



CR 2006/75 - Income tax: Tattersall's Group Restructure: allocation of shares to current employee beneficiaries

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Class Ruling

Income tax: Tattersall's Group Restructure: allocation of shares to current employee beneficiaries

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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:

- Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936; and
- Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of entities

3. The class of entities to which this Ruling applies is all persons who on 30 May 2005 were Current Employees in accordance with the Trust Deed for the Tattersall's Clause Y Employee Trust.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. This Ruling does not apply to any Tattersall's Limited shares allocated, or to be allocated, to persons out of the Future Employees' Trust Fund as defined in the Tattersall's Clause Y Employee Trust Deed.
6. 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 14 to 33 of this Ruling.
7. 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

9. This Ruling applies from the income year (as defined in subsection 995-1(1) of the ITAA 1997) ended 30 June 2005 to those persons who are Current Employees as defined in the Tattersall's Clause Y Employee Trust Deed. 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.
10. 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)).

11. 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.

12. 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).

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after the year of income ended 30 June 2007. However, the Ruling continues to apply after its withdrawal in respect of the relevant provisions ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

14. The scheme that is the subject of this Ruling is described below. The 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 the description of the scheme are:

- Class Ruling request from KPMG Tax Lawyers Pty Ltd dated 25 January 2006 including additional information provided on 22 February 2006, 19 and 20 April 2006, 16 and 18 May 2006, 16 and 20 June 2006 and 25 July 2006;
- Will of the Late George Adams dated 16 March 1901;
- Codicil to the Will of the Late George Adams dated 31 May 1902;
- Settlement Deed (Employee Compromise) dated 10 November 2004 between the trustees of the Estate of the Late George Adams (Estate Trustees), the representative of the Named Beneficiaries, the representative of the Employee Beneficiaries and the representative for future Employee Beneficiaries, as approved by the Supreme Court of Victoria;
- Tattersall's Clause Y Employee Trust Deed (Trust Deed);

- Decision of the appellate court of the Supreme Court of Victoria handed down on 7 April 2005 as to how the entitlements of the Named Beneficiaries are to be determined (*Playoust v. Hornsby & others* [2005] VSCA 73);
- Agreement dated May 2005 between the Trustees of the Tattersall's Clause Y Employee Trust and the Current Employees concerning the tax treatment of any capital gains made on the execution of the Tattersall's Clause Y Employee Trust Deed or as a result of the employees becoming entitled to shares in Tattersall's Limited;
- Briefing to Tattersall's employees entitled 'Securing Tattersall's Future' dated July 2004 (Employee Briefing Paper);
- Briefing on the Employee Proposal provided to the Beneficiaries of the Estate of the Late George Adams dated 22 October 2004; and
- Minutes of a Meeting of the Trustees of the Tattersall's Clause Y Employee Trust held on 31 May 2005 at 4.34pm.

Background

15. The Estate of the Late George Adams (Estate) was established by will dated 16 March 1901, together with a codicil dated 31 May 1902 (Will).

16. At the time of his death, Mr Adams conducted a sweeps business known as 'The Tattersalls Sweep Consultation care of George Adams'. Since Mr Adams' death, the Estate Trustees conducted the business (Business), both directly and through corporate entities, the shares in which were held by the Estate Trustees. The Business has expanded to include not only sweeps but lotteries, club keno and electronic gaming machines, all conducted under the name 'Tattersall's'.

Entitlements of Beneficiaries under the Will

17. In accordance with Clause Y of the Will, 90% of the net profits of the Estate were to be distributed to the Named Beneficiaries (and their successors and assigns) in fixed proportions. The remaining 10% of the net profits were to be distributed to the employees for the time being engaged in the Business (Employee Beneficiaries), at the discretion of the Estate Trustees.

18. Clause Y of the Will established a separate discretionary trust (the Clause Y Trust) for the Employee Beneficiaries.

Estate Restructure

19. Subject to the satisfaction of a number of conditions, the Estate Trustees resolved to restructure the Estate and the Tattersall's Business (the Restructure) by:

- transferring the assets of the Estate including the Business to a new Australian company, Tattersall's Limited (Tattersall's), with the intention that Tattersall's would continue the Business and be listed on the Australian Stock Exchange;
- issuing shares in Tattersall's (Shares) to the Estate Trustees as consideration for the transfer of the assets of the Estate including the Business; and
- distributing the Shares in specie to the beneficiaries of the Estate that is, the Named Beneficiaries and the Trustees of the Clause Y Trust.

The Employee Compromise

20. Legal advice obtained by the Estate Trustees suggested that the entitlement of the Employee Beneficiaries to a distribution of Shares under the Restructure was uncertain.

21. The Estate Trustees, together with the representatives of the Named Beneficiaries and representatives of Employee Beneficiaries agreed to resolve this uncertainty by entering into a Deed of Settlement (the Employee Compromise).

22. Under the Employee Compromise, the parties agreed that 5% of the Shares would be held on trust for the Employee Beneficiaries in accordance with the terms and conditions of the Trust Deed which was to be executed on 30 May 2005. The execution of the Trust Deed formalised the Clause Y Trust for the purpose of facilitating the trustees' proper administration of the trust. As formalised, the Clause Y Trust was to be known as the Tattersall's Clause Y Employee Trust.

23. Of the total Shares held for the Employee Beneficiaries, the Trust Deed required that 75% of these Shares be held on trust for the Current Employees defined as the employees of the Business at the close of business on 30 May 2005 (the Current Employees' Trust Fund). The remaining 25% of the Shares were to be held on trust for Future Employees being persons who were, or became, employees of Tattersall's or any of its wholly owned subsidiaries after 30 May 2005 (the Future Employees' Trust Fund).

24. While the Trust Deed gave the trustees a discretion to allocate the Shares comprising the Current Employees' Trust Fund amongst Current Employees, in exercising this discretion the trustees were required to have regard to, and act in accordance with, the Employee Briefing Paper.

25. The Employee Briefing Paper proposed that Shares be allocated to employees in substantially the same proportions as the one-tenth profit distribution was allocated in the year ended 30 June 2003. The Employee Briefing Paper also proposed that 50% of the Shares allocated to employees be transferred immediately after the Restructure. The remaining 50% of the Shares would be transferred in two equal tranches 12 months and 24 months after the Restructure.

26. The Employee Compromise was brought as a representative action before the Supreme Court of Victoria and approved by the Court at a hearing on 11 November 2004. The Compromise then became binding on the Estate Trustees, Named Beneficiaries and Employee Beneficiaries.

Implementing the Employee Compromise

27. On 30 May 2005 the Trust Deed of the Tattersall's Clause Y Employee Trust was executed.

28. On 31 May 2005 the Business was transferred to Tattersall's. In consideration for the transfer of the Business, approximately 600 million Shares were issued to the Estate Trustees and, of those, 30 million were held on trust by the Trustees of the Tattersall's Clause Y Employee Trust for Current Employees and Future Employees. The Restructure qualified for CGT rollover relief under Subdivision 124-N of the ITAA 1997.

29. On 31 May 2005 the Trustees of the Tattersall's Clause Y Employee Trust resolved that 75% of the Shares that they held on trust (22.5 million) would be held for the Current Employees. Under the terms of the Trust Deed, the resolution did not give any Current Employee a right, title or interest in the property held.

30. The Trustees also resolved to allocate and to distribute the Shares to the employees in the proportions agreed to in the Employee Briefing Paper.

31. Pursuant to the Trust Deed, upon the making of the resolution, the Shares ceased to be part of the Current Employees' Trust Fund. Further, each Current Employee's allocation of shares immediately commenced to be held by the Trustees (with all income, rights and entitlements attaching to such property) on a separate trust for each Current Employee.

32. Each Current Employee had an interest in the Shares so held for them that was vested in possession. Also, there was, or is, no possibility of a Current Employee being deprived of their Shares just because the legal transfer was proposed to take place at a later time.

33. The Trustees also resolved that, in accordance with the Employee Briefing Paper, 50% of the Shares held for each Current Employee (11.25 million shares in total) would be transferred to them immediately after the restructure. The legal title to the remaining 50% of the Shares would be transferred to the Current Employees on 31 May 2006 and 31 May 2007 (in equal instalments).

Ruling

Division 13A implications of the resolutions

34. When the Trustees of the Tattersall's Clause Y Employee Trust allocated a Tattersall's Share to a Current Employee on 31 May 2005, the share was not acquired by the Current Employee under an employee share scheme for the purposes of Division 13A of Part III (Division 13A) of the ITAA 1936.

35. Thus, there is no requirement for a Current Employee to include in assessable income under section 139B of the ITAA 1936, any discount given in relation to such a Share allocated by the Trustees on 31 May 2005.

CGT implications of the execution of the Trust Deed

36. The execution of the Tattersall's Clause Y Employee Trust Deed did not result in the creation of a new trust as it merely formalised the Clause Y Trust.

CGT implications of the resolutions

37. The Trustees of the Tattersall's Clause Y Employee Trust resolved, in accordance with the Trust Deed, to allocate and distribute Shares held on the Current Employees Trust Fund to Current Employees. Pursuant to the Trust Deed, upon making the resolution, each Current Employee's allocation of Shares immediately commenced to be held by the Trustees (with all income, rights and entitlements attaching to such property) on a separate trust. The Trustees will make a capital gain or capital loss under Part 3-1 of the ITAA 1997 on each Share the subject of the resolution.

38. The capital gain or loss made by the Trustees on each Share will be taken into account in calculating the net capital gain of the Tattersall's Clause Y Employee Trust. Any net capital gain will be included in the net income of the Tattersall's Clause Y Employee Trust under subsection 95(1) of the ITAA 1936.

39. Where a Current Employee's assessable income includes an amount of net income of the Tattersall's Clause Y Employee Trust that is attributable to a capital gain made by the Trustee, the employee will be treated as having made an extra capital gain under Subdivision 115-C of the ITAA 1997.

40. No CGT event happens when legal title to a Share is transferred from the separate trust to a Current Employee because the employee is absolutely entitled to the Shares as against the trustee.

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.*

Application of Division 13A to the Tattersall's Shares

41. In accordance with section 139B of the ITAA 1936, a taxpayer must include any discount given in relation to a share acquired under an employee share scheme in their assessable income.

Subsection 139C(1) of the ITAA 1936 provides that a person acquires a share under an employee share scheme, if the share is acquired by the person in respect of, or for or in relation directly or indirectly to, any employment of the person.

42. Section 139G of the ITAA 1936 outlines the circumstances in which a person **acquires** a share for the purposes of Division 13A of the ITAA 1936, including when the person acquires a beneficial interest in a share.

43. A Current Employee will have acquired a beneficial interest in a share when the Trustees of the Tattersall's Clause Y Employee Trust allocated a Tattersall's share to a Current Employee on 31 May 2005. Thus, a Current Employee on 31 May 2005 acquired a share within the meaning of section 139G of the ITAA 1936.

44. Of the 22.5 million shares allocated at that time, 11.25 million were distributed by the Trustees of the Tattersall's Clause Y Employee Trust on 31 May 2005 with the balance to be distributed in the future. This does not change the time of acquisition by the Current Employees of the 22.5 million shares, for the purposes of Division 13A of the ITAA 1936. That time is determined by reference to the acquisition of a beneficial interest in a share, not the time when a share is actually distributed by the Trustees.

45. While the expression in subsection 139C(1) of the ITAA 1936 has not been considered by the courts, a similar term in the *Fringe Benefits Tax Assessment Act 1986* has been considered by the courts on numerous occasions.

46. In *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22 it was noted that the term 'in respect of employment', includes benefits where there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment.

47. Where, as a consequence of the Restructure and the allocation of a Tattersall's Share to a Current Employee by the Trustees of the Tattersall's Clause Y Employee Trust, that employee acquired a beneficial interest in a Share, it is accepted that that acquisition had a causal connection with the employment of that employee.

48. However, pursuant to the description of the scheme contained in paragraphs 14 to 33 of this Ruling, it is considered that under these circumstances, the acquisition of a beneficial interest in a Share by a Current Employee did not have a sufficient or material connection with the employment relationship of that employee.

49. The lack of a sufficient or material connection with employment means that the acquisition of a beneficial interest in a Share by a Current Employee on 31 May 2005, did not satisfy the test in subsection 139C(1) of the ITAA 1936. Thus, such a Share cannot be said to have been acquired under an employee share scheme for the purposes of Division 13A.

50. Further, this means that a Current Employee who acquired a beneficial interest in a Share as a consequence of the restructure, and who later acquires a legal interest in the share when it is distributed, is not required to include any amount in assessable income under section 139B of the ITAA 1936.

CGT implications of the execution of the Trust Deed

51. The execution of the Tattersall's Clause Y Employee Trust Deed did not result in the creation of a new trust as it merely formalised the Clause Y Trust.

CGT consequences of resolutions

52. The Trustees of the Tattersall's Clause Y Employee Trust resolved, in accordance with the Trust Deed, to allocate and distribute Shares held on the Current Employees Trust Fund to Current Employees. Pursuant to the Trust Deed, upon making the resolution, each Current Employee's allocation of Shares immediately commenced to be held by the Trustees (with all income, rights and entitlements attaching to such property) on a separate trust. The Trustees will make a capital gain or capital loss under Part 3-1 of the ITAA 1997 on each Share the subject of the resolution.

53. In calculating the capital gain or loss, the cost base and reduced cost base of each Share is worked out by reference to the original trust interest for which rollover relief was obtained under Subdivision 124-N of the ITAA 1997 (section 124-870 and section 124-10 of the ITAA 1997).

54. The capital gain made on each Share is the amount by which the market value of the Share (as at the time of the Trustees' resolution and the creation of the separate trust) exceeds its cost base. The Trustees will make a capital loss on each Share if the market value is less than the Share's reduced cost base.

55. A capital gain or capital loss that the Trustees make on each Share will form part of the calculations of the net capital gain of the Tattersall's Clause Y Employee Trust. Any net capital gain will be included in the calculation of the net income of the Tattersall's Clause Y Employee Trust under subsection 95(1) of the ITAA 1936.

56. A Current Employee who is presently entitled to the income of the trust will be assessed on a share of the net income of the Tattersall's Clause Y Employee Trust pursuant to Division 6 of Part III of the ITAA 1936. The Current Employee's share of the trust net income to be included in their assessable income will be based on the proportion of the trust income to which they are presently entitled. However, Practice Statement PS LA 2005/1 (GA) sets out other approaches the Commissioner will accept for the taxation of a net capital gain of a trust estate in certain circumstances.

57. Where a Current Employee's assessable income includes an amount of net income of the Tattersall's Clause Y Employee Trust (that includes a capital gain), the employee will be treated as having made an extra capital gain under Subdivision 115-C of the ITAA 1997.

58. No CGT event happens when legal title to the Shares is transferred from the separate trusts to each Current Employee because the employees are absolutely entitled to the Shares as against the trustees (section 106-50 of the ITAA 1997).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- absolute entitlement
- acquisition of shares
- capital gains tax
- employee share scheme
- employees
- trust deeds
- trusts

Legislative references:

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- ITAA 1936 Pt III Div 6
- ITAA 1936 95(1)
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B
- ITAA 1936 139C(1)
- ITAA 1936 139G
- ITAA 1997 Pt 3-1
- ITAA 1997 106-50

- ITAA 1997 Subdiv 115-C
- ITAA 1997 Pt 3-3
- ITAA 1997 124-10
- ITAA 1997 Subdiv 124-N
- ITAA 1997 124-870
- ITAA 1997 995-1(1)
- FBTAA 1986
- Copyright Act 1968

Case references:

- Playoust v. Hornsby & others
[2005] VSCA 73
- J & G Knowles & Associates
Pty Ltd v. Federal
Commissioner of Taxation
(2000) 96 FCR 402; 2000 ATC
4151; (2000) 44 ATR 22

Other references:

- Law Administration Practice
Statement PS LA 2005/1 (GA)

ATO references

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