



# ***CR 2005/56 - Income tax: Promina Group Limited - Employee Share Purchase Plan (Deferral 2003)***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2003*



## Class Ruling

### Income tax: Promina Group Limited – Employee Share Purchase Plan (Deferral 2003)

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#### **Preamble**

*The number, subject heading, **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**

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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 laws dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 109-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

## Class of persons

3. The class of persons to whom this Ruling applies is Australian resident employees of Promina Group Limited (PGL) and Australian Associated Motor Insurers (AAMI) who participate in the 'PGL Employee Share Purchase Plan (Deferral 2003)' described in the Arrangement section of this Ruling. In this Ruling, this class of person is referred to as a 'participating employee'.

## 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 22.

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

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

## Withdrawal

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9. This Ruling is withdrawn and ceases to have effect from 1 July 2005. The Ruling, however, continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those 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

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10. The arrangement that is the subject of the Ruling is described below. This description is based on a number of 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 for the 'PGL Employee Share Purchase Plan (Deferral 2003)' (the Plan) dated 20 August 2004;
- The PGL Employee Share Purchase Plan Trust Deed (the Trust Deed);
- The 'Rules of the PGL Employee Share Purchase Plan (Deferral 2003)' (the Rules);
- Letter from PGL dated 25 October 2004;
- Letter from PGL dated 8 November 2004; and
- Letter from PGL dated 15 March 2005.

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

11. The Plan has been established by the board of directors of PGL (the Board) to assist in the retention and motivation of eligible employees of PGL and AAMI (the Promina Group).

12. Under the Plan, eligible employees are offered shares in PGL and invited to apply to become participants of the Plan.

13. Where the Board resolves to grant offered shares to an eligible employee they become a participating employee.

14. To acquire and hold shares for the benefit of participating employees, the Board has established the PGL Employee Share Purchase Plan Trust (the Trust). CPU Share Plans Pty Limited has been appointed as trustee (the Trustee) of the Trust.

15. The Rules provide for Promina Group companies or participating employees to make contributions to the Trust.
16. Contributions by Promina Group companies may include amounts salary sacrificed (in accordance with paragraphs 19 to 23 of Taxation Ruling TR 2001/10) by participating employees.
17. The applicant has advised that it is not contemplated that participating employees will be asked to make contributions directly towards the acquisition of shares under the Plan.
18. The Trustee will use contributions to acquire ordinary shares in PGL.
19. Shares acquired by the Trustee are allocated and held for the benefit of named participating employees, such shares being subject to disposal restrictions.
20. Upon the happening of certain events prescribed in the Rules, the Trustee can sell the shares on behalf of the participating employee or transfer the shares to the participating employee.
21. Whilst a participating employee's shares are held by the Trustee, they are subject to forfeiture in accordance with the Rules.
22. The applicant has advised that shares acquired under the Plan are qualifying shares for the purposes of section 139CD of the ITAA 1936.

## Ruling

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*[All legislative references are to the ITAA 1936 unless stated otherwise.]*

23. Under the Plan, a participating employee acquires a qualifying share when the Trustee acquires the share and allocates it to the participating employee.

### **Where an employee makes an election**

24. Where a participating employee makes an election under section 139E, the discount given in relation to the share acquired under the Plan is included in their assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).
25. The discount included in the participating employee's assessable income will be an amount equivalent to the market value of the share at the time of acquisition less any consideration paid or given by the participating employee to acquire the share. The market value of a share at this time is determined under Subdivision F of Division 13A of Part III (Subdivision F of Division 13A).

***Capital gains tax (CGT)***

26. Where a participating employee acquires a share under the Plan they will acquire the share for CGT purposes when they become absolutely entitled to the share.

27. Where the share is subsequently disposed of by, or on behalf of, the participating employee, the participating employee makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share. Conversely, a capital loss will arise where the capital proceeds are less than the reduced cost base.

28. The first element of the cost base or reduced cost base of the share is the market value of the share at the time the Trustee allocates the share to the participating employee, that is, when the participating employee acquires a beneficial interest in the share. The market value of the share at this time is determined under Subdivision F of Division 13A.

***Forfeiture***

29. Where a participating employee acquires a share under the Plan and the share is subsequently forfeited, the amount of the discount assessable to the participating employee in accordance with paragraph 25 cannot be excised from the participating employee's assessable income.

30. For CGT purposes, if the participating employee forfeits the share before they become absolutely entitled to the share they will not make a capital gain or capital loss in relation to their forfeiture of the share.

***Where an employee does not make an election***

31. Where a participating employee has not made an election under section 139E, the discount given in relation to a share acquired under the Plan will be included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

32. The cessation time will be the earliest of the following times:

- the time when the participating employee forfeits their interest in the share;
- the time when the Trustee transfers the share to the participating employee or sells the share and transfers the net proceeds to the participating employee;
- the time when the participating employee ceases to be employed by their employer or any Promina Group company; or
- the end of the 10 year period starting when the participating employee acquired the share.

## ***Disposal within 30 days***

33. Where the participating employee disposes of the share in an arm's length transaction at, or within 30 days of, the cessation time the discount assessable at the cessation time will be the amount or value of any consideration received on the disposal of the share less any consideration paid or given by the participating employee to acquire the share, in accordance with subsection 139CC(3).

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

## ***Disposal after 30 days***

35. Where the participating employee does not dispose of the share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the market value of the share at the cessation time, in accordance with subsection 139CC(4). The market value of the share is determined under Subdivision F of Division 13A.

36. For CGT purposes, a capital gain or capital loss will arise when the participating employee disposes of the share. In determining the gain or loss the first element of the cost base, or reduced cost base, of the share will be the market value of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value of the share is determined under Subdivision F of Division 13A.

## **Forfeiture of shares**

37. Where a participating employee forfeits a share acquired under the Plan in respect of which no section 139E election has been made, and the forfeiture triggers the cessation time (or the forfeiture happens within 30 days of the cessation time) no amount is included in assessable income under subsection 139B(3).

38. For CGT purposes, if the participating employee forfeits the share before they become absolutely entitled to it, they will not make a capital gain or capital loss in relation to their forfeiture of the share.

## **Explanation**

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39. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

40. For the purposes of this Ruling, the Commissioner accepts the statement by the applicant that shares acquired under the Plan are qualifying shares for the purposes of section 139CD. Thus, a participating employee will acquire a qualifying share when the Trustee allocates a share to the participating employee under the Plan and the participating employee acquires a beneficial interest in the share.

41. Where an employee acquires a share under an employee share scheme the discount given in relation to the share is included in the assessable income of the employee, pursuant to subsection 139B(1).

42. Where the share is a qualifying share the year of income in which the discount is included in assessable income and the amount of the discount depend on whether the employee has made a section 139E election in relation to the acquisition of the share.

43. Where the shares are acquired with funds contributed by the employee under a salary sacrifice arrangement in accordance with paragraphs 19 to 23 of Taxation Ruling TR 2001/10, the funds contributed by the employee will not be consideration paid or given by the employee for the purposes of Division 13A of Part III.

#### **Where an employee makes an election**

44. An employee can elect under section 139E that subsection 139B(2) applies in respect of all shares acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the employee's assessable income in the year of income in which the share is acquired.

45. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount is the market value of the share at the time it was acquired by the employee less any consideration (if any) paid or given by the employee for the acquisition of the share.

46. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. If a share is quoted on an approved stock exchange on the particular day, section 139FA provides that its market value is:

- if there is at least one transaction on the approved stock market in shares of that class during the week up to and including that day – the weighted average of the prices at which those shares were traded on that stock market during that week;
- if there was no such transaction in that one week period up to and including the acquisition day – the last price at which an offer was made on that stock market during that week to buy a share; or

- if there was no transaction in, or offer made to buy shares on that stock market in the specified period – the value as determined under section 139FB.

If the share is not quoted on an approved stock exchange on that day, the market value of the share is determined in accordance with section 139FB.

## ***Capital gains tax***

47. Where an employee has a beneficial interest in a share they will acquire the share for CGT purposes when they become absolutely entitled to the share as against the trustee, pursuant to section 109-5 of the ITAA 1997.

48. Where the share is disposed of a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss will arise if the reduced cost base exceeds the capital proceeds.

49. Where an employee acquires a qualifying share and makes a section 139E election, the first element of the cost base or reduced cost base of the share for CGT purposes is determined in accordance with subsection 130-80(3) of the ITAA 1997. Under subsection 130-80(3), the first element of the cost base or reduced cost base is the market value of the share at the time the employee first acquires a beneficial interest in the share; the market value of the share being determined under Subdivision F of Division 13A (refer to paragraph 47).

## ***Forfeiture***

50. Where a share acquired under the Plan is forfeited the amount of discount included in a participating employee's assessable income under section 139B cannot be excised as Division 13A of Part III does not provide any mechanism for excising the discount.

51. For CGT purposes, no capital gain or capital loss will arise in relation to the forfeited share where the participating employee has not become absolutely entitled to the share. This is because the share will not have been acquired for CGT purposes.

## ***Where an employee does not make an election***

52. Where an employee acquires a qualifying share and does not make an election under section 139E, the discount given in relation to the share is included in assessable income in the year of income in which the cessation time occurs, in accordance with subsection 139B(3).

53. As shares acquired under the Plan are subject to disposal restrictions and may be forfeited, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share (that is, where a participating employee forfeits their interest in the share);
- the time when any restriction preventing disposal of the share by the participating employee and any forfeiture condition cease to have effect (that is, when the Trustee transfers the share to the participating employee or sells the share and transfers the net proceeds to the participating employee and the share is no longer subject to forfeiture);
- the time when the participating employee ceases to be employed by either their employer (being their employer at the time they acquired the share) or a Promina Group company, pursuant to subsection 139CA(3); or
- ten years after the share was acquired.

54. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the share is disposed of in an arm's length transaction within 30 days of the cessation time.

### ***Disposal within 30 days***

55. Where an employee disposes of a share in an arm's length transaction at, or within 30 days of, the cessation time the amount of the discount to be included in the employee's assessable income is calculated in accordance with subsection 139CC(3). The discount is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

### ***Capital gains tax***

56. Subsection 130-83(2) of the ITAA 1997 provides that where CGT event A1, C2, E1, E2 or E5 happens in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time, any capital gain or capital loss the participating employee makes from the event is disregarded.

## ***Disposal after 30 days***

57. Where an employee does not dispose of a share in an arm's length transaction at, or within 30 days of, the cessation time the discount to be included in an employee's assessable income is calculated in accordance with subsection 139CC(4). The discount is the market value of the share at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

58. Under the Plan, for the purposes of subsection 139CC(4), the market value of a share is determined in accordance with Subdivision F of Division 13A.

## ***Capital gains tax***

59. Subsection 130-83(3) of the ITAA 1997 provides that where CGT event A1, C2, E1, E2 or E5 does not happen in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time, the first element of the cost base or reduced cost base of the share is its market value at the cessation time. The market value of the share at this time is determined under Subdivision F of Division 13A, as set out in paragraph 47.

## ***Forfeiture of shares***

60. Where a participating employee forfeits a share acquired under the Plan and the forfeiture triggers a cessation time (or the forfeiture happens within 30 days of the cessation time) the Commissioner accepts that the forfeiture will constitute an arm's length disposal. As such, the discount given in relation to the share will be determined under subsection 139CC(3). Thus, as no consideration will be received by the participating employee upon forfeiture of the share, no amount will be included in the participating employee's assessable income under subsection 139B(3).

61. If the participating employee forfeits the share before they become absolutely entitled to it, no capital gain or capital loss will arise in relation to that share. This is because the share will not have been acquired for CGT purposes.

## Detailed contents list

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# CR 2005/56

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

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

*Subject references:*

- capital gains tax
- election
- employee share scheme

*Legislative references:*

- TAA 1953 Pt IVAAA
- Copyright Act 1968
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)

- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(3)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139G
- ITAA 1997 109-5
- ITAA 1997 130-80
- ITAA 1997 130-80(3)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)

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ATO references

NO: 2005/8749

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ employee share schemes