

CR 2008/62 - Income tax: BHP Billiton Group - Global Employee Share Plan

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Class Ruling

Income tax: BHP Billiton Group – Global Employee Share Plan

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	12
Ruling	27
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	28
Appendix 2:	
<i>Detailed contents list</i>	43

📌 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 provision dealt with in this Ruling is:

- section 139C of the *Income Tax Assessment Act 1936* (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 are persons who participate in the Global Employee Share Plans (the plans) while they are working in Australia for BHP Billiton Limited or BHP Billiton Plc (collectively referred to as BHP Billiton) or a subsidiary of either company.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

4. The Commissioner makes this ruling based on the precise scheme identified in this 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 26 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 from the income year ended 30 June 2008. 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 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.

13. 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:

- the request for class ruling from PricewaterhouseCoopers dated 28 May 2008;
- the letter from PricewaterhouseCoopers dated 4 July 2008 including:
 - the BHP Billiton Group Employee Plan for BHP Billiton Plc;
 - the BHP Billiton Group Employee Plan for BHP Billiton Limited; and
 - Shareplus 2008 Information Guide.

14. BHP Billiton operates a number of employee share schemes including the plans.

15. The purpose of the plans is to allow employees of BHP Billiton and subsidiaries (the BHP Billiton group) the opportunity to:

- acquire shares in BHP Billiton (shares); and
- where they hold those shares for a specified period and remain employed by the BHP Billiton group, to receive additional shares for no further consideration.

16. Under the plans, BHP Billiton issues invitations to employees of the BHP Billiton group, to apply to participate in one of the plans.

17. Invitations are upon terms and subject to restrictions that BHP Billiton determines.

18. An employee is only eligible to apply to participate in a plan if they satisfy criteria that BHP Billiton determine.

19. BHP Billiton may accept or reject any application at its discretion.

20. Where BHP Billiton accepts an eligible employee's application to participate in a plan, the employee becomes a participant in the plan.

21. Under the plan a participant makes after tax salary contributions to a plan administrator appointed by BHP Billiton.

Acquired shares

22. The plan administrator uses a participant's contributions to purchase shares, which are referred to as acquired shares.
23. The plan administrator pays any brokerage fees incurred on the acquisition of these shares out of funds provided by BHP Billiton.
24. Shares acquired by the plan administrator are notionally allocated to a participant and held by the plan administrator for the benefit of the participant.
25. A participant may, at any time, instruct the plan administrator to sell any or all of their acquired shares.

Matched shares

26. Where a participant holds acquired shares for a specified period (the holding period) and they remain employed by the BHP Billiton group, they are entitled to be awarded an additional share for each acquired share held, for no further consideration. Each additional share is referred to as a matched share.

Ruling

27. Where under a plan a participant makes contributions to a plan administrator and they are allocated an acquired share, the acquired share is considered to be acquired by the participant in respect of the participant's employment, for the purposes of subsection 139C(1).

Commissioner of Taxation

22 October 2008

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.***

28. Subsection 139C(1), subject to subsections (3), (4) and (5), provides that an employee will acquire a share under an employee share scheme if:

- the share is acquired by the employee; and
- in respect of, or for, or in relation directly or indirectly to, any employment of the employee (the employment connection test).

Acquisition of a share

29. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a beneficial interest in the share. Under a plan, a participant will acquire a beneficial interest in a share when it is allocated to them by the plan administrator

30. Therefore, a participant will acquire an acquired share within the meaning of section 139G at this time.

The employment connection test

31. Whilst subsection 139C(1) has not been considered by the courts, the Commissioner considers the employment connection test contained therein to be essentially the same as that contained within the definition of 'fringe benefit' in section 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) and also within section 26(e), which have both been considered by the courts on numerous occasions.

32. In *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22, the court considered the application of fringe benefits tax in relation to interest free loans provided by a unit trust to directors of a corporate trustee, where the directors were also beneficiaries of the trust. At issue was whether such loans were provided in respect of the employment of an employee, for the purposes of the FBTAA. In considering this matter the court noted:

Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment.

33. In *Payne v. Federal Commissioner of Taxation* (1996) 66 FCR 299; 96 ATC 4407; (1996) 32 ATR 516, the court considered the application of section 26(e) in relation to frequent flyer points granted to Mr Payne. At issue was whether the points granted to Mr Payne constituted a benefit allowed, given or granted to him in respect of, or for, or in relation directly or indirectly to, any employment or services he rendered. In his judgement, Foster J, when discussing another case dealing with section 26(e), stated:

In my view, the judgments in Smith illustrate rather than depart from the view of the section established in Dixon, Hayes and Scott insofar as those cases established, in my opinion, that, for a benefit, etc, to be caught by the section, there needed to be a role played by the employer in the giving, etc, of the benefit.

In Smith's case there was a clear and positive role played by the employer, which is totally lacking in the present case.

34. These two cases establish that for something to be acquired in respect of employment:

- there must be a sufficient or material rather than a causal connection or relationship between the acquisition of a thing and the employment of an employee; and
- the employer (or the holding company of the employer) must play a role in the acquisition of the thing.

35. BHP Billiton operates a number of share plans including the plans. Invitations to participate in the plans can only be made to employees of the BHP Billiton group. The plans are therefore operated exclusively for the benefit of employees of the BHP Billiton group.

36. The overall purpose of the plans is to provide an outcome that allows ongoing employees of the BHP Billiton group to receive additional shares (matched shares) for no further consideration where they acquire and hold acquired shares for a specified period.

37. By design, the plans contain a number of elements that must be satisfied before this outcome can be achieved.

38. In order for a participant to receive a matched share:

- the participant must receive an invitation from BHP Billiton to apply for participation in a plan;
- the participant's application must be accepted by BHP Billiton;
- the participant's employer must deduct amounts from their payroll account and pay these amounts to the plan administrator;
- the plan administrator must use these amounts to acquire shares in BHP Billiton (acquired shares) which it must notionally allocate and hold for the benefit of the participant;

- BHP Billiton must pay an amount to the plan administrator to fund any brokerage incurred by the plan administrator in acquiring the acquired shares; and
- the participant must remain employed by the BHP Billiton group for a specified period (the holding period) and must not have sold their acquired shares.

39. Whilst an acquired share is purchased by the plan administrator from funds provided by the participant, the funding and subsequent acquisition of an acquired share are fundamental elements of the operation of a plan. Without an acquired share, a participant cannot benefit from the operation of the plan.

40. The overall purpose of the plans is to provide benefits to participants who can only be employees of the BHP Billiton group. The benefit for a participant being the opportunity to acquire shares in BHP Billiton under one of the plans. As such, the plans operate to provide a form of incentive or reward for employment services provided by participants who are ongoing employees.

41. Having regard to the above, the Commissioner considers that the acquisition by a participant of an acquired share under one of the plans, being an integral and necessary element of the plan:

- has the requisite sufficient or material connection to the employment of a participant; and
- the employer of the participant (or the holding company of the employer) has clearly played a role in the acquisition of an acquired share.

42. Therefore, when a participant acquires an acquired share under the plan, the share will be acquired by the participant in respect of, or for, or in relation directly or indirectly to, any employment of the participant.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	12
Acquired shares	22
Matched shares	26
Ruling	27
Appendix 1 – Explanation	28
Acquisition of a share	29
The employment connection test	31
Appendix 2 – Detailed contents list	43

References

Previous draft:

Not previously issued as a draft

Subject references:

- employee share schemes & options

Legislative references:

- ITAA 1936
- ITAA 1936 26(e)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139C(4)
- ITAA 1936 139C(5)
- ITAA 1936 139G
- FBTAA 1986

- FBTAA 1986 136(1)
- Copyright Act 1968
- TAA 1953
- TAA 1953 Sch 1 357-75(1)

Case references:

- J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22
- Payne v. Federal Commissioner of Taxation (1996) 66 FCR 299; 96 ATC 4407; (1996) 32 ATR 516

ATO references

NO: 2008/15988

ISSN: 1445-2014

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