

***CR 2001/27 - Income tax: Employee Share Scheme: Exemption Conditions: disposal of shares held under the Spicers Paper Limited General Employee Share Plan within three years of acquisition***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2000*



## Class Ruling

Income tax: Employee Share Scheme:  
Exemption Conditions: disposal of shares held  
under the Spicers Paper Limited General  
Employee Share Plan within three years of  
acquisition

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### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

## **What this Class Ruling is about**

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are sections
- 139B of the *Income Tax Assessment 1936* ('ITAA 1936');
  - 139BA of the ITAA 1936;
  - 139CE of the ITAA 1936;
  - 139E of the ITAA 1936; and
  - 139GF of the ITAA 1936.

### **Class of persons**

3. The class of persons to whom this Ruling applies is employees of Spicers Paper Limited ('Spicers'), and Spicers subsidiaries, who acquired shares by participating in an offer made under the Spicers Paper Limited General Employee Share Plan (the 'share plan'). They

are persons who were compelled to dispose of their Spicers shares to Paper Australia Limited ('Paper Australia') as part of the 'arrangement' outlined below. In this Ruling this class of persons is referred to as the 'participating employees'.

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 14 to 25 is carried out in accordance with the details of the arrangement provided in this Ruling.
6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
  - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
  - (b) this Ruling may be withdrawn or modified.
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8. The Commissioner accepts that the shares acquired by the participating employees under the share plan are:
  - shares acquired under an employee share scheme for the purposes of Division 13A of Part III of the ITAA; and
  - qualifying shares for the purposes of section 139CD.
9. Unless section 139BA applies to the qualifying shares acquired under the share plan, the effect of any elections made under section 139E is that the discount given in relation to each share is included in the assessable income of the relevant participating employee under subsection 139B(2) for the year of income ended 30 June 2001. If section 139BA applies, the total amount of discounts assessable to each employee for this year of income is limited to the amount by

which the discounts exceed \$1000. Section 139BA applies if the exemption conditions in section 139CE are satisfied in relation to the shares covered by the elections. Accordingly, this Ruling only applies to those participating employees who have made, or will make, an election under section 139E that subsection 139B(2) applies for the year of income ended 30 June 2001 to the qualifying shares acquired under the share plan.

10. This Ruling is made on the basis that the share plan has been operated in accordance with the arrangement outlined in paragraphs 14 to 25 of this ruling.

11. This Ruling is made on the basis that Paper Australia has complied with all the requirements of the Corporations Law in respect of the compulsory acquisition of shares held under the share plan.

## **Date of effect**

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12. This Ruling applies to the year of income ended 30 June 2001. However this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement agreed to before the date of this Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## **Withdrawal**

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13. This Ruling is withdrawn and ceases to have effect after the last day on which participating employees can have their returns of income lodged for the year of income ended 30 June 2001. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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14. The arrangement that is the subject of the 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 arrangement are:

- the October 1999 share plan rules;
- a Ruling application dated 29 January 2001; and
- further correspondence from Mallesons Stephen Jaques dated 30 January 2001, 13 February 2001, 14 February 2001, 21 February 2001 and 5 June 2001.

**Note:** certain information received from Mallesons Stephen Jaques has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

15. The share plan was established in October 1999 to enable eligible employees to acquire Spicers shares.

16. Under the rules governing the share plan those responsible for administration of the share plan were Spicers, the Spicers' Remuneration Committee and Computershare Investor Services Pty Ltd (formerly Computershare Registry Services Pty Ltd, 'Computershare'). The rules governing the share plan defined Computershare, or such other person nominated by the Spicers Remuneration Committee to carry out the day to day administration of the share plan, as the 'Plan Administrator'.

17. The Remuneration Committee was authorised to invite eligible employees to participate in the share plan. On acceptance of an invitation eligible employees became Participants.

18. On 31 May 2000, Spicers' Remuneration Committee invited all Australian based employees of Spicers, and Spicers' subsidiaries, to participate in a share plan offer. The closing date for applications to participate in the share plan was 28 June 2000. Some 257 Spicers' employees accepted that invitation.

19. On 4 August 2000 Spicers caused to be acquired, in the ordinary course of trading on the ASX, the appropriate number of shares determined under the share plan rules on behalf of Participants. These shares were acquired in the names of Participants and recorded by Computershare in Spicers' share register in the names of Participants.

20. The rules governing the operation of the share plan prohibit the Plan Administrator from allowing the sale or transfer of shares allocated to an employee under the share plan before the earlier of:

- the period ending three years after the time of acquisition of the shares, and
- the time at which the employee ceased to be employed by Spicers or a Spicers subsidiary.

21. Computershare also acted as Spicers' share registrar. Shares acquired by share plan Participants were recorded separately on the

Spicers share register. Without the approval of the Spicers Remuneration Committee Computershare was compelled by the rules of the share plan not to register the transfer of shares held in the name of a share plan Participant. Spicers Remuneration Committee would not approve a transfer of shares which would contravene the rules of the share plan.

22. At no time did the number of shares acquired by Participants under the share plan exceed 5 % of the total number of ordinary shares issued by Spicers.

### **The Paper Australia bid for Spicers**

23. PaperlinX Limited announced its intention of bidding for Spicers on 16 November 2000. On 23 November 2000, Paper Australia, a wholly owned subsidiary of PaperlinX Limited, made an offer to purchase all of the Spicers ordinary shares in which it did not already hold an interest.

24. The Paper Australia offer expired on 29 January 2001. By that date, Paper Australia held 95.3 % of all Spicers ordinary shares and on 30 January 2001 Paper Australia announced its intention to compulsorily acquire the remaining 4.7 % of shares – including those shares held by Participants in the share plan.

25. During February 2001 Paper Australia completed the compulsory acquisition.

## **Ruling**

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26. Having regard to the information provided in relation to the share plan, it has been concluded that the exemption conditions in section 139CE have been satisfied in relation to the shares acquired by the participating employees, in that:

- the share plan did not contain any conditions which allowed for shares acquired by the participating employees to be forfeited,
- the share plan was operated so that participating employees would not be permitted to dispose of shares acquired until three years after their acquisition, or until the participating employees ceased to be employed by Spicers or a Spicers subsidiary – whichever occurred earlier, and
- the share plan was operated on a non-discriminatory basis in accordance with the terms of section 139GF.

27. Furthermore, the conclusion reached in the previous paragraph is not affected by the fact that shares acquired under the share plan were disposed of by participating employees due to the operation of the compulsory acquisition provisions of the Corporations Law.

28. Accordingly, as the exemption conditions in section 139CE have been satisfied, section 139BA applies to the participating employees to ensure that the total amount of discounts, given to each employee in relation to the qualifying shares acquired under the share plan for the year of income ended 30 June 2001, is only assessable under subsection 139B(2) to the extent that it is greater than \$1000.

## Explanations

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29. A taxpayer who acquires shares under an employee share scheme is required by section 139B to include in his or her assessable income, for an income year, the value of the discount given in relation to each share acquired during that year. Where subsection 139B(2) applies to the discount, the amount of the discount is calculated, pursuant to subsection 139CC(2), by deducting the amount of consideration paid or given for the share from the market value of that share at the time it was acquired.

### Elections under section 139E

30. A taxpayer who acquires qualifying shares under an employee share scheme is able to make an election under subsection 139E(1) that subsection 139B(2) applies in relation to a year of income and to each qualifying share acquired during that year.

31. Subsection 139E(2) requires that the election be made in writing in a form approved by the Commissioner before the taxpayer lodges his or her return of income for the year of income, or within such further time as the Commissioner allows.

### The exemption conditions

32. Section 139CE contains three exemption conditions:

- the first exemption condition is that the scheme did not contain any conditions which could result in recipients forfeiting ownership of shares acquired (subsection 139CE(2));
- the second exemption condition is that the scheme is operated so that no recipient would be permitted to dispose of shares acquired until three years after

acquisition or until the recipient ceases to be an employee of the employer – whichever event occurs earlier (subsection 139CE(3)); and

- the third exemption condition is that the employee share scheme and any financial assistance scheme in respect of acquisition of shares under the employee share scheme is operated on a non-discriminatory basis (subsection 139CE(4)).

33. As the reference to ‘the scheme’ in subsections 139CE(2) to (4) is effectively a reference to the mechanism by which the participating employees acquire qualifying shares, the exemption conditions must, initially, be satisfied at the time an offer of shares is made to employees. However, as the purpose of subsection 139CE(3) is to ensure that qualifying shares are held for the nominated period in order to access the concession in section 139BA, satisfaction of the conditions at the time of the offer, alone, may not be enough. The share plan needs to continue to be operated in a manner that satisfies the exemption conditions.

### **Forfeiture of Ownership**

34. The Macquarie Dictionary (1997, Third Edition) defines ‘forfeit’ as ‘something to which the right is lost by the commission of a crime or misdeed, the neglect of a duty, the breach of a contract etc’. The context in which ‘forfeiting’ is used in subsection 139CE(2) connotes a meaning somewhat broader than the legal definition - taking in a ‘relinquishing’, or a ‘loss’, without due recompense.

35. One provision within the share plan rules allowed for amendment of the share plan rules. That provision recognised that a consequence of amending the rules could be the reduction of participating employees’ rights ‘in respect of shares issued’.

36. Shares acquired under the share plan have, however, been acquired in the name of, and are owned by, the participating employees. It would not be possible, therefore, for any amendment - even a retrospective amendment - to the share plan’s rules to affect the participating employees’ title to those shares. No other provision within the rules of the share plan contemplates the reduction, or removal, of any employee’s entitlements in any circumstance.

37. Under the compulsory acquisition, Spicers’ shareholders were entitled to receive the consideration offered in Paper Australia’s ‘Bidder’s Statement’. The value of that consideration, considered by the independent directors of Spicers to be ‘fair’ and ‘reasonable’ on the basis of an independent expert’s report provided to Spicers, did not differ between the participating employees and other Spicers’ shareholders. An entitlement to ‘fair’ and ‘reasonable’ consideration

precludes a finding that compulsorily acquired shares had been 'forfeited'.

38. As the rules of the share plan do not contemplate 'forfeiture', and because compulsory acquisition did not see shares being 'forfeited', the exemption condition in subsection 139CE(2) has been satisfied.

## **Restrictions on Disposal**

39. The rules governing the operation of the share plan prohibited the Plan Administrator from allowing the sale or transfer of shares allocated to an employee under the share plan before the earlier of:

- the period ending three years after the time of acquisition of the shares, and
- the time at which the employee ceased to be employed by Spicers or a Spicers subsidiary.

40. The restrictions on disposal were enforced by Computershare and the Spicers Remuneration Committee. Without the approval of Spicers Remuneration Committee, which would not be given unless trading restrictions were satisfied, Computershare (acting as Plan Administrator) was compelled by the share plan rules not to register any transfer of shares in the name of a plan Participant.

41. The Participants in the share plan, Spicers, Spicers Remuneration Committee and Computershare have operated the share plan to prevent disposal within the requisite period (being the earlier of three years from the time of acquisition or cessation of employment with Spicers or a Spicers subsidiary).

42. Compulsory acquisition of securities following a takeover bid is regulated by the provisions contained within Division 1 of Part 6A.1 of the Corporations Law. Section 661A of the Corporations Law allows a bidder acquiring over 90% of any class of securities to compulsorily acquire the remaining securities in that class.

43. The decision to pursue compulsory acquisition of Spicers shares was taken by Paper Australia and, as such, was a decision beyond the influence of the participating employees, Spicers, Spicers Remuneration Committee and Computershare. There was, then, no connection between the forced disposal of shares and the 'operations' of the share plan.

44. As the forced disposal, due to compulsorily acquisition, was outside the operation of the share plan, it has been concluded that the share plan has been operated so that no participating employee could dispose of the shares acquired under the share plan before the time set

out in subsection 139CE(3). Accordingly, the exemption condition set out in that subsection has been satisfied.

### **Non-discriminatory operation**

45. Subsection 139CE(4) requires that the employee share scheme and any financial assistance in respect of the acquisition of the shares must be operated on a non-discriminatory basis.

46. The share plan is operated on a non-discriminatory basis if the following conditions in sub-section 139GF(2) are satisfied:

- participation in the scheme is open to at least 75 % of permanent employees of the relevant employer;
- the time for acceptance of offers to acquire shares under the share plan is reasonable; and
- the essential features of each offer are the same for at least 75% of permanent employees.

47. The one offer made under the share plan was open to all Australian employees of Spicers and the time allowed for acceptance of the offer is considered to have been reasonable. Accordingly, the share plan is seen as having been operated on a non-discriminatory basis and to have satisfied the exemption condition in subsection 139CE(4).

## **Detailed contents list**

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## Commissioner of Taxation

11 July 2001

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<i>Previous draft:</i>	- ITAA 1936 139CC(2)
Not previously issued in draft form	- ITAA 1936 139CD
	- ITAA 1936 139CE
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CE(2)
CR 2001/1; TR 92/1; TR 97/16;	- ITAA 1936 139CE(3)
TR 92/20	- ITAA 1936 139CE(4)
	- ITAA 1936 139E
<i>Subject references:</i>	- ITAA 1936 139E(1)
- employee share scheme	- ITAA 1936 139E(2)
	- ITAA 1936 139GF
	- ITAA 1936 139GF(2)
<i>Legislative references:</i>	- ITAA 1936 Div 13A of Part III
- ITAA 1936 139B	- Corporations Law 661A
- ITAA 1936 139B(2)	- Corporations Law Div 1 of Part
- ITAA 1936 139BA	6A.1
- ITAA 1936 139B	

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### ATO References

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