

CR 2006/103 - Income tax: Brambles Industries Limited 2001 Executive Share Option Plan and 2001 Executive Performance Share Plan



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Class Ruling

Income tax: Brambles Industries Limited 2001 Executive Share Option Plan and 2001 Executive Performance Share Plan

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139C of the ITAA 1936; and
- section 139G of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who were granted options under the Brambles Industries Limited (BIL) 2001 Executive Share Option Plan (Option Plan) or share rights under the BIL 2001 Performance Share Plan (Performance Share Plan) while employed in Australia by BIL or Brambles Australia Limited (BAL) (subject to paragraph 14 of this Ruling). In this Ruling, a person belonging to this class of entities is referred to as a participating employee.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in the Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 12 to 32 of this Ruling.

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

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme 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 income year ended 30 June 2002 and all subsequent income years. 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 issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. The scheme that is the subject of the Ruling is described below. This description is based on, and includes reference to, 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 scheme are:

- Request for class ruling from Allens Arthur Robinson (AAR) dated 13 May 2006;
- the BIL 2001 Executive Share Option Plan;
- the BIL 2001 Executive Performance Share Plan;
- the Brambles Information Booklet for participants updated 11 August 2003;
- Supplementary submission to request for class ruling dated 8 June 2006;
- Written resolutions of the remuneration committees of the Boards of Directors of BIL and Brambles Industries plc (BIP) faxed on 30 June 2006; and
- Emails from AAR dated 6 July 2006 and 22 September 2006.

13. BIL is an Australian resident company listed on the Australian Stock Exchange and BIP is a United Kingdom resident company listed on the London Stock Exchange.

14. BIL and BIP are parties to a dual listed company structure and carry on business in a number of countries including Australia. BAL was a subsidiary of BIL until 5 July 2006.

The Option Plan

15. The Option Plan, adopted by BIL shareholders on 28 November 2001, was established by BIL to align the interests of employees with those of shareholders.

16. The applicant has advised that under the Option Plan, participating employees were only ever granted options to acquire shares in BIL.

17. The number of options granted to a participating employee was based on their salary at the time of grant and no consideration was provided for the options.

18. Options granted under the Option Plan are subject to performance conditions which are based on the Total Shareholder Return (TSR) achieved by BIL and BIP relative to a specified peer group.

19. Where BIL and BIP's TSR score is:

- below 50 no options vest
- 50 38% of the options vest
- between 50 and 75 options vest on a pro rata basis
- 75 or more 100% of the options vest

20. To the extent that options do not vest in accordance with the Option Plan, they lapse.

21. On satisfaction of the performance conditions, vested options held by a participating employee may be exercised.

22. At the exercise time a participating employee working in a foreign country that prohibits the acquisition of shares may be paid a cash equivalent in substitution for their right to acquire a share on exercise of their vested options.

23. The applicant has advised that:

- The Option Plan was operated and it is intended that it will continue to be operated so that a participating employee will receive shares on exercise of their vested options where:
 - at the time of exercise, they reside in Australia; or
 - at the time of exercise, they reside in a country that does not prohibit the acquisition of shares.
- However, pursuant to a resolution of the remuneration committee of the Board of Directors of BIL (the Board), participating employees may in the future be offered a choice to receive cash.

The Performance Share Plan

24. The Performance Share Plan, adopted by BIL shareholders on 28 November 2001, was established by BIL to align the interests of employees with those of shareholders.

25. The applicant has advised that under the Performance Share Plan participating employees were only ever granted share rights which were conditional options to acquire BIL shares.

26. The number of share rights granted to a participating employee was based on their salary at the time of grant and no consideration was provided for the share rights.

27. Share rights granted under the Performance Share Plan are subject to performance conditions which are based on the compound Earnings Per Share (EPS) growth of both BIL and BIP over specified periods.

28. Where BIL and BIP's compound EPS growth is:

- Below 7% p.a. no rights vest
- 7% p.a. 25% of rights vest
- Between 7 – 15% p.a. rights vest on a pro rata basis
- 15% p.a. or above 100% of rights vest

29. To the extent that share rights do not vest in accordance with the Performance Share Plan rules, they lapse.

30. On satisfaction of the performance conditions, vested share rights held by a participating employee may be exercised.

31. At the exercise time a participating employee working in a foreign country that prohibits the acquisition of shares may be paid a cash equivalent in substitution for their right to acquire a share on exercise of their vested share rights.

32. The applicant has advised that:

- The Performance Share Plan was operated and it is intended that it will continue to be operated, so that a participating employee will receive shares on exercise of their vested share rights where:
 - at the time of exercise, they reside in Australia; or
 - at the time of exercise, they reside in a country that does not prohibit the acquisition of shares.
- However, pursuant to a resolution of the remuneration committee of the Board, participating employees may in the future be offered a choice to receive cash.

Ruling

33. Where a participating employee acquires an option under the Option Plan, the employee acquires a right under an employee share scheme for the purposes of Division 13A of Part III (Division 13A), and any discount given in relation to the right is included in the assessable income of the participating employee in accordance with Subdivision B of Division 13A.

34. Where a participating employee acquires a share right under the Performance Share Plan, the employee acquires a right under an employee share scheme for the purposes of Division 13A, and any discount given in relation to the right is included in the assessable income of the participating employee in accordance with Subdivision B of Division 13A.

Commissioner of Taxation

18 October 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

35. An employee will acquire a right under an employee share scheme for the purposes of Division 13A where the right is:

- a right for the purposes of Division 13A;
- acquired within the meaning of section 139G;
- acquired in respect of their employment (subsection 139C(1); and
- acquired for less than market value (subsection 139C(3).

36. The expression 'right' as used in Division 13A is not defined, but as 'right' and 'right to acquire a share' are used interchangeably throughout Division 13A, the Commissioner considers that a right should be taken to mean a 'right to acquire a share'.

37. Where at the time a right is granted to an employee:

- the employee has a right to acquire a share on exercise of the right; and
- for the purposes of subsection 139B(2), the amount of the discount in respect of such a right can reasonably be determined,

the Commissioner considers the right to be a right for the purposes of Division 13A.

38. The Option Plan provides for a participating employee to acquire a share on exercise of a vested option or if the Board so decides, to be paid a cash equivalent in substitution for their right to acquire a share. Similarly the Performance Share Plan provides for a participating employee to acquire a share on exercise of a share right or if the Board so decides, to be paid a cash equivalent in substitution for their right to acquire a share. The Board discretion to pay a cash equivalent in substitution for shares is included in these plans to allow employees, residing in countries that prohibit the acquisition of a share on exercise of a right to receive a cash payment.

39. Despite the discretionary powers under the rules of the Option Plan and Performance Share Plan, the Board will not exercise their discretion to pay a cash equivalent, where a participating employee in either plan resides in Australia or a country that does not prohibit the acquisition of shares. However, pursuant to a resolution of the remuneration committee of the Board, in the future, participating employees may be offered a choice to receive cash instead of shares.

40. Regardless of whether or not a participating employee is ultimately given a choice to receive cash instead of a share, it is accepted that a participating employee will always retain the right to acquire a share on the exercise of an option or a share right.

41. Thus, the Commissioner accepts that at the time of grant, the options and share rights held by participating employees will give those employees the right to acquire a share at the time of exercise of those rights.

Note: Where an employee acquires a right under an employee share scheme and the scheme is operated so that the employer makes the ultimate decision as to whether an employee receives a share or cash in lieu of a share, the right granted to the employee will not be considered to be a right to acquire a share for the purposes of Division 13A.

42. Where an employee is granted rights to acquire a specific number of shares and the rights are subject to performance conditions, the amount of the discount (in relation to all such rights) to be included in the employee's assessable income for the purposes of subsection 139B(2) must be capable of being calculated at the time of grant of those rights. When determining the amount of the discount, the Commissioner considers that calculation should be based on the maximum number of rights that will vest where the performance conditions are satisfied in full, providing those conditions are reasonably capable of being satisfied.

43. Pursuant to the performance conditions in both plans, the maximum number of options or share rights granted to an employee will vest where the highest rating under those performance conditions is achieved. Where a lesser rating is achieved, a percentage of the options or share rights granted will not vest and will lapse. The Commissioner accepts that under both plans, at the time of grant of the rights, the highest rating under the performance conditions is reasonably capable of being achieved such that the amount to be included in the assessable income of a participating employee, for the purposes of subsection 139B(2) (being the discount given in relation to the maximum number of options or share rights granted) is capable of being calculated at the time the rights are granted.

44. Thus the Commissioner accepts that when a participating employee is granted options under the Option Plan or share rights under the Performance Share Plan, they will have been granted a right for the purposes of Division 13A.

45. Section 139G provides that a person will acquire a right for the purposes of Division 13A in several circumstances, including when another person creates a right in the person.

46. Thus where a participating employee is granted an option under the Option Plan or a share right under the Performance Share Plan, a right will be created in the participating employee and they will acquire the right within the meaning of section 139G.

47. The Option Plan and the Performance Share Plan were both established by BIL to align the interests of employees with those of shareholders and as employees are granted options or share rights in proportion to their salary, the rights acquired by participating employees are considered to be acquired in respect of their employment.

48. As the options and share rights are granted for no consideration, the Commissioner accepts that when a participating employee is granted an option or a share right they acquire a right for less than market value.

49. As the requirements specified in paragraph 35 of this Ruling are satisfied, the Commissioner accepts that where a participating employee acquires an option under the Option Plan or a share right under the Performance Share Plan, they will acquire a right under an employee share scheme for the purposes of Division 13A.

50. Thus, pursuant to subsection 139B(1) any discount given in relation to the option or share right will be included in the assessable income of the participating employee in accordance with Subdivision B of Division 13A.

Appendix 2 – Detailed contents list

51. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Subject references:

- employee share scheme

Legislative references:

- Copyright Act 1968
- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv
B
- ITAA 1936 139B

- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139G
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

ATO references

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