHH(6) of the ITAA 1936***

27. Former subsection 160APHH(6) of the ITAA 1936 provides that if shares are held by a bare trustee in trust for a sole beneficiary who is absolutely entitled to the shares, the bare trustee will be ignored for the purposes of Division 1A of former Part IIIA of the ITAA 1936.

28. Subsection 160APHH(6) of the ITAA 1936 will apply to the Scheme as the custodian will hold Fermentum shares in a separate trust for each Fermentum shareholder and the shareholder will remain absolutely entitled to their shares at all times.

29. Therefore, each Fermentum shareholder will be treated as holding their Fermentum shares at all relevant times and will be the person who must satisfy the qualified person requirement for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

## ***Qualified persons***

30. Where a franked dividend is paid to an entity, paragraph 207-145(1)(a) of the ITAA 1997 denies a tax offset where the entity is not a qualified person for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

31. An entity will be a qualified person in relation to dividends paid on their shares during a year of income if they satisfy the holding period rule (former section 160APHO of the ITAA 1936).

32. Former paragraph 160APHO(1)(a) of the ITAA 1936 provides that where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend, the taxpayer must satisfy the holding period rule in relation to the primary qualification period.

33. Where the shares are not preference shares, the primary qualification period is the period commencing on the day after the shareholder acquires the shares and ending on the 45<sup>th</sup> day after the day on which the shares become ex-dividend.

34. Former paragraph 160APHO(2)(a) of the ITAA 1936 provides that where the shares are not preference shares, the holding period rule requires shareholders to hold their shares for a continuous period of not less than 45 days in relation to the primary qualification period.

35. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk of loss or opportunities for gain in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

36. Under former subsection 160APHM(2) of the ITAA 1936, a taxpayer is taken to have materially diminished risks of loss and opportunities for gain with respect to shares or an interest in shares if the 'net position' of the taxpayer results in the taxpayer having less than 30% of the risks and opportunities relating to the shares or interest in shares.

37. A taxpayer will therefore be a qualified person for the purposes of section 207-145 of the ITAA 1997 provided the shares are beneficially held at risk for a continuous period of not less than 45 days during the primary qualification period.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2004/D25; TR 2006/10

*Legislative references:*

- ITAA 1997 104-10(1)
  - ITAA 1997 104-10(2)
  - ITAA 1997 104-55
  - ITAA 1997 104-55(1)
  - ITAA 1997 104-55(5)
  - ITAA 1997 104-60
  - ITAA 1997 104-60(1)
  - ITAA 1997 104-60(5)
  - ITAA 1997 104-75
  - ITAA 1997 Div 128
  - ITAA 1997 207-145
  - ITAA 1997 207-145(1)
  - ITAA 1997 207-145(1)(a)
  - ITAA 1997 Div 230
  - ITAA 1997 977-50
  - ITAA 1997 995-1(1)
  - TAA 1953
  - ITAA 1936
  - ITAA 1936 6(1)
  - ITAA 1936 Pt IIIAA Div
  - ITAA 1936 160APHM(2)
  - ITAA 1936 160APHH(6)
  - ITAA 1936 160APHN
  - ITAA 1936 160APHO
  - ITAA 1936 160APHO(1)(a)
  - ITAA 1936 160APHO(2)(a)
  - ITAA 1997
  - ITAA 1997 104-10
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ATO references

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Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events E1 to E9 - trusts  
Income tax ~~ Capital management ~~ Qualified person rule

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