


CR 2003/38 - Income tax: Employee Share Scheme: Deferred Employee Share Plan of AlintaGas Group

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Class Ruling

Income tax: Employee Share Scheme: Deferred Employee Share Plan of AlintaGas Group

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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:

- 139B of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- 139C of the ITAA 1936;
- 139CA of the ITAA 1936;
- 139CC of the ITAA 1936;
- 139CD of the ITAA 1936;
- 139E of the ITAA 1936;
- 139FA of the ITAA 1936;
- 139FB of the ITAA 1936;
- 139G of the ITAA 1936;
- 104-75 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- 109-5 of the ITAA 1997;

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- 130-80 of the ITAA 1997; and
- 130-83 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 participate in the Deferred Employee Share Plan ('DESP'). 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 9 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.

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Date of effect

8. This Ruling applies from the 2001/2002 year of income. 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

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 parts of documents incorporated into this description of the arrangement are:

- Application for Class Ruling dated 13 July 2001;
- AlintaGas Ltd Deferred Employee Share Plan (DESP) 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.

10. The DESP is established as part of the employee share plan strategy of the AlintaGas Group. Participation is offered to all Australian employees of the AlintaGas Group to salary sacrifice a part of their remuneration to acquire shares under the Plan. Participation in the Plan is also offered to certain executives to salary sacrifice a part of any bonus entitlement. Allocations made under the plan may have vesting periods and performance conditions attached to attract and retain key employees.

11. The issue of AlintaGas Limited ordinary shares will be fully funded by way of an effective salary sacrifice arrangement within the

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meaning of paragraphs 19 to 23 of Taxation Ruling TR 2001/10. Participants will not be required to contribute any other funds in order to acquire the ordinary shares.

12. The Trustee Plan Company ('TPC') has been established to act as trustee in the implementation and administration of the Plan. The Trust will be administered in a manner that ensures the sole activities of the Trust are to acquire AlintaGas ordinary shares and to provide such ordinary shares to employees of the AlintaGas Group. In this regard, any income or property to which a participant is not presently entitled will only be used for the administration of the employee share plan and powers in the Trust Deed that may permit TPC to do otherwise will not be so exercised.

13. The TPC will use the funds it receives from the employer companies to purchase AlintaGas Limited ordinary shares from fresh issues or from the Australian Stock Exchange. The shares will be registered in the name of the TPC and held for the benefit of participants.

14. Shares will be notionally allocated to participants and TPC will ensure that each participant is notified in writing when ordinary shares are acquired by TPC and allocated to them. The TPC will keep proper books and records of the ordinary shares allocated to each participant and provide a statement at least annually to each participant showing the number of shares so allocated.

15. The TPC will not hold fractions of shares for the benefit of participants. Dividends paid by AlintaGas on shares held by the TPC from year to year will be distributed to participants with reference to the number of shares notionally allocated to them in the year that dividends are declared and paid.

16. The participant's beneficial interest in the shares is subject to restrictions, the satisfaction of any relevant requirements, and subject to forfeiture where the participant has committed an act of gross misconduct, theft or defalcation, or where the relevant requirements have not been satisfied and the employee is no longer an employee of the AlintaGas Group. Relevant requirements are minimum service periods and performance criteria.

17. Participants wishing to withdraw share benefits from the DESP must seek permission from the TPC by completing a Notice of Withdrawal of shares before a distribution can be made. The share benefits identified for withdrawal will be examined together with underlying service and performance criteria and any other restrictions affecting a distribution. If permission is granted, an in specie distribution will be provided to the participating employee or the shares sold on the participant's behalf.

18. At no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of AlintaGas Limited. Also at no time will a participating employee be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of AlintaGas.

Ruling

Where the employee does not make an election

19. Where a participating employee acquires shares under the DESP and does not make an election under section 139E, the amount of discount on the shares will be included in assessable income pursuant to subsection 139B(3) in the year of income in which cessation time occurs.

20. As there are restrictions and forfeiture conditions on the shares under the Plan, the cessation time will be determined under subsection 139CA(2).

21. In accordance with subsection 139CA(2), the cessation time for a share under the Plan, will be the earliest of:

- The time when the TPC has approved giving effect to a Notice of Withdrawal by the participant;
- The time when the participant ceases to be employed by a company in the AlintaGas Group; or
- 10 years from when the eligible employee acquires the shares.

22. Where the participating employee subsequently disposes of the shares in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time under subsection 139B(3) is calculated in accordance with subsection 139CC(3). The discount is the consideration received by the participating employee for the disposal of the shares.

23. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded pursuant to subsection 130-83(2).

24. Shares that are not subsequently disposed of by the participating employee in an arm's length transaction within 30 days of the cessation time, will have the discount calculated in accordance with subsection 139CC(4). The discount is the market value of the shares at cessation time. The market value of the share is worked out under section 139FA.

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25. The cost base of such shares upon a capital gains tax (CGT) event happening will be their market value at the cessation time pursuant to subsection 130-83(3).

26. Where DESP shares in respect of which a section 139E election has not been made, are forfeited under the Plan Rules before cessation time, no amount is included in assessable income under subsection 139B(3), and there are no CGT consequences.

Where the employee does make an election

27. Where a participating employee acquires shares under the Plan and makes an election under section 139E, the discount on the shares is included in assessable income in the year of income in which the shares are acquired pursuant to subsection 139B(2). This will be the year of income in which TPC allocates the share to the participating employee.

28. The discount is calculated under subsection 139CC(2). The amount of discount to be included in assessable income is the market value of each share at the time that it was allocated to the employee by TPC. The market value of a share at this time is determined under section 139FA.

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*.

30. Where a participating employee acquires shares under the Plan and makes an election under section 139E and the shares are subsequently forfeited under the Plan Rules, the amount of discount on the shares will be included in assessable income under subsection 139B(2) as outlined above in paragraphs 27 & 28.

Explanations

Employee Share Schemes

31. Where, as under this arrangement, a participant acquires a beneficial interest in a share under an effective salary sacrifice arrangement for the purposes of Taxation Ruling TR 2001/10 there is an acquisition of a share under an employee share scheme as defined in section 139C.

32. For the purposes of Division 13A, section 139G provides that a person acquires a share in several circumstances, including by acquiring a beneficial interest in the share, or having a share allotted to them by another person.

33. Clause 4.7 of the DESP Trust Deed makes it clear that the participating employee acquires a beneficial interest in a share at the time the share is acquired under the Plan by TPC for the benefit of the participant. For the purposes of Division 13A, the participating employee acquires a share when it is allocated to their account by the TPC.

34. To be dealt with under the provisions of Division 13A, the beneficial interest in the share must be acquired under an employee share scheme. Subsection 139C(1) provides that a share is acquired under an employee share scheme if the share is acquired in respect of, or in relation directly or indirectly to, any employment provided by the taxpayer.

35. Subsection 139C(3) provides that a share is not acquired under an employee share scheme unless it is acquired for less than its market value. This condition is satisfied under the Plan as the participant is not required to make any payment for the allocation of the shares.

36. A participant will therefore acquire shares under an *employee share scheme*, as the shares will be acquired by that employee for less than market value and in respect of or in relation to their employment.

37. The discount given in relation to the acquisition is included in assessable income in accordance with section 139B. It is either included in the income year in which the share is acquired (subsection 139B(2)) or in the income year in which the cessation time for the share occurs (subsection 139B(3)).

38. So far as the acquisition of shares under the Plan is concerned, the time at which the income is assessable depends on two material factors. The first is whether the shares are 'qualifying shares' within the meaning of that term in section 139CD. The second is whether the taxpayer has made an election under section 139E to be assessed on the discount in the year of the acquisition.

39. It is accepted that having regard to the conditions under section 139CD the shares acquired by participants in the Plan are qualifying shares.

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Where the employee does not make an election

40. Where a participating employee has not made an election under section 139E, as the shares are qualifying shares, the discount in relation to the shares will be included in assessable income pursuant to subsection 139B(3), in the year in which cessation time occurs. As the shares are subject to forfeiture and there are restrictions preventing the participating employee from disposing of the shares, cessation time will be determined pursuant to subsection 139CA(2).

41. Subsection 139CA(2) provides that the cessation time will be the earliest of:

- (a) the time when the taxpayer disposes of the share;
- (b) the later of the time when, -any restriction preventing the taxpayer from disposing of the share and - any condition that could result in the taxpayer forfeiting the share, ceases to have effect;
- (c) the time when the employment in respect of which the share was acquired ceases; and
- (d) 10 years after the taxpayer acquired the share.

42. Under the Plan Rules shares acquired under the Plan will be subject to forfeiture until the Notice of Withdrawal by the participant is approved by the TPC. The cessation time will therefore be the earliest of the approval of the Notice of Withdrawal, the time when the participant ceases to be employed by a company in the AlintaGas Group, or 10 years after the participant acquired the share for the purposes of Division 13A.

43. Subsection 139CC(3) calculates the discount to be included in assessable income where the shares are disposed of by the employee in an arm's length transaction within 30 days of cessation time. As no consideration was given by the employee for the shares, the entire proceeds received by the employee on disposal of the shares will be included in assessable income.

44. As the shares are qualifying shares and no election was made under section 139E in the year of income that the share was acquired, any capital gain or loss made on the disposal, outlined above, will be disregarded in accordance with subsection 130-83(2).

45. An employee who does not dispose of the shares in an arm's length transaction within 30 days of cessation time will include the discount in their assessable income. The discount is calculated in accordance with subsection 139CC(4). The discount is the market value of the shares at cessation time as no consideration was paid by the employee to acquire the shares.

46. The shares in AlintaGas Limited are listed on an approved stock exchange. The market value of the shares for the purposes of paragraph (a) of subsection 139CC(4) will be determined in accordance with section 139FA. The market value of an ordinary share under section 139FA is:

- if there was at least one transaction on the Australian Stock Exchange 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 stock exchange during that week; or
- if there were no such transactions in the period – the last price at which an offer was made on the Australian Stock Exchange 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.

47. The cost base of the shares for the purposes of the CGT provisions will be determined in accordance with subsection 130-83(3), the first element being the market value of the shares worked out under section 139FA at cessation time. This amount is the market value determined in paragraph 46.

48. Where a participating employee acquires shares under the Plan and the shares are subsequently forfeited under the Plan Rules, the discount to be included in assessable income pursuant to subsection 139B(3) will be nil. As the Plan Rules apply equally to all participating employees, the forfeiture by the employee is considered to be at arm's length for the purposes of subsection 139CC(3). As the employee has not received any consideration upon forfeiture of the shares, nor paid anything for them, the discount calculated in accordance with subsection 139CC(3) is nil.

49. Where a participating employee acquires shares under the Plan and the shares are subsequently forfeited under the Plan's Rules, there will be no capital gains tax consequences because there is no acquisition of the shares by the participating employee as required for section 130-80 to apply. The employee has not acquired the shares by becoming absolutely entitled to them pursuant to section 109-5 event E5, and section 104-75.

Where the employee does make an election

50. An employee can elect under section 139E that subsection 139B(2) applies for a year of income. Subsection 139B(2) includes the discount in assessable income in the year of income in which the share was acquired.

51. 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.

52. Where an election is made under section 139E for a year of income, subsection 139B(2) will apply to determine when the discount with respect to all the qualifying shares or rights acquired in that year is assessed.

53. The discount is calculated in accordance with subsection 139CC(2). The discount is the market value of the share, as determined by section 139FA (see paragraph 46), when it was acquired by the participant as no consideration was provided for the acquisition of the share by the participant.

54. 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

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Commissioner of Taxation

14 May 2003

Previous draft:

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Related Rulings/Determinations:

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

Subject references:

- employee share scheme
- cost base
- capital gains tax

Legislative references:

- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139CA
- ITAA 1936 139CA(2)

- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CC(4)(a)
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139G
- ITAA 1936 139G Div 13A
- ITAA 1997 104-75
- ITAA 1997 109-5
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- TAA 1953 Part IVAAA
- Copyright Act 1968

 ATO references

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