



***CR 2003/45 - Income tax: Employee Share Scheme:
Exemption Conditions: disposal of shares held under
MIM Holdings Limited General Employee Share Plan
within three years of acquisition***

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Class Ruling

**Income tax: Employee Share Scheme:
Exemption Conditions: disposal of shares held
under MIM Holdings 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 Act 1936* (ITAA 1936);
- 139BA of the ITAA 1936;
- 139CC of the ITAA 1936;
- 139CE of the ITAA 1936;
- 139E of the ITAA 1936;
- 139FA & 139FAA of the ITAA 1936;
- 139GF of the ITAA 1936; and
- 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to which this Ruling applies is employees of MIM Holdings Limited (MIM) and its Australian subsidiaries (MIM Group) who have acquired shares by participating in offers made under MIM General Employee Share Plan (the Share Plan). They may be persons who are compelled to dispose of their MIM shares to Xstrata Holdings Pty Limited, a wholly owned subsidiary of Xstrata Plc, as part of the Scheme 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 actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 21.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the years of income ended 30 June 2003 and 30 June 2004. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 December 2003. The Ruling continues to apply, in respect of the tax laws ruled upon to all persons within the specified class who enter into a specified arrangement during the term of the Ruling. Thus the Ruling continues to apply to persons, even following its withdrawal, for arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

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 arrangement are:

- Letter from MIM Holdings Limited dated 1 May 2003 enclosing Application for Class Ruling and other material;
- MIM General Employee Share Plan Rules dated 6 September 1999;
- MIM General Employee Share Plan Administrative Regulations approved on 6 September 1999;
- Information Release – MIM and Xstrata Announce Recommended Scheme of Arrangement;
- Copy of the Deed Poll of Xstrata Holdings Pty Limited executed 7 April 2003; and

- Copy of MIM General Employee Share Plan Private Ruling dated 15 November 1999.

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

11. The Share Plan commenced on 6 September 1999. It provides an opportunity for eligible employees of MIM Group to acquire shares in MIM.

12. The Share Plan is administered by MIM General Employee Share Plan Pty Ltd (the Share Plan company) in accordance with Share Plan rules. Annually, eligible employees are offered participation in the Share Plan and upon acceptance of the offer, the eligible employee becomes a Participant.

13. The Share Plan company acquires shares in MIM in the ordinary course of trading on the stock market of the ASX for Participants on a quarterly basis.

14. At no time has the total number of ordinary shares in the capital of MIM acquired by the Participants under the Share Plan exceeded 5% of the total number of ordinary shares of the capital of MIM.

15. Shares acquired under the Share Plan are registered in the name of the Participant with the Participant having full shareholder voting and dividend rights.

16. The Share Plan rules provide that during a three year period after the date of registration of any share in the name of the Participant, the shares acquired must not be withdrawn from the plan or sold, unless the employee ceases to be an employee of the MIM Group.

17. These restrictions on disposal are enforced by the Share Plan company holding all certificates issued in respect of the shares.

Scheme of Arrangement

18. Xstrata Plc via a wholly owned subsidiary, Xstrata Holdings Pty Limited has launched an offer for MIM subject to a Court approved Scheme of Arrangement (Scheme).

19. Before Court approval can be given, the Scheme requires approval by a majority in number of MIM shareholders who vote at the Scheme meeting (in person or by proxy) and at least 75% of the total number of shares voted at the Scheme meeting (in person or by proxy).

20. The transaction is subject to a number of conditions, including regulatory approvals; Xstrata Plc shareholder approval of the transaction; the obligations of Xstrata's equity underwriters and debt financiers under their agreements with Xstrata becoming unconditional, and those agreements not having been terminated.

21. If Court and Shareholder approval is given, along with other regulatory approvals, Xstrata Holdings Pty Limited will compulsorily acquire all MIM shares. All approvals are expected to allow completion of the Scheme on or before 15 July 2003.

Ruling

22. Provided that the Share Plan rules are not varied to lift the disposal restrictions referred to in paragraph 16 above, it would be 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 participating employees to be forfeited;
- the Share Plan has been 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 cease to be employed by the MIM Group – whichever occurs earlier; and
- the Share Plan has been operated on a non-discriminatory basis in accordance with terms of section 139GF.

23. Furthermore, the conclusion reached in the previous paragraph is not affected by the fact that shares acquired under the Share Plan might be compulsorily disposed of by participating employees due to operation of the Scheme.

24. Accordingly, as the exemption conditions in section 139CE have been satisfied, section 139BA applies to participating employees in respect of qualifying shares acquired under the Share Plan in a year of income covered by this Ruling, provided that the employee has made an election under section 139E for that year. This means that the total amount of discounts, assessable to the employee in relation to such shares, is only assessable under subsection 139B(2) to the extent that it is greater than \$1,000.

Disposal of shares as a result of an alteration to the Share Plan Rules

25. However, should the shares acquired by the participating employees under the Share Plan be disposed of within three years of acquisition, as a result of an alteration to the Share Plan rules made by MIM, the exemption condition in subsection 139CE(3) will not be satisfied.

26. Accordingly, as the exemption condition in subsection 139CE(3) would not be satisfied, section 139BA will not apply to the participating employees for the relevant years of income. Thus employees are required under subsection 139B(2) to include in their assessable income for each year of income the total value of any discounts given. Existing assessments may be required to be amended where a participating employee has excluded an amount of discount given from their assessable income in a year of income.

Cost Base

27. Under subsection 130-80(2) of the ITAA 1997, the first element of the cost base or reduced cost base of each share that was acquired by a participating employee under the Share Plan is the market value of the share (worked out under either section 139FA or section 139FAA of the ITAA 1936) when it was acquired.

Explanation

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

Elections under section 139E

29. 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 for a year of income to each qualifying share acquired by the taxpayer in that year.

30. 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 requires.

The exemption conditions

31. 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 the shares that were acquired under the Share Plan (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 under the Share Plan until three years after the 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 the acquisition of shares under the employee share scheme is operated on a non discriminatory basis (subsection 139CE(4)).

32. As the reference to 'the scheme' in subsections 139CE(2) to (4) is effectively a reference to the mechanism by which participating employees acquire qualifying shares, the exemption conditions initially must be satisfied at the time of the offer of shares to the employees. However, as part of the purpose of section 139CE 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 offer, of itself, may not be enough. The Share Plan needs to continue to be operated in a manner that satisfies the exemption conditions.

Forfeiture of ownership

33. 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, a 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.

34. Rule 12.1 of the Share Plan rules allows for the amendment of the Share Plan rules. The provision recognises that a consequence of amending the Share Plan rules could be a reduction of the rights of participating employees in respect of the shares issued.

35. Irrespective of the foregoing Rule in the plan relating to a possible reduction of rights, it is recognised that shares acquired under the Share Plan have been acquired in the name of, and are owned by the Participants. It would not be possible for any amendment - even a retrospective amendment - to the Share Plan rules to affect the title of participating employees to those shares.

36. If Xstrata Holdings Pty Limited and MIM gain Court approval for the proposed Scheme, the current shareholders of MIM will receive the consideration offered in the Xstrata Holdings Pty Limited executed Deed Poll. The value of that consideration will not differ between the participating employees and other shareholders. An entitlement to that consideration precludes a finding that the acquired shares had been 'forfeited'. Thus the Share Plan rules do not contain any conditions which could result in shares acquired by Participants being forfeited.

37. As the Share Plan rules do not contemplate 'forfeiture' of the shares acquired by the participating employees, the exemption condition in subsection 139CE(2) is satisfied.

Restrictions on disposal

38. The Share Plan rules prohibit the Share Plan Company 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 the MIM Group.

39. Compulsory acquisition of shares occurs automatically following Court approval of the Scheme, in conjunction with Xstrata Plc shareholder approval and other regulatory approvals being obtained.

40. The Participants in the Share Plan, along with the Share Plan company, have operated the Share Plan to prevent disposal of the shares within the requisite three year period.

41. Any decision by Xstrata Holdings Pty Limited to pursue acquisition of the shares acquired by the participating employees is out of the control of both the employees and the Share Plan company, notwithstanding the ability of the participating employees to vote at company meetings. It is considered the total shareholding under the employee Share Plan in relation to the total shares issued by MIM, effectively means that the participating employees have no decision making influence on the Scheme. There is effectively no connection between any disposal of the shares and the operation of the Share

Plan. Any early disposal of the shares is outside the operation of the Share Plan. As those responsible for the operation of the Share Plan would not effectively be involved in the Scheme decision, it would be 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 would be satisfied.

42. However, the position is different if the shares acquired by the participating employees under the Share Plan are disposed of within three years of acquisition, as a result of an alteration to the Share Plan rules made by MIM.

43. Alteration of the Share Plan rules is within the direct control of MIM. By altering the Share Plan rules to allow disposal of shares within three years of acquisition, it could not be concluded that the Share Plan is being operated in a manner that complies with the exemption condition in subsection 139CE(3).

44. Failure to meet the exemption condition in subsection 139CE(3) means that a participating employee who has made an election under section 139E for a particular year of income will not be able to avail themselves of the \$1,000 concession in section 139BA.

45. In these circumstances, employees that only included in their assessable income, for a particular year of income, that part of the total amount of discounts given that exceeded \$1,000, may be required to amend their income tax return for that year.

Non-discriminatory operation

46. 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.

47. In order for an employee share scheme to have been operated on a non discriminatory basis, the conditions listed in subsection 139GF(2) must be satisfied in relation to all offers to acquire shares under the scheme. These conditions are that:

- participation in the scheme is open to at least 75% of permanent employees;
- the time for acceptance of offers made is reasonable; and
- the essential features of each offer are the same for at least 75% of permanent employees.

48. The Share Plan has been operated on a non discriminatory basis. Rule 4.3 of the Share Plan rules provides that ‘...all offers to Employees must be made on a non-discriminatory basis in accordance with section 139GF of the ITAA 1936.’

Cost base

49. The first element of the cost base and reduced cost base of a qualifying share that is covered by an election under section 139E is its market value (worked out under sections 139FA to 139FF) when it was acquired (subsection 130-80(2) of the ITAA 1997).

50. As the qualifying shares acquired by the participating employees under the Share Plan are listed shares, their market value is determined under either section 139FA or section 139FAA.

Detailed contents list

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

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Commissioner of Taxation

25 June 2003

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

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

Legislative references:

- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139BA
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CE
- ITAA 1936 139CE(2)

- ITAA 1936 139CE(3)
- ITAA 1936 139CE(4)
- ITAA 1936 139E
- ITAA 1936 139E(1)
- ITAA 1936 139E(2)
- ITAA 1936 139FA
- ITAA 1936 139FAA
- ITAA 1936 139FF
- ITAA 1936 139GF
- ITAA 1936 139GF(2)
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- Copyright Act 1968
- TAA 1953 Part IVA

ATO references

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