CR 2008/20 - Income tax: Qantas Deferred Share Plan - 2006 Performance Rights Plan

Class Ruling

Income tax: Qantas Deferred Share Plan – 2006 Performance Rights Plan

Contents Para

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 (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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 provisions 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 21A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 13A of Part III (Division 13A) of the ITAA 1936;
- section 139B of the ITAA 1936;
- section 139BA of the ITAA 1936;
- section 139CB of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139DD of the ITAA 1936;
- section 139DE of the ITAA 1936;

- section 139E of the ITAA 1936;
- Subdivision F of Division 13A (Subdivision F) of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FF of the ITAA 1936;
- section 15-2 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 130-60 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1936 unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is all persons who are Australian resident employees (excluding directors) of the Qantas group (the group) who participated in the Qantas Deferred Share Plan – 2006 Performance Rights Plan. In this Ruling, a person belonging to this class of entities is referred to as a participant. For the purposes of this Ruling only, the group comprises:

- Qantas Airways Limited (Qantas);
- Eastern Australian Airlines Pty Limited;
- Jetstar Airways Pty Limited; and
- Sunstate Airlines (Qld) Pty Limited.

Qualifications

4. 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 27 of this Ruling.

5. 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.

Date of effect

7. This Ruling applies from 1 July 2006 to 30 June 2007. However, the Ruling continues to apply after 30 June 2007 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

8. 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 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 Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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 following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description of the scheme:

- the request for a Class Ruling from Qantas Airways Limited dated 5 October 2007;
- Qantas Deferred Share Plan – 2006 Performance Rights Plan Rules;
- Qantas Deferred Share Plan Trust Deed dated 9 December 2002;
- Qantas Deferred Share Plan Terms and Conditions (DSP Terms and Conditions);
- Qantas' email dated 28 August 2006 regarding the former and revised insider trading and notification procedures;
- Qantas Code of Conduct and Ethics dated 19 July 2006; and
- correspondence from Qantas Airways Limited dated between 9 October 2007 and 5 December 2007.

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.

The Qantas Deferred Share Plan

13. The Qantas Deferred Share Plan (DSP), which commenced on 17 October 2002, was established as part of the employee share plan strategy of the Qantas group of companies and provides a platform for a broader based delivery of equity ownership to employees.

14. Under the DSP, the Qantas board (the board) may from time to time offer shares or grant rights to an eligible employee, subject to such conditions as it determines.

2006 Performance Rights Plan Rules

15. The 2006 Performance Rights Plan Rules (the Plan) operate in conjunction with the DSP. Eligible employees (excluding directors) of the group were invited to participate in the Plan as part of their annual remuneration package. Those employees who accepted the invitation became eligible to be granted rights to acquire shares (rights) in Qantas subject to approval by the board or CEO.

16. On 4 October 2006, the board (or CEO as appropriate) approved the grant of rights under the Plan, such rights being subject to vesting conditions.

17. The vesting of rights is subject to performance hurdles being met, as described in the Plan. The performance hurdles are first tested at 30 June 2009 and re-tested at quarterly intervals over the subsequent two year period ending 30 June 2011.

18. To the extent the vesting conditions are satisfied a right will vest following the tenth anniversary from the date it was granted to a participant, provided the participant remains employed by the Qantas group of companies and does not commit an act of gross misconduct in relation to any of the Qantas group of companies (refer also to paragraph 21 of this Ruling).

19. A participant may, however, request that the board exercise its discretion to vest rights (to the extent that the performance hurdles have been achieved) prior to the tenth anniversary from the date of grant, by completing a request to vest rights.

20. Rights that vest will be converted to fully paid ordinary shares in Qantas (shares) that are listed on the Australian Securities Exchange (ASX).

Lapse of rights

21. Unless the board determines otherwise, any rights that have not vested will lapse if:

- the participant ceases employment with the Qantas group of companies;
- the participant commits an act of gross misconduct (as defined in the Plan); or
- the performance hurdles are not met after testing as at 30 June 2011.

22. When a right lapses, all rights of the participant under the Plan in relation to the right cease and no consideration or compensation will be payable for, or in relation to that lapse.

23. Rights will not lapse due to a participant ceasing employment with the Qantas group of companies where:

- due to special circumstances (as defined in the DSP), the CEO resolves that the rights will vest; or
- where the participant is employed by the Qantas group of companies after any testing date that has resulted in some or all of the performance hurdles being achieved, and the participant has completed a request to vest rights prior to ceasing employment with the Qantas group of companies.

Restrictions – Qantas code of conduct and ethics

24. The applicant has advised that various procedures have been implemented under the Qantas Code of Conduct and Ethics – Insider Trading Policy (the Code). The procedures are intended to restrict the sale of Qantas securities by participants who are in possession of information (material, non-public information) that could or would be likely to influence persons in deciding to buy or sell Qantas securities.

25. Paragraph 14.8 of the Code provides that various nominated categories of employees (nominated employees) are considered to be routinely in possession of material, non-public information. As such, they are prohibited from dealing in Qantas securities without providing the CEO (or Nominee) a written request to deal in Qantas securities. The request must also state that at the time they do not believe they are in possession of material, non-public information.

26. Other groups of employees (other employees) who are not nominated employees may from time to time be advised that they are considered to be in possession of material, non-public information (they are also advised when they are no longer considered to be in possession of material, non-public information). Such employees are not permitted to deal in Qantas securities unless they obtain permission to do so.

27. The applicant has advised that

- the rights granted under the Plan are not listed on the ASX and cannot be assigned or transferred by participants;
- the rights acquired by the participants under the Plan meet the conditions of section 139CD;
- the participants pay no consideration to acquire or exercise the rights; and
- the Plan, operating in conjunction with the DSP, does not satisfy the exemption conditions in section 139CE.

Ruling

28. A right granted to a participant under the Plan will be a right acquired under an employee share scheme for the purposes of Division 13A, and will be a qualifying right for the purposes of section 139CD.

29. For the purposes of Division 13A, a right is acquired by a participant at the time the right is granted to them by the board.

30. A right granted to a participant under the Plan:

- is precluded from being a non-cash business benefit for the purposes of section 21A of the ITAA 1936; and

- is not an item that is included in assessable income under section 15-2 of the ITAA 1997,

by the operation of section 139DE of the ITAA 1936.

Where a participant makes an election

31. Where a participant makes an election under section 139E, the discount given in relation to a right is included in the participant's assessable income in the year of income in which the right is acquired, under subsection 139B(2).

32. The discount included in the participant's assessable income will be an amount equal to the market value of the right (worked out under Subdivision F) at the time of acquisition, pursuant to subsection 139CC(2).

33. Subsection 139BA (2) will not apply to reduce the discount included in the participant's assessable income.

Capital gains tax

34. A participant acquires a right for capital gains tax (CGT) purposes at the time the right is granted to them by the board. For the purposes of CGT, the right is a convertible interest.

35. Any capital gain or capital loss made by the participant on the conversion of a right is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

36. Where the participant disposes of a share acquired as a result of conversion of the right, a capital gain or capital loss may arise pursuant to subsection 104-10(4) of the ITAA 1997. A capital gain will arise if the capital proceeds from the disposal of the share exceed the cost base of the share. A capital loss will arise if the reduced cost base exceeds the capital proceeds received.

37. Pursuant to subsection 130-60(1) of the ITAA 1997, the first element of the cost base or reduced cost base of the share will be the cost base of the right at the time of the conversion. The first element of the cost base of the right will be the market value of the right worked out under sections 139FA to 139FF of the ITAA 1936 at the time the participant acquired the right, pursuant to subsection 130-80(2) of the ITAA 1997.

38. Where the disposal of the share acquired as a result of conversion by exercise of the right occurs 12 months or more after the date of acquisition of the share, any capital gain that results from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

Lapse of rights

39. Where a participant acquires a right and it lapses without having been exercised, the amount of the discount may be excluded from the participant's assessable income, pursuant to section 139DD.

Capital gains tax

40. The participant will not make a capital gain or capital loss in relation to the right lapsing.

Where a participant does not make an election

41. Where a participant has not made an election under section 139E, the discount given in relation to a right will be included in the participant's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

42. Pursuant to section 139CB, the cessation time for rights will be the earliest of:

- the time when the participant disposes of the right (other than by exercising it);
- the time when the participant ceases employment with their employer, a holding company of their employer, or a subsidiary of their employer or of a holding company of their employer;
- the time when:
  - any disposal restrictions imposed on a share (acquired on conversion by exercise of a right) under the Plan cease to have effect; or
  - where additional disposal restrictions imposed under the Code apply at the time the disposal restrictions under the Plan are removed, when those restrictions under the Code cease to have effect;
- the time when any condition that could result in the participant forfeiting ownership of a share acquired as a result of exercising a right ceases to have effect;
- if the right is exercised and there are no such restrictions or conditions, the time when the right is exercised; and
- the end of the 10 year period starting when the participant acquired the right.

Disposal within 30 days

43. Where a right is converted by exercise and the participant disposes of the share (acquired as a result of the right being exercised) in an arm's length transaction at, or within 30 days of the cessation time, the discount calculated under subsection 139CC(3) will be the amount or value of any consideration received on the disposal of the share.

Capital gains tax

44. Any capital gain or capital loss made by the participant on the conversion by exercise of a right is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

45. Any capital gain or capital loss made as a consequence of an arm's length disposal within 30 days of the cessation time of a share acquired as a result of the conversion of the right, will be disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

46. Where the cessation time occurs on the conversion by exercise of the right and the share acquired as a result of the exercise of the right is disposed of by the participant more than 30 days after the cessation time, or in a non-arm's length transaction, the discount on the right is the market value of the share acquired at the cessation time (pursuant to subsection 139CC(4)), calculated in accordance with Subdivision F.

47. If the right is exercised after the cessation time and the share acquired as a result of the exercise of the right is disposed of by the participant more than 30 days after the cessation time, or in a non-arm's length transaction, the discount assessable to the participant will be the market value of the right at the cessation time, (pursuant to subsection 139CC(4)), calculated in accordance with Subdivision F.

Capital gains tax

48. Any capital gain or capital loss made by the participant on the conversion by exercise of a right is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

49. Where a participant disposes of the share acquired as a result of the conversion of the right more than 30 days after the cessation time, or in a non-arm's length transaction, a capital gain will arise where the capital proceeds from the disposal are more than the cost base of the share, pursuant to subsection 104-10(4) of the ITAA 1997.

50. The first element of the cost base of the share acquired as a result of the conversion of the right will be the cost base of the right at the time of conversion, pursuant to subsection 130-60(1) of the ITAA 1997. The first element of the cost base of the right will be the market value of the right worked out under sections 139FA to 139FF of the ITAA 1936 at the time the participant acquires the right, pursuant to subsection 130-83(3) of the ITAA 1997.

51. Where any share acquired as a result of the conversion of the right is disposed of 12 months or more after acquisition of the share, any capital gain that results from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

Lapse of rights

52. Where a right lapses, in respect of which no section 139E election has been made, no amount is included in the assessable income of the participant for the purposes of subsection 139B(3).

Capital gains tax

53. The participant will not make a capital gain or capital loss in relation to the right lapsing.

Commissioner of Taxation
5 March 2008

Appendix 1 – Explanation

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.

Right acquired under an employee share scheme

54. A participant will acquire a right under an employee share scheme, for the purposes of Division 13A, if it is:

- acquired within the meaning of section 139G; and

in accordance with section 139C, the right is:

- acquired in respect of the employment of an employee; and
- acquired for less than market value.

55. Section 139G provides that a person will acquire a right in several circumstances, including when another person creates the right in the employee or they acquire a legal interest in the right from another person.

56. Under the Plan, rights are granted to participants at the time approved by the board. Thus, the rights are acquired at this time within the meaning of section 139G.

57. The DSP was established as part of the employee share scheme strategy of the Qantas group of companies and provides a platform for a broader based delivery of equity ownership to employees. As such, any right acquired by a participant under the Plan is considered to be acquired in respect of their employment, pursuant to subsection 139C(1).

58. As no consideration is paid or given by a participant to acquire a right, they will acquire the right for less than market value for the purposes of subsection 139C(3).

59. The Commissioner accepts the applicant's statement that the qualifying conditions specified in section 139CD are satisfied. Thus, a participant will acquire a qualifying right for the purposes of Division 13A, when they acquire a right under the Plan.

Section 21A of the ITAA 1936 and section 15-2 of the ITAA 1997 do not apply

60. Where a right is acquired under an employee share scheme, section 139DE of the ITAA 1936 specifically provides that section 21A of the ITAA 1936 and section 15-2 of the ITAA 1997 do not apply to such a right. Thus, a right acquired under the Plan is not income derived as a non-cash business benefit for the purposes of section 21A of the ITAA 1936 and is not an item that is included in assessable income under section 15-2 of the ITAA 1997.

61. Where a participant acquires a right under the Plan, the discount given in relation to the right is included in the assessable income of the participant, pursuant to subsection 139B(1).

62. Where a right is a qualifying right, the year of income in which the discount is included in assessable income and the amount of the discount (for the purposes of Division 13A) depend on whether the participant has made a section 139E election in relation to the year of income in which the right was acquired.

Where a participant makes an election

63. A participant can elect under section 139E that subsection 139B(2) applies in respect of a right acquired by them in a year of income. Subsection 139B(2) provides that the discount in relation to a right is included in the employee's assessable income in the year of income in which the right is acquired.

64. The amount of the discount to be included in the participant's assessable income is calculated in accordance with subsection 139CC(2). The discount is the market value of the right (determined in accordance with Subdivision F) at the time it was acquired by the participant, as no consideration was paid or given by the participant for the acquisition of the right.

65. Subdivision F contains special provisions to determine the market value of a right on a particular day. As the right is not quoted on the ASX, the market value of the right will be determined in accordance with section 139FC or section 139FE.

66. As the right has a nil exercise price, the market value of the right is determined pursuant to subsection 139FE(1) and will be equal to the market value (determined under section 139FA) of a share on the day the right was granted.

67. As Qantas shares are listed on the ASX, section 139FA provides that their market value will be:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition – the weighted average of the prices at which those shares were traded on the ASX during that week;
- if there were no such transactions in the week up to and including the date of acquisition – the last price at which an offer was made on the ASX in that period to buy such a share; or
- if no offer was made, the value as determined under section 139FB.

68. The applicant has advised that the exemption conditions in section 139CE are not satisfied in relation to a right acquired under the Plan. Therefore subsection 139BA (2) does not apply to reduce the discount included in the assessable income (by up to $1,000) of a participant.

Capital gains tax

69. The participant will acquire a CGT asset, pursuant to subsection 109-5 of the ITAA 1997, at the time a right is granted. For CGT purposes the right is a convertible interest of the kind referred to in item 4 of the table in subsection 974-75(1) of the ITAA 1997.

70. Any capital gain or capital loss made by the participant on the conversion of a right is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

71. Where shares are allotted or transferred to a participant as a result of a right being converted, the participant will acquire a CGT asset at that time, pursuant to subsection 130-60(2) of the ITAA 1997.

72. Where the participant disposes of a share acquired as a result of conversion of the right, a capital gain or capital loss may arise pursuant to subsection 104-10(4) of the ITAA 1997. A capital gain will arise if the capital proceeds from the disposal of the share exceed the cost base of the share. A capital loss will arise if the reduced cost base exceeds the capital proceeds received.

73. The first element of the cost base of the share will be the cost base of the right at the time of conversion, pursuant to subsection 130-60(1) of the ITAA 1997. The first element of the cost base of the right will be the market value of the right worked out under sections 139FA to 139FF of the ITAA 1936 at the cessation time, pursuant to subsection 130-80(2) of the ITAA 1997.

74. Where the participant disposes of a share acquired as a result of the conversion of the right, any capital gain arising from the disposal will be a discount capital gain if it satisfies the requirements of Subdivision 115-A of the ITAA 1997.

75. Pursuant to subsection 115-25(1) of the ITAA 1997, any capital gain the participant makes on the disposal of the share acquired as a result of the conversion of the right will be a discount capital gain if the disposal of the share occurs 12 months or more after acquisition of the share. The discount percentage for the participant will be 50%, pursuant to Subdivision 115-A of the ITAA 1997.

Lapse of rights

76. Where a participant acquires a right and it lapses without having been exercised, section 139DD applies to deem the right to never have been acquired for the purposes of Division 13A.

77. As a consequence, the amount of any discount previously assessed in relation to a right that lapses, can be excised from the participant's assessable income by an amended assessment. Subsection 139DD (4) provides that the discount can be excluded from the participant's assessment at any time.

Capital gains tax

78. The lapse of a participant's right in accordance with the Plan will constitute the ending of an intangible CGT asset (CGT event C2). Thus, pursuant to subsection 104-25(3) of the ITAA 1997, the participant may make a capital gain or a capital loss on the lapse of a right.

79. However, as the participant's lapsed right is deemed never to have been acquired for the purposes of Division 13A of the ITAA 1936 (pursuant to section 139DD of the ITAA 1936), Subdivision 130-D of the ITAA 1997 has no application and any capital gain or capital loss is determined under Part 3-1 of the ITAA 1997.

80. The first element of the cost base of the right will be nil as a participant does not provide any consideration for the acquisition of the right. The market value substitution rule has no application, pursuant to Item 5 in the table in subsection 112-20 (3) of the ITAA 1997.

81. Whilst a participant will not receive any capital proceeds from the lapse of the right, the market value substitution rule will not apply as it is accepted that the lapse of the right constitutes an ending by expiry, pursuant to subsection 116-30(3) of the ITAA 1997.

82. As such, a participant will not make a capital gain or capital loss where a right lapses in accordance with the Plan.

Where a participant does not make an election

83. Where a participant acquires a right and does not make an election under section 139E, the discount given in relation to the right is included in the participant's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

84. The cessation time is determined in accordance with subsection 139CB(1). As the share acquired by a participant (as a result of the conversion by exercise of a right) is not subject to forfeiture, the cessation time for the right will be the earliest of:

- the time when the participant disposes of the right (other than by exercising it);
- the time when the participant ceases employment with their employer, a holding company of their employer, or a subsidiary of their employer or of a holding company of their employer;
- the time when:
  - any disposal restrictions imposed on a share (acquired on conversion by exercise of a right) under the Plan cease to have effect; or

  - where additional disposal restrictions imposed under the Code apply at the time the disposal restrictions under the Plan are removed, the time whether those restrictions under the Code cease to have effect;

- the time when any condition that could result in the participant forfeiting ownership of the shares acquired as a result of exercising the rights ceases to have effect;
- if the right is exercised and there are no such restrictions or conditions, the time when the right is exercised; and
- the end of the 10 year period starting when the participant acquired the right.

When restrictions under the Code are not applicable for Division 13A purposes

85. Participants who are nominated employees or other employees:

- who are not in possession of material, non-public information at the time a share is acquired (on conversion by exercise of a right);and
- who subsequently acquire material, non-public information at any time after the share is acquired,

will not be considered to be subject to (additional) disposal restrictions for the purposes of determining when a cessation time occurs for a right under subsection 139CB(1).

86. The exercising of the right occurs when it vests and the time when the right is converted to a share by Qantas may be a cessation time.

87. When a cessation time occurs, the amount of the discount to be included in the participant's assessable income is determined under section 139CC and will depend on whether the right, or any share acquired as a result of the exercise of the right, is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days of cessation time

88. Where a participant disposes of a share acquired as a result of the exercise of the right, in an arm's length transaction at, or within 30 days of the cessation time, the discount to be included in assessable income is determined in accordance with subsection 139CC(3).

89. As the participant does not provide any consideration to acquire the right or to exercise that right the discount to be included in the participant's assessable income will be the amount or value of any consideration they receive for the disposal of the share acquired as a result of the exercise of the right.

Capital gains tax

90. In accordance with paragraph 69 of this Ruling, for the purposes of CGT, a right is a convertible interest. Any capital gain or capital loss made by the participant on the conversion of a right, being a convertible interest, is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

91. Subsection 130-83(2) of the ITAA 1997 provides that if a CGT event (for example a disposal) happens in relation to a share acquired as a result of the conversion of a right, within 30 days of the cessation time and in an arm's length transaction, then any capital gain or capital loss from the CGT event is disregarded.

Disposal after 30 days of cessation time

92. Where the cessation time occurs on exercise of the right and the share acquired as a result of the exercise of the right is not disposed of by the participant at, or within, 30 days of the cessation time, or is disposed of in a non-arm's length transaction, the discount on the right will be the market value of the share at the cessation time (worked out under Subdivision F).

93. Where a right is exercised after the cessation time and any share acquired as a result of the exercise of the right is not disposed of at, or within 30 days of the cessation time, or in a non-arm's length transaction, the discount in respect of the right is determined under subsection 139CC(4).

94. The amount of the discount will be the market value of the right at the cessation time less the amount of any consideration they have paid or given to acquire the right. As the participant does not pay any consideration to acquire the right, the discount will be the market value of the right at the cessation time.

95. As the right has a nil exercise price, the market value of the right is determined pursuant to subsection 139FE(1) and will be equal to the market value (determined under section 139FA) of a share on the day the right was granted.

Capital gains tax

96. Any capital gain or capital loss made by the participant on the conversion by exercise of a right more than 30 days after the cessation time is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

97. Where a participant disposes of a share acquired as a result of the conversion by exercise of a right, a capital gain or capital loss may arise.

98. Pursuant to subsection 130-60(1) of the ITAA 1997, the first element of the cost base of the share acquired as a result of the conversion by exercise of the right will be the cost base of the right at the time of conversion. Pursuant to subsection 130-83(3) of the ITAA 1997, the first element of the cost base of the right will be the market value of the right worked out under sections 139FA to139FF of the ITAA 1936 at the cessation time.

Lapse of rights

99. Where a right acquired by a participant lapses before it is converted by exercise, whether or not a cessation time has occurred (prior to the lapse), section 139DD will apply to deem the right to never have been acquired for the purposes of Division 13A. As a consequence, no amount in relation to that right is included in assessable income under subsection 139B (1).

Capital gains tax

100. The lapse of a participant's right in accordance with the Plan will constitute the ending of an intangible CGT asset (CGT event C2). Thus, pursuant to subsection 104-25(3) of the ITAA 1997, the participant may make a capital gain or a capital loss on the lapse of a right.

101. However, as the participant's lapsed right is deemed never to have been acquired for the purposes of Division 13A of the ITAA 1936 (pursuant to section 139DD of the ITAA 1936), Subdivision 130-D of the ITAA 1997 has no application and any capital gain or capital loss is determined under Part 3-1 of the ITAA 1997.

102. The first element of the cost base of the right will be nil as a participant does not provide any consideration for the acquisition of the right. The market value substitution rule has no application, pursuant to Item 5 in the table in subsection 112-20 (3) of the ITAA 1997.

103. Whilst a participant will not receive any capital proceeds from the lapse of the right, the market value substitution rule will not apply as it is accepted that the lapse of the right constitutes an ending by expiry, pursuant to subsection 116-30(3) of the ITAA 1997.

104. As such, a participant will not make a capital gain or capital loss where a right lapses in accordance with the Plan.

Appendix 2 Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- employee share schemes
- rights

Legislative references:

- ITAA 1936
- ITAA 1936 21A
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)
- ITAA 1936 139CB(2)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139CE
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