CR 2003/37 - Income tax: Employee Share Scheme: Exempt Employee Share Plan of AlintaGas Group

Australian Taxation Office

Class Ruling
Income tax: Employee Share Scheme: Exempt Employee Share Plan of AlintaGas Group

Contents Para

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:

- 139B of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- 139BA of the ITAA 1936;
- 139CC of the ITAA 1936;
- 139CD of the ITAA 1936;
- 139CE of the ITAA 1936;
- 139E of the ITAA 1936;
- 139FA of the ITAA 1936;
- 139FB of the ITAA 1936;
- 139GF of the ITAA 1936;
- 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997'); and
- 6-10 of the ITAA 1997.

Note: On December 5th 2002, Taxation Laws Amendment Bill (No.8) 2002 was introduced into Parliament which amends the capital gains tax treatment of certain shares and rights acquired under employee share schemes in Division 13A. This ruling deals only with the law as presently enacted and which is not subject to the proposed amendments.

Class of persons

3. The class of persons to whom this Ruling applies are the Australian resident employees of AlintaGas Group who receive shares in AlintaGas Ltd under the Exempt Employee Share Plan ('EESP') and who make an election under section 139E. The AlintaGas Group comprises AlintaGas Limited, Alinta Finance Pty Ltd, AlintaGas Network Pty Ltd and AlintaGas Sales Pty Ltd.

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 10 to 18 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.

7. The Commissioner accepts that the shares acquired by the class of persons defined in this Ruling under the arrangement identified in this Ruling will be qualifying shares under section 139CD.

Commonwealth Copyright Administration
Intellectual Property Branch
Department of Communications, Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2601

or by e-mail: commonwealth.copyright@dcita.gov.au.

Date of effect

9. This Ruling applies from the 2001/2002 income year. 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). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Arrangement

10. 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:

- Application for Class Ruling dated 13 July 2001;
- AlintaGas Ltd Exempt Employee Share Plan (EESP) Trust Deed; and
- Correspondence by facsimile received by the Australian Taxation Office from Kris Chikarovski dated 11 March 2003.

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

11. The EESP is established as part of an employee share plan strategy of the AlintaGas Group. The share plan is part of AlintaGas Group's remuneration benefit and performance pay strategy for all its employees. The TPC will acquire ordinary shares in AlintaGas Limited for the benefit of the participating employees. These shares will be fully funded by an effective salary sacrifice arrangement within the meaning of paragraphs 19 to 23 of Taxation Ruling TR 2001/10. Participating employees will not be required to contribute any other funds in order to acquire the ordinary shares.

12. The EESP is designed to provide share benefits of up to $1,000 per participating employee per annum. Offers to participate in the EESP will be made on a non-discriminatory basis.

13. AlintaGas Group has implemented the EESP under a trust structure. The Trustee Plan Company ('TPC') has been established to act as trustee in the implementation and administration of the Plan.

14. The TPC will use the contributions it receives to acquire fully paid ordinary shares for the benefit of participating employees and will not acquire any restricted shares or loan notes. The employer AlintaGas company will provide funds to the TPC to purchase shares from fresh issues or from the Australian Stock Exchange ('ASX'). The shares purchased by the TPC will be registered in the name of the TPC. The shares will be held for the benefit of specific participating employees.

15. The participating employee's interest in the shares held by the TPC will be subject to a prohibition on disposal for a period terminating on the earlier of the occasion of three years after acquisition or termination of employment, but will not be subject to conditions that could result in forfeiture of shares. While the participating employee remains an employee of the AlintaGas Group, shares will be held by the TPC for a period of three years.

16. At no time will the number of shares acquired or held by a participating employee exceed 5% of the total number of shares issued in AlintaGas Limited. At no time is a participating employee in a position to cast or control the casting of more than 5% of the number of votes that may be cast at a general meeting of the company.

17. A participating employee is entitled to receive any dividends, or other distributions or entitlements made in respect of shares held by the TPC for their benefit under the Plan.

18. Participating employees wishing to withdraw share benefits from the EESP will first seek permission from the TPC before a distribution will be made. The share benefits identified for withdrawal will be available if they have been held by the TPC for three years or the participating employee has ceased employment whichever is first to occur.

Ruling

19. Amounts paid by an employer company to the TPC under the Plan, pursuant to an effective salary sacrifice arrangement, will not be included in the assessable income of the participating employee, pursuant to section 6-5, when those amounts are paid. The employee will include the amount of the discount on the shares in assessable income in accordance with the following paragraphs of this Ruling.

20. Where a participating employee acquires shares under the EESP and makes an election under section 139E for the year of income, the discount on the shares will be included in the assessable income in the year of income in which the shares are acquired pursuant to subsection 139B(2).

21. The discount will be calculated in accordance with section 139CC(2). The discount is the market value of the share at the time it is acquired less any consideration paid by the participating employee. As the exemption conditions in section 139CE are satisfied, subsection 139BA(2) applies with the result that only the amount of discount for the income year greater than $1,000 is included in the participating employee's assessable income.

Explanations

22. A salary sacrifice arrangement is an arrangement under which an employee agrees to forego part of their total remuneration, which they would expect to receive as salary or wages, in return for the employer providing benefits of a similar value. An effective salary sacrifice arrangement requires the employee to agree to receive part of their total remuneration as an employee share scheme benefit before the employee has earned the entitlement to receive the amount as salary or wages.

23. At the time contributions are made by an employer to the TPC no income has been derived by the participating employee and no amount would be included in the participating employee's assessable income. When the participating employee acquires the shares (when TPC purchases the shares for the benefit of the employee) an amount may be included in assessable income as outlined below.

Election to be taxed in year of acquisition

24. As the shares acquired under this arrangement are qualifying shares as defined in section 139CD, a participating employee can elect under section 139E that subsection 139B(2) applies for a year of income. The election will apply to each qualifying share acquired by the participating employee in the year of income. Subsection 139B(2) provides that the discount is included in the taxpayer's assessable income in the year of acquisition of the share, that is, in the year when TPC purchases the share for the benefit of the participating employee.

25. An election under section 139E must 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. Taxpayers should not forward their section 139E elections to the Australian Taxation Office unless specifically requested to do so, see paragraph 3 of Taxation Determination TD 97/23.

26. The discount is calculated in accordance with subsection 139CC(2). As the participating employee does not provide any consideration for the acquisition of the share the discount is the market value of the share, determined by section 139FA, when it was acquired by the participating employee. The market value of an ordinary share under section 139FA is:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition – the weighted average of the prices at which those shares were traded on the ASX during that week; or
- if there were no such transactions in the period – the last price at which an offer was made on the ASX in that period to buy such a share, or if no such offer was made, the value of the share determined as if section 139FB applied to the share.

Reduction of amount to be included in assessable income

27. In order for section 139BA to apply to the shares, the 3 exemption conditions set out in section 139CE must be satisfied. They are:

- The first exemption condition is that the scheme did not contain any conditions which could result in participating employees forfeiting ownership of the shares that were acquired under the Plan, (subsection 139CE(2));

- The second exemption condition is that the scheme is operated so that no participating employee would be permitted to dispose of shares acquired under the Plan until three years after the acquisition or until after the participating employee ceases to be an employee of the AlintaGas Group - whichever event occurs first, (subsection 139CE(3)); and
- The third exemption condition is that the employee share scheme and any financial assistance scheme in respect of the acquisition of shares under the employee share scheme is operated on a non discriminatory basis pursuant to section 139GF, (subsection 139CE(4)).

28. The EESP satisfies the exemption conditions in section 139CE. Therefore subsection 139BA(2) will apply so that only the discount for the income year greater than $1000 will be included in the participating employees assessable income.

29. The first element of the cost base of the shares for the purposes of the capital gains tax provisions will be determined in accordance with subsection 130-80(2). No advice is provided on the operation of this provision as it is currently subject to a retrospective legislative amendment contained in *Taxation Laws Amendment Bill (No. 8) of 2002.*

Detailed contents list

30. Below is a detailed contents list for this Class Ruling

Commissioner of Taxation
14 May 2003

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16;
TD 97/23; CR 2001/1; TR 2001/10

Subject references:

- employee share scheme
- cost base
- election
- capital gains tax

Legislative references:

- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CD
- ITAA 1936 139CE
- ITAA 1936 139CE(2)
- ITAA 1936 139CE(3)
- ITAA 1936 139CE(4)
- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139GF
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 130-80(2)
- TAA 1953 Part IVAAA
- Copyright Act 1968

ATO references

NO 2003/005210
ISSN: 1445-2014