

***CR 2008/9 - Income tax and fringe benefits tax:
Brookfield Asset Management Inc - 2007
Management Share Option Plan***



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Class Ruling

Income tax and fringe benefits tax: Brookfield Asset Management Inc – 2007 Management Share Option 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 (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 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 139CC of the ITAA 1936; and
- Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

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 are Australian resident employees of the Brookfield Asset Management group (Brookfield) who are granted an award of options under the 2007 Management Share Option Plan (the Plan). 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 13 to 23 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 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. 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 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 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.

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).

Scheme

13. 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:

- the application for a Class Ruling dated 27 November 2007 received from Ernst & Young (applicant);
- the 2007 Management Share Option Plan;
- a pro-forma letter for Australian participants in the Plan; and
- emails from the applicant dated 29 November 2007 and 20 December 2007.

2007 Management Share Option Plan

14. Brookfield is a company co-listed on the New York and Toronto Stock Exchanges. As part of its senior employee and executive remuneration practice, it has established the Plan, which is aimed at creating a stronger link between performance and reward.

15. Under the Plan, participants will be granted an award of options, structured as rights to receive either:

- Brookfield Class A shares (shares) upon payment of the exercise price; or
- a cash payment based on the difference between the market price of the shares that would otherwise be issued to the participant and the exercise price payable by the participant to acquire the shares.

16. Options are granted to a participant under the Plan for nil consideration and are subject to vesting conditions. The Brookfield board (the board) will determine the exercise price of an option at the time the option is granted.

17. The board will also determine whether a vested option is to be satisfied by the issue or transfer of a share or a cash payment to a participant. The applicant has advised that the board will generally determine this upon receipt of a notice provided by a participant (notice of exercise). However, the board has the discretion to make this decision at an earlier date.

18. The applicant has also advised that, contrary to section 2.3(h) of the Plan, participants will not be permitted to assign options granted to them.

Vesting conditions

19. 20% of options will vest at the end of the first anniversary date of grant and 20% at the end of each subsequent anniversary date up to and including the fifth anniversary date, unless otherwise specified by the board. The applicant has advised that the vesting conditions for an option may also include performance hurdles.

20. The board will determine the maximum period following the grant date during which a vested option may be exercised, subject to a maximum period of 10 years.

21. Vested but unexercised options may be cancelled when certain other events happen, as stipulated in the Plan.

Exercise of options

22. Once an option vests a participant will be entitled to exercise the option.

23. A participant may submit a notice of exercise in relation to vested options, the options being satisfied at the discretion of the board by either the issue or transfer of shares or the payment of cash as described in paragraph 15 of this Ruling.

Ruling

Grant of an option

24. A participant will not acquire a right under an employee share scheme for the purposes of Division 13A of Part III (Division 13A) on the grant of an option under the Plan.

25. The grant of an option under the Plan does not give rise to a reportable fringe benefits amount for the participant, for the purposes of Part XIB of the FBTAA.

Board decision prior to notice of exercise

26. Where, prior to receiving a notice of exercise from a participant, the board decides that an option will be satisfied by the issue or transfer of a share, the participant will acquire a right under an employee share scheme for the purposes of Division 13A when the board makes that decision.

Board decision on notice of exercise

27. Where, after the receipt of a notice of exercise from a participant, the board decides that an option will be satisfied by the issue or transfer of a share, the participant will acquire a share under an employee share scheme for the purposes of Division 13A when a share is issued or transferred to the participant, where that share is provided at a discount as calculated under section 139CC.

Commissioner of Taxation

20 February 2008

Appendix 1 – Explanation

① *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.*

Acquiring a right under Division 13A

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

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

29. 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'.

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

- the employee has a right to acquire a share on the exercise or operation 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.

31. However, where an employee is granted a right under a scheme that purports to be a right to acquire a share, and the scheme is operated so that the employer makes the ultimate decision as to whether an employee actually receives a share or cash in lieu of a share, the right will not be considered to be a right to acquire a share for the purposes of Division 13A at the time it is granted.

Grant of an option

32. Under the Plan, the board will generally determine whether an option is to be satisfied by the issue or transfer of a share or by way of cash payment when it receives a notice of exercise from a participant.

33. Therefore, the Commissioner considers that a participant who is granted an option under the Plan will not acquire a right for the purposes of Division 13A at the time the option is granted, as they are not provided with a right to acquire a share at that time.

Fringe benefit

34. Where an employee is granted a right or rights to remuneration (pre-existing remuneration rights) that are an intrinsic part of a contract for services that ultimately results in the receipt by the employee of remuneration that is subject to tax under the relevant tax laws as 'salary or wages' or as the discount on a right or share (under Division 13A), those pre-existing remuneration rights come within the definition of a 'benefit' for the purposes of the FBTAA.

35. However, those pre-existing remuneration rights, given the context in which they arise and the relevant tax laws, will not be 'fringe benefits' for the purposes of the FBTAA. Those pre-existing remuneration rights relate to the whole process that is the payment of 'salary or wages' or a benefit constituted by the acquisition by an employee of a right or share within the meaning of Division 13A. Both the payment of 'salary or wages' or a benefit constituted by the acquisition by an employee of a right or share within the meaning of Division 13A are specifically excluded from the definition of 'fringe benefit' in subsection 136(1) of the FBTAA.

36. Therefore, where a participant is granted a right in the form of an option under the Plan which is not considered at that time to be a right for the purposes of Division 13A, the grant of that right will not be a 'fringe benefit' for the purposes of the FBTAA. Accordingly, as the grant of the option is not a 'fringe benefit', the grant of the option does not give rise to a reportable fringe benefits amount for the participant, for the purposes of Part XIB of the FBTAA.

Board decision prior to notice of exercise

37. The board also has the discretion to determine whether an option will be satisfied by the payment of cash or the issue or transfer of a share prior to receiving a notice of exercise from a participant.

38. Thus, the Commissioner considers that where the board exercises this discretion to determine that an option will be satisfied by the issue or transfer of a share prior to receiving a notice of exercise from a participant, the participant will acquire a right under an employee share scheme for the purposes of Division 13A at the time the board exercises its discretion.

Acquiring a share on the exercise of a right

39. Subsection 139C(4) provides that an employee will not acquire a share under an employee share scheme for the purposes of Division 13A, where the share is acquired as a result of exercising a right that the employee acquired under an employee share scheme (within the meaning of section 139C).

40. As explained in paragraph 38 of this Ruling, a participant will acquire a right under an employee share scheme at the time that the board exercises its discretion prior to receiving a notice to exercise from a participant (to determine that an option will be satisfied by the issue or transfer of a share).

41. Accordingly, a participant will not acquire a share under an employee share scheme for the purposes of Division 13A upon the issue or transfer of a share to a participant following the vesting and exercise of an option as set out in paragraph 38 of this Ruling.

Board decision on notice of exercise

42. Section 139C effectively provides that a taxpayer acquires a share under an employee share scheme if the share is:

- acquired within the meaning of section 139G;
- acquired in respect of, or for or in relation directly or indirectly to, any employment of the taxpayer or an associate of the taxpayer (subsection 139C(1)); and
- acquired for less than market value (subsection 139C(3)).

43. A person will acquire a share when, amongst other things, the share is issued or transferred to them. Therefore, where options granted under the Plan have vested and the board determines, upon the receipt of a notice to exercise, to satisfy the option by the issue or transfer of shares to a participant, such shares will be acquired by the participant within the meaning of section 139G.

44. Further, it is accepted that the shares are acquired directly or indirectly in relation to employment services provided (within the meaning of subsection 139C(2)) to Brookfield by a participant.

45. Therefore, provided that the exercise price of an option (effectively the consideration for a share) granted under the Plan that is satisfied by the issue or transfer of a share to a participant:

- is less than the market value of the share as determined under Subdivision F of Division 13A; and
- therefore the share is provided at a discount as calculated under section 139CC,

the Commissioner accepts that the participant will acquire a share under an employee share scheme for the purposes of Division 13A.

Appendix 2 – Detailed contents list

46. 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
- fringe benefit
- reportable fringe benefits amount

Legislative references:

- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)

- ITAA 1936 139C(2)
- ITAA 1936 139C(3)
- ITAA 1936 139C(4)
- ITAA 1936 139CC
- ITAA 1936 139G
- ITAA 1936 Pt III Div 13A Subdiv F
- FBTA 1986 Pt XIB
- FBTA 1986 136(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

ATO references

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