

CR 2003/50 - Income tax: Brickworks Limited - Exempt Employee Share Plan

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Class Ruling

Income tax: Brickworks Limited - Exempt Employee Share 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 taxation laws dealt with in this ruling are:

- 139B of the *Income Tax Assessment Act 1936* ITAA 1936;
- 139BA of the ITAA 1936;
- 139C of the ITAA 1936;
- 139CA 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;
- 139G of the ITAA 1936;
- 139GB of the ITAA 1936;

- 130-80 of the *Income Tax Assessment Act 1997* (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 is the Australian resident employees (participants/participating employees) of the Brickworks Group - who participate in the Brickworks Limited Exempt Employee Share Plan (EESP/Plan) as described in the Arrangement part of this Ruling. The Brickworks Group comprises Brickworks Limited; The Austral Brick Company Pty Limited, The Austral Tile Company Pty Limited, The Austral Export Company Pty Limited, and Eureka Tiles Pty Limited.

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 from the 2002/2003 year of income. However, this 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 issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore this Ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette; or
- it is not taken to be withdrawn by an inconsistent later Public Ruling; or
- the relevant taxation laws are not amended.

Arrangement

9. The arrangement that is the subject of this 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;

- Class Ruling Application dated 1 July 2002;
- Brickworks Limited (ACN 000 028 526) Exempt Employee Share Plan Trust Deed (May 2002); or
- Brickworks Limited (ACN 000 028 526) Exempt Employee Share Plan ('Exempt Plan') Information Booklet.

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 EESP was established as part of the employee share plan strategy of the Brickworks Group. Participation is offered to all permanent employees and directors of the Brickworks Group, who have completed at least 3 months employment with the Group, to salary sacrifice a part of their remuneration to acquire Brickworks

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Limited shares under the Plan. Employees and directors who choose to participate in the alternate Brickworks Limited Deferred Employee Share Plan are not permitted to also participate in the EESP.

11. The purchase of Brickworks Limited ordinary shares will be funded by way of an effective salary sacrifice arrangement within the meaning given in paragraphs 19 to 23 of Taxation Ruling TR 2001/10. Also, the Brickworks Group will make additional contributions towards the purchase price of shares for each participant, who is not also a director, on an equal basis. Participants will not be required to contribute any other funds to acquire the 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. CPU Share Plans Pty Limited (CPU/Plan Trustee) has been appointed 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 Brickworks Limited ordinary shares and to provide such ordinary shares to participating employees of the Brickworks Group. In this regard any income or property to which a participant is not presently entitled cannot be used for the administration of the Plan. The Brickworks Group will meet the brokerage fees on share purchases, along with all other EESP expenses, costs and charges incurred by the Plan Trustee. Participating employees will only be responsible for brokerage fees on any share sales or transfers.

14. CPU will use the funds it receives from the Brickworks Group companies to purchase Brickworks Limited ordinary shares from new issues of shares by Brickworks Limited or from the Australian Stock Exchange (ASX). The shares will be registered in the name of CPU and held for the benefit of participants.

15. Shares will be notionally allocated, as a beneficial interest, to participants and CPU will ensure that each participant is notified in writing when ordinary shares are acquired and allocated to them. CPU will keep proper books and records of the ordinary shares allocated to each participant and provide a statement of account at least annually to each participant.

16. CPU will not hold fractions of shares for the benefit of participants. Amounts remaining over from share purchases will be notionally carried forward on each participant's behalf to be used for future share purchases. Dividends paid by Brickworks Limited on shares held by CPU will be distributed to participants with reference to the total number of shares notionally allocated to them at the time that dividends are declared and paid. Dividends cannot be reinvested under the Plan.

17. Each participating employee's beneficial interest in the shares is:

- subject to a restriction (shares must be held by the CPU for three years from the date of their allocation to the participant, unless the participant ceases to be employed within the Brickworks Group before the three years has elapsed); and
- **not** subject to any conditions which would result in the forfeiture of any shares.

18. Participating employees wishing to withdraw share benefits from the EESP must complete and lodge with the plan trustee a Notice of Withdrawal of shares before a distribution can be made. The share benefits identified for withdrawal will be available for distribution if they have been held by CPU for the benefit of the participant for three years, or on the participant ceasing to be employed with the Brickworks Group, whichever is first to occur.

19. At no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of Brickworks 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 Brickworks Limited.

Ruling

Where the participating employee makes an election under section 139E

20. Where a participating employee acquires shares under the Plan and makes an election pursuant to section 139E for a year of income, the discount on the shares is included in that employee's assessable income in the year of income in which the shares are acquired pursuant to subsection 139B(2). This is the year of income in which CPU allocates the shares to the participating employee.

21. The discount is calculated in accordance with subsection 139CC(2). The amount of discount to be included in the participant's assessable income is the market value of each share at the time that it is allocated to the participant by CPU. The market value of a share at this time is determined under section 139FA.

22. Provided that the share plan is operated in a manner that continues to satisfy the exemption conditions in section 139CE, only the amount of discount in any one year of income in excess of \$1,000 is included in the participating employee's assessable income, pursuant to subsection 139BA(2).

23. The first element of the cost base of the shares for the purposes of the capital gains tax (CGT) provisions will be determined in accordance with section 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997). No advice is provided on the operation of this provision as it is currently subject to a legislative amendment contained in *Taxation Laws Amendment Bill (No. 8) of 2002*.

Where the participating employee does not make an election under section 139E

24. Where a participating employee acquires shares under the Plan and does not make an election under section 139E, the amount of the discount on the shares is included in assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3). The cessation time is determined under section 139CA.

25. As the shares are subject to restrictions preventing the participating employee from disposing of them before a particular time, the cessation time will be determined pursuant to subsection 139CA(2). The cessation time for a share acquired under the Plan will be the earlier of:

- Three years after the share is acquired by the participating employee; or
- The time when the participating employee ceases to be employed by a company in the Brickworks group.

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

27. Any capital gain or loss made as a consequence of such a disposal will be disregarded pursuant to subsection 130-83(2) of the ITAA 1997.

28. Where the participating employee does not subsequently dispose of the shares in an arm's length transaction within 30 days of the cessation time, the discount included in assessable income at the cessation time under subsection 139B(3) is calculated in accordance with subsection 139CC(4). The discount is the market value of the shares at the cessation time. The market value of the share is worked out under section 139FA.

29. The first element of the cost base of such shares upon a CGT event happening will be their market value at the cessation time pursuant to subsection 130-83(3) of the ITAA 1997.

Explanation

Employee share schemes

30. Where, as under this arrangement, a participant acquires a beneficial interest in a share under an effective salary sacrifice arrangement within the meaning given in *Taxation Ruling TR 2001/10* there is an acquisition of a share under an employee share scheme for the purposes of Division 13A as defined in section 139C.

31. In this regard, 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.

32. Clause 4.7 of the EESP 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 CPU for the benefit of the participant. For the purposes of Division 13A, the participating employee acquires a share when it is allocated to him or her by CPU.

33. For Division 13A to apply, 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 of the taxpayer (that is, of the participant).

34. 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.

35. A participant will therefore acquire shares under an ***employee share scheme*** within the meaning given by section 139C, as the shares will be acquired by that employee for less than market value and in respect of or in relation to their employment.

36. The discount given in relation to the acquisition is included in assessable income in accordance with section 139B. It is included in the income year in which the share is acquired where an election under section 139E is made by the participant (subsection 139B(2)) or, where no such election is made, in the income year in which the cessation time occurs (subsection 139B(3)).

37. In so far as the acquisition of shares under the Plan is concerned, the time at which the income is included in the participant's assessable income 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 include the discount in assessable income in the year that the shares are allocated to him or her.

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

Where a participating employee makes a section 139E election

39. A participating 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 in which the share was acquired.

40. 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*.)

41. Where an election is made by a participating employee under section 139E for a year of income, the discount given on all the qualifying shares or rights acquired is included in the participant's assessable income in the income year of acquisition.

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

43. As the ordinary shares in Brickworks Limited are listed on the Australian Stock Exchange (ASX), which is an approved stock exchange, section 139FA provides that their market value is:

- (a) if there was at least one transaction on the ASX in Brickworks Limited shares in the week up to and including the valuation date - the weighted average of the prices at which those shares were traded on the ASX during that week; or
- (b) if there were no transactions in Brickworks Limited shares on the ASX in the period - the last offered price on the ASX for Brickworks Limited shares, or if no such offer was made, the value as determined under section 139FB.

\$1,000 tax-free threshold:

44. Section 139CE contains three exemption conditions that must be satisfied by the Plan for the participating employees to have access to the \$1,000 tax free threshold provided for in subsection 139BA(2). The exemption conditions are:

- the first condition is that the scheme does not contain any conditions which could result in an employee forfeiting ownership of any shares that were acquired under the Plan, subsection 139CE(2);
- the second condition is that the scheme is operated so that no employee is permitted to dispose of shares acquired under the Plan until; - three years after their acquisition; - or until after the employee ceases to be an employee of both the employer company employing him or her when the share was acquired and of the Brickworks Group - whichever event occurs first, subsections 139CE(3) & (5); and
- the third condition is that the scheme is operated on a non discriminatory basis, subsection 139CE(4).

45. As the reference to 'the scheme' in subsections 139CE(2) to (4) is 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, is not enough.

46. For the exemption to be maintained, the share plan needs to continue to be operated in a manner that satisfies the exemption conditions. Subject to this necessary proviso, subsection 139BA(2) applies, so that only the amount of the discount in excess of \$1,000 for the year of income is included in the participating employee's assessable income.

47. The first element of the cost base of the shares for the purposes of the CGT provisions will be determined in accordance with subsection 130-80 of the ITAA 1997. 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*.

Where a participating employee does not make an election under section 139E

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

49. Under the Plan, the cessation time for a share acquired by a participant is the earliest of:

- the time when the participant disposes of the share;
- the time when the disposal restrictions cease to have effect. Under the Plan rules the restrictions effectively cease three years after the participating employee acquires the share or when the participant ceases to be employed by a company in the Brickworks Group. The employee can, from that date, lodge a Notice of Withdrawal which must be complied with by the Plan Trustee;
- the time when the employment in respect of which the share was acquired, ceases; and
- 10 years after CPU allocates the share to the participant.

As the participating employee's shares have disposal restriction for the first 3 years, the participant's cessation time for any shares acquired under the Plan will be the earliest of the second and third abovementioned times.

Disposal within 30 days of cessation time:

50. Where the shares are disposed of by the participating employee in an arms length transaction within 30 days of the cessation time, the discount included in assessable income is calculated pursuant to subsection 139CC(3). As the participating employee has given no consideration for the acquisition of the shares, the entire amount received from their disposal is included in the participating employee's assessable income.

51. 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) of the ITAA 1997.

No disposal within 30 days of cessation time:

52. A participating employee who does not dispose of the shares in an arm's length transaction within 30 days of the cessation time will include the discount in his or her assessable income. The discount is calculated in accordance with subsection 139CC(4). The discount is the market value of the shares at the cessation time as no consideration was paid by the participating employee to acquire the shares. The market value of the shares for the purposes of paragraph (a) of subsection 139CC(4) is determined in accordance with section 139FA as outlined at paragraph 43.

53. The cost base of the shares for the purposes of the CGT provisions is determined in accordance with subsection 130-83(3) of the ITAA 1997, the first element being the market value of the shares worked out under section 139FA at the cessation time. This is the market value determined in paragraph 43.

Detailed contents list

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Commissioner of Taxation

9 July 2003

Previous draft:

Not previously released in draft form.

- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CC(4)(a)

Related Rulings/Determinations:

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

- ITAA 1936 139CD
- ITAA 1936 139CE
- ITAA 1936 139CE(2)
- ITAA 1936 139CE(3)
- ITAA 1936 139CE(4)
- ITAA 1936 139CE(5)

Subject references:

- employee share schemes

- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139G
- ITAA 1936 139GB
- ITAA 1997 130-180
- ITAA 1997 130-80(2)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- Copyright Act 1968
- TAA 1953 PT IVAAA

Legislative references:

- ITAA 1936 Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139C
- ITAA 1936 139CA
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139CA(2)
- ITAA 1936 139CC

ATO References

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