


CR 2001/76 - Income tax: Employee Incentive Plan: Brightstar Environmental Employee Incentive Plan

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 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

 This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*



Class Ruling

Income tax: Employee Incentive Plan: Brightstar Environmental Employee Incentive Plan

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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**, **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:
- section 6-5 of the *Income Tax Assessment Act* (‘ITAA 1997’); and
 - paragraph 26(e) of the *Income Tax Assessment Act* (‘ITAA 1936’)

Class of persons

3. The class of persons to whom this Ruling applies are employees, together with their executor or successor in title, of Brightstar Environmental Partnership (BEP) who accept an offer to participate in Brightstar Environmental Employee Incentive Plan (the Plan). In this Ruling the employees who have accepted an offer to participate in the Plan are referred to as ‘participants’.

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 9 to 19 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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Date of effect

8. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Arrangement

9. 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 relevant parts of documents incorporated into this description of the arrangement are:

- Brightstar Environmental Employee Incentive Plan: Plan Rules;
- correspondence from the applicant dated 20 April 2001;
- applications for Class Ruling dated 17 May and 28 May 2001;
- correspondence from the applicant dated 31 July 2001; and
- correspondence from the applicant dated 12 November 2001.

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

10. The Plan is a bonus program, offering a payment of a cash amount at a future date calculated by using a pre-determined formula. The payment of the cash amount is based upon the growth of the employer partnership, BEP. A phantom option structure has been created to provide an incentive program that, as close as possible, resembles a real equity plan. The primary objective of the phantom option structure is to provide an incentive for the employees of BEP to benefit from the performance of the business of BEP.

11. The Plan Committee from time to time may make offers to the employees of BEP to participate in the Plan on the terms and conditions set out in the Plan Rules. Any such offer will be in the form of the Plan Agreement. On acceptance of the offer, the employees will become participants of the Plan.

12. Phantom options are issued/granted to participants for no consideration.

13. Having received their allocated phantom options participants are entitled to specify the vesting date(s) that the phantom options will first become exercisable under the Plan. According to the Plan, the vesting date(s) cannot be earlier than 3 years after the grant of a phantom option and not later than 10 years after the grant of a phantom option.

14. Notwithstanding the selection of vesting date(s) by the participant, as referred to in paragraph 13, the Plan Committee may include, without limitation, the following conditions in a Plan Agreement:

- proportion of a participant's phantom options that may be exercisable at different vesting dates or the circumstances under which any of the phantom options will become exercisable;

- performance conditions (“performance hurdles”) which may require that the proportion of phantom options that may become exercisable be reduced or that some or all the options lapse in circumstances determined by the Plan Committee; and
- period or periods of time (“performance period”) at the expiration of which the Plan Committee may review the performance conditions.

15. At the end of the performance period the Plan Committee will determine the outcome of any performance hurdles. The determination includes whether a participant’s phantom options may be exercisable in full or part, a reduction in their number and the lapsing, in whole or part, in consequence of the outcome of any applicable performance hurdle. A determination made by the Plan Committee is final.

16. Participants are required to lodge with the Plan Committee, within the specified time period, an Exercise Form, a copy of which is contained at Annexure B of the Plan Rules. The exercise period is between 1 December and 31 January of each financial year. Payment of the cash amount to participants will occur by 30 April immediately following the lodgment of the Exercise Form with the Plan Committee. The exercise period and the receipt of the cash amount both occur within the same financial year.

17. The Exercise Form states that the Plan Committee is not obligated to offer participants any consideration other than cash.

18. The cash amount is determined by subtracting the exercise price of the phantom option from the notional share value and where the amount is greater than zero, the amount is then multiplied by the number of vested share options being exercised to arrive at the cash amount.

19. Valuation of the business is conducted annually and the notional share value is calculated by an appropriately qualified valuer. Both the annual valuation of the business and the notional share value are communicated to the participants by 30 November.

Ruling

20. At the time that phantom options are granted to participants, participants have not derived assessable income under section 6-5 of the ITAA 1997 or section 26(e) of the ITAA 1936.

21. At the time that phantom options become vested in participants, participants have not derived assessable income under section 6-5 of the ITAA 1997 or section 26(e) of the ITAA 1936.

22. Any cash bonuses received by participants as a result of the exercise of the phantom options under the Plan will be assessable income under section 6-5 of the ITAA 1997 or section 26(e) of the ITAA 1936 in the year of receipt.

Explanations

23. The cash amount awarded to participants under the Plan is a cash bonus received in the context of an employment relationship. Cash bonuses, like salary and wages, are assessable on receipt.

24. The Commissioner of Taxation has issued Taxation Ruling TR98/1 titled: 'Income Tax: determination of income; receipts versus earnings' which sets out guidelines on the application of section 6-5 of the ITAA 1997, including the treatment of individuals who are in receipt of employment remuneration.

25. Paragraph 40 of TR 98/1 states that:

'In relation to non-trading income, the general rule is that there must be a receipt; '... there must be something "coming in"; that is, for income tax purposes, receivability without receipt is nothin' (from Law of Income Tax, Sir Houldsworth Shaw and Mr Baker, quoted by Dixon J in Carden's case at CLR 155, and by Rich ACJ in *Permanent Trustee Co (NSW) v. FC of T* (1940) 2 AITR 109 at 111; (1940) 6 ATD 5 at 13'.

26. Further at paragraphs 41 and 42 of TR 98/1, it is stated that:

'Generally, for non-trading income, it is when the amounts are received that they have, applying the words of Dixon J, 'come home to the taxpayer in a realised or immediately realisable form'. Income from employment would normally be assessable on a receipts basis. Salary, wages or other employment remuneration are assessable on receipt even though they relate to a past or future income period.'

27. At the time any cash amount is made to a participant under the Plan, which is by 30 April immediately following the lodgment of the Exercise Form with the Plan Committee, assessable income is derived and will constitute assessable income of the participant under section 6-5 of the ITAA 1997.

28. Alternatively, at the time any cash amount is made to a participant under the Plan, which is by 30 April immediately following the lodgment of the Exercise Form with the Plan Committee, assessable income is derived and will constitute assessable income of the participant under section 26(e) of the ITAA 1936.

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29. It is unnecessary to determine whether section 6-5 of the ITAA 1997 or section 26(e) of the ITAA 1936 should take preference because there is no disagreement between these two sections concerning the assessability of the cash amount and the financial year in which the cash amount should be included.

30. A participant does not have any entitlement to a future cash amount under the Plan when phantom options are granted or vested. It is not until the Plan Committee has made a determination to pay a cash amount that a participant's entitlement ceases to be contingent and unascertainable. Therefore, assessable income has not been derived under either section 6-5 of the ITAA 1997 or section 26(e) of the ITAA 1936 at the date of granting or of vesting of phantom options.

Detailed contents list

31. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

5 December 2001

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 97/16; TR 98/1

Subject references

- employee bonuses

Legislative references:

- ITAA 1936 26(e)
- ITAA 1997 6-5

Case references:

- Permanent Trustee Co (NSW) v.
FC of T (1940) 2 AITR 109

ATO References

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