CR 2009/20 - Income tax: New Hope Corporation Limited - Deferred Employee Share Plan

Class Ruling

Income tax: New Hope Corporation Limited – Deferred Employee Share Plan

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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:

- Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936;
- section 139CA 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 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 104-75 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 130-90 of the ITAA 1997.

All subsequent 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 persons who are Australian resident employees of the New Hope Corporation Limited group of companies (the NHC group) who:

- acquire an ordinary share in New Hope Corporation Limited under the proposed Deferred Employee Share Plan (the plan); or
- hold options granted under the Employee Share Option Plan (the ESOP) and who accept an invitation to transition the administration of those options into the plan.

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

4. The NHC group comprises:

- New Hope Corporation Limited (NHC);
- New Hope Collieries Pty Ltd;
- Tivoli Collieries Pty Ltd;
- Acland Pastoral Co. Pty Ltd;
- Jeebropilly Collieries Pty Ltd;
- Fowlers Engineering Pty Ltd;
- New Oakleigh Coal Pty Ltd;
- New Hope Exploration Pty Ltd;

- Seven Mile Coal Pty Ltd;
- New Acland Coal Pty Ltd;
- Arkdale Pty Ltd;
- New Lenton Coal Pty Ltd;
- New Saraji Coal Pty Ltd;
- New Hope Water Pty Ltd;
- Tivoli Coal (Hawaii) Pty Ltd;
- Andrew Wright Holdings Pty Ltd;
- Tetard Holdings Pty Ltd; and
- Queensland Bulk Handling Pty Ltd.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. This Ruling does not address the consequences of any assignment of options issued under the ESOP.

7. 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 11 to 28 of this Ruling.

8. 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

10. This Ruling applies from 1 July 2008. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

11. 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 request for Class Ruling from PricewaterhouseCoopers (applicant) dated 23 September 2008;
- the rules for the Employee Share Option Plan;
- the rules for the Deferred Employee Share Plan;
- employee booklet for the Deferred Employee Share Plan;
- the New Hope Corporation Employee Share Trust deed (the trust deed);
- letter from PricewaterhouseCoopers dated 24 November 2008;
- option certificate from New Hope Corporation Limited (the option certificate); and
- emails received from the applicant in relation to the class ruling.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

12. NHC is an Australian company listed on the Australian Securities Exchange (ASX). It has undertaken a review of its employee remuneration strategy with a view to enhancing NHC's ability to retain and attract staff in the competitive mining sector.

13. NHC is either the employer of a participant or the holding company of the employer of a participant.

14. NHC will establish the New Hope Corporation Employee Share Trust (the trust) with an independent trustee, for the purpose of subscribing for or acquiring, delivering, allocating and holding shares in NHC under the plan (and other plans) for the benefit of the participants.

15. The applicant has advised that the main features of the plan are:

- it will be open to all eligible Australian resident permanent full time or part time employees and directors of the NHC group;
- employees who participate in the plan are excluded from participating in the NHC group's Exempt Employee Share Plan in the same financial year;
- eligible employees may complete an application form to participate in the plan;
- participants must contribute towards acquiring NHC shares (shares) by way of an effective salary sacrifice arrangement (SSA) within the meaning of paragraphs 19 to 23 of Taxation Ruling TR 2001/10;
- participants will not otherwise be required to contribute any funds to acquire the shares;
- participation in the plan will be on-going unless a participant notifies the trustee in writing that they wish to cease participating;
- the trustee of the trust (the trustee) will use the funds it receives from the NHC group to acquire ordinary shares in NHC, either by buying shares on-market or subscribing for new issues; and
- shares will be notionally allocated by the trustee for the benefit of a participant.

16. The applicant has also advised that:

- shares acquired under the plan meet the conditions of section 139CD and therefore, will be qualifying shares for the purposes of Division 13A;
- the reference to satisfying performance hurdles in the plan will not apply to shares issued under the plan that are the subject of this Ruling; and
- such shares will not be subject to meeting minimum service requirements.

Forfeiture

17. Where a person is found to have engaged in fraud, the participant will forfeit any right or interest in any shares (or other entitlements under the plan) held by the trustee on their behalf pursuant to the plan.

18. Any forfeited shares or the proceeds of sale from such shares will be dealt with in accordance with the terms of the plan and trust deed.

Withdrawal of shares from the plan

19. A participant may submit a notice of withdrawal to NHC to withdraw or sell some or all of the shares allocated to them by the trustee. A withdrawal notice is subject to approval by the board and the trading windows outlined in the plan. Provided that the board is satisfied that the participant has not been found to have engaged in fraud and therefore forfeited any right or interest in the shares, the board will approve the withdrawal notice.

20. Under the terms of the trust deed and in accordance with the terms of the withdrawal notice, the trustee is required to comply with an approved withdrawal notice by:

- transferring the shares to the participant;
- transferring the shares to a nominee; or
- selling the shares on behalf of the participant.

Options acquired under the ESOP

21. NHC has previously granted options to acquire NHC shares under the ESOP (for nil consideration) to a number of employees as part of its reward and retention strategy. No options have been granted since 1 July 2008.

22. In accordance with the ESOP:

- membership was open to executives and directors (eligible employees) of NHC by invitation only;
- eligible employees could only accept an invitation by completing an application form;
- where an eligible employee accepted an invitation (referred to as an option holder) each option was granted for a five year period and was to vest any time after the third anniversary of the date of grant;
- each option entitles the option holder to subscribe for one NHC share, and on exercise, requires the payment of a pre-determined exercise price;
- before an option can be exercised and a NHC share issued, certain exercise conditions must be satisfied;
- any options not exercised will lapse on the earlier of:
  - the expiry of the relevant option parcel; or
  - the date the option holder ceases to be an employee of the NHC group (or the end of such further period that is allowed under the ESOP to exercise the options after cessation of employment); and

- the total number of shares that may be issued as a result of exercising options granted under the ESOP will not exceed 5% of NHC's issued ordinary share capital.

Transition of administration of options

23. To achieve greater administrative and capital management efficiencies, NHC proposes to transfer or transition the options issued under the ESOP into the plan, such that the administration aspects of the plan will apply to the options.

24. Option holders will be invited, but not compelled to transition the administration of their options into the plan. Where an option holder does not consent to such a transition, their entitlements will continue to be administered by NHC pursuant to the terms of the ESOP.

25. The transition of options into the plan is an administrative step and the terms of the ESOP will remain unchanged for all options issued under the ESOP, whether or not an option is transitioned.

26. A participant who has accepted an invitation to transition the administration of their options into the plan (and where the exercise conditions have been met), may exercise the options and pay the exercise price to the trustee. NHC will make an irretrievable contribution to the trustee for the difference between the market value of the shares and the exercise price. The trustee will then purchase the required number of shares on-market or subscribe for the issue of shares by NHC.

27. Shares acquired by the trustee pursuant to a participant exercising their options will be held by the trustee, under the terms of the trust deed and the plan, for the benefit of the participant. This includes being subject to the withdrawal process and forfeiture conditions outlined in paragraphs 17 to 18 of this Ruling. Under the trust deed, each participant will have a separate account created for the shares allocated to them.

28. The applicant has advised that options acquired under the ESOP:

- are rights acquired under an employee share scheme; and
- meet the conditions of section 139CD and are therefore qualifying rights for the purposes of Division 13A.

Ruling

Share acquired under the plan

Where section 139E election made

29. Where a participant makes an election under section 139E in relation to a share acquired under the plan, the discount given in relation to the share will be included in their assessable income under subsection 139B(2) in the year in which the share is acquired.

30. The discount to be included in the participant's assessable income will be an amount equivalent to the market value of the share at the time it is acquired. The market value of the share is determined under section 139FA.

Capital gains tax

31. When the board approves a withdrawal notice, a participant becomes absolutely entitled to a share and CGT event E5 in section 104-75 of the ITAA 1997 happens. Any capital gain or capital loss the participant makes under subsection 104-75(5) is disregarded under subsection 104-75(6).

32. Where a participant disposes of a share, CGT event A1 in subsection 104-10(1) of the ITAA 1997 happens.

33. A participant makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share, or a capital loss where the capital proceeds are less than the reduced cost base of the share, under subsection 104-10(4) of the ITAA 1997.

34. The first element of the cost base and reduced cost base of a share is the market value of the share, calculated under section 139FA of the ITAA 1936, at the time it was allocated for the benefit of the participant by the trustee, under subsection 130-80(3) of the ITAA 1997.

35. For the purposes of Subdivision 115-A of the ITAA 1997, a participant will acquire a share at the time at which the trustee allocated the share for the benefit of the participant under subsection 115-30(1), item 8, of the ITAA 1997.

36. Where a participant disposes of a share more than 12 months after the time when the trustee allocated the share for the benefit of the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Forfeiture of shares

37. Where a section 139E election has been made and a participant forfeits a share that is held by the trustee on their behalf, Division 13A does not provide for the discount to be excluded or excised from the participant's assessable income.

Capital gains tax

38. Where a participant forfeits their interest in the trust before the participant becomes absolutely entitled to the shares, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3) of the ITAA 1997.

39. The first element of the cost base and reduced cost base of an interest in the trust is nil under subsection 110-25(2) of the ITAA 1997.

40. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends, under section 116-30 of the ITAA 1997.

41. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Where no section 139E election made

42. Where a participant does not make an election under section 139E, the discount given in relation to a share will be included in their assessable income under subsection 139B(3) in the year of income in which the cessation time occurs.

43. The cessation time for a share is determined in accordance with subsection 139CA(2) and will be the earliest of:

- the time when the participant disposes of the share;
- the time when the participant ceases to be employed within the NHC group within the meaning of subsection 139CA(3);
- the time when the forfeiture conditions cease to have effect, that is, the time when the board approves a withdrawal notice; or
- the end of the 10 year period commencing when the participant acquired the share under the plan.

Capital gains tax

44. When the board approves a withdrawal notice, a participant becomes absolutely entitled to the share and CGT event E5 in section 104-75 of the ITAA 1997 happens. Any capital gain or capital loss a participant makes under subsection 104-75(5) is disregarded under subsection 104-75(6).

Disposal within 30 days at arm's length

45. Where a participant disposes of the share in an arm's length transaction within 30 days after 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

46. Where a participant disposes of the share in an arm's length transaction at or within 30 days after the cessation time, CGT event A1 happens under subsection 104-10(1) of the ITAA 1997.

47. Any capital gain or loss made from the disposal is disregarded under subsection 130-83(2) of the ITAA 1997.

Forfeiture of shares

48. Where a section 139E election has not been made and a participant forfeits a share that is held by the trustee on their behalf, no amount is included in the assessable income of the participant for the purposes of subsection 139B(3).

Capital gains tax

49. Where a participant forfeits their interest in the trust before the participant becomes absolutely entitled to a share, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3).

50. The first element of the cost base and reduced cost base of an interest in the trust is nil under subsection 110-25(2) of the ITAA 1997.

51. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends under section 116 -30 of the ITAA 1997.

52. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Disposal after 30 days or a non-arm's length disposal

53. Where the participant does not dispose of a share in an arm's length transaction within 30 days after the cessation time, the discount assessable will be the market value of the share at the cessation time in accordance with subsection 139CC(4).

Capital gains tax

54. Where a share is not disposed of by a participant in an arm's length transaction at or within 30 days after the cessation time, CGT event A1 happens on the disposal of that share under subsection 104-10(1) of the ITAA 1997.

55. A participant makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share, or a capital loss where the capital proceeds are less than the reduced cost base, under subsection 104-10(4) of the ITAA 1997.

56. The first element of the cost base and reduced cost base of the share is the market value of the share calculated under section 139FA of the ITAA 1936 at the cessation time, under subsection 130-83(3) of the ITAA 1997.

57. For the purposes of Subdivision 115-A of the ITAA 1997, a participant will acquire the share at the time at which the participant becomes absolutely entitled to the share under subsection 109-5(2) of the ITAA 1997.

58. Where a participant disposes of the share more than 12 months after the participant becomes absolutely entitled to the share, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Transition of administration of options into the plan

59. Where the administration of an option is transitioned into the plan, there is no disposal of the option for the purposes of Division 13A and it remains a qualifying right for the purposes of section 139CD.

Capital gains tax

60. A CGT event does not happen to an option on the transition of the option into the plan.

Where no section 139E election made

61. Where a participant has not made an election under section 139E in respect of an option acquired under the ESOP, the discount given in relation to the option will be included in their assessable income under subsection 139B(3) in the year of income in which the cessation time occurs.

62. The cessation time for an option is determined in accordance with section 139CB and will be the earliest of:

- the time when the participant ceases to be employed within the NHC group (within the meaning of subsection 139CB(2));

- if the option is exercised and a share is acquired, the time when the share ceases being subject to forfeiture, that is, the time when the board approves a withdrawal notice; or
- the end of the 10 year period starting when the participant acquired the option under the ESOP.

Capital gains tax

63. When (after the exercise of an option) the board approves a withdrawal notice, a participant becomes absolutely entitled to a share and CGT event E5 in section 104-75 of the ITAA 1997 happens. Any capital gain or capital loss the participant makes under subsection 104-75(5) will be disregarded under subsection 130-90(1) of the ITAA 1997 unless the exercise price of the participant's option exceeds the trustee's cost base for the share, under subsection 130-90(4).

64. Where a capital gain or capital loss is not disregarded under subsection 130-90(1) of the ITAA 1997, the participant makes a capital gain or a capital loss under subsection 104-75(5) of the ITAA 1997. The participant makes a capital gain if the market value of the share (at the time of the event) is more than the cost base of the participant's interest in the trust capital to the extent it relates to the share. The participant makes a capital loss if the market value of the share is less than the reduced cost base of the participant's interest in the trust capital to the extent that it relates to the share.

Disposal within 30 days at arm's length

65. Where the participant disposes of a share acquired as a result of the exercise of an option in an arm's length transaction at or within 30 days after 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 less the amount or value of any consideration paid to exercise the option.

Capital gains tax

66. Where a participant disposes of a share acquired by exercising an option in an arm's length transaction at or within 30 days after the cessation time, CGT event A1 happens under subsection 104-10(1) of the ITAA 1997.

67. Any capital gain or loss made from the disposal is disregarded under subsection 130-83(2) of the ITAA 1997.

Forfeiture of shares

68. Where a participant forfeits a share (that is held by the trustee on their behalf) acquired as a result of the exercise of an option, a cessation time will occur. There is no amount to be included in the assessable income of the participant for the purposes of subsection 139B(3).

Capital gains tax

69. Where a participant forfeits their interest in the trust before the participant becomes absolutely entitled to a share acquired from the exercise of an option, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3).

70. The first element of the cost base and reduced cost base of an interest in the trust is the amount paid to exercise the options under subsection 110-25(2) of the ITAA 1997.

71. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends under section 116 -30 of the ITAA 1997.

72. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Disposal after 30 days or a non-arm's length disposal

73. Where a share acquired as a result of the exercise of an option is not disposed of by the participant in an arm's length transaction at or within 30 days after the cessation time, the discount assessable under subsection 139CC(4) will be the market value of the share at the cessation time less the amount or value of any consideration paid to exercise the option.

Capital gains tax

74. Where a share is not disposed of by a participant in an arm's length transaction at or within 30 days after the cessation time, CGT event A1 happens on the disposal of that share under subsection 104-10(1) of the ITAA 1997.

75. Where CGT event A1 happens, a participant makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share or a capital loss where the capital proceeds are less than the reduced cost base, under subsection 104-10(4) of the ITAA 1997.

76. Where the cessation time occurs after the exercise of an option and the share is not disposed of in an arm's length transaction at the cessation time, or within 30 days after that time, subsection 130-83(3) of the ITAA 1997 applies. The first element of the cost base and reduced cost base of the share is the market value of the share calculated under section 139FA of the ITAA 1936 at the cessation time.

77. Where a participant disposes of a share more than 12 months after the participant becomes absolutely entitled to the share, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Lapse of option

78. Where an option lapses before being exercised, pursuant to section 139DD, no amount is included in the assessable income of the participant under section 139B(3).

Capital gains tax

79. CGT event C2 in section 104-25 of the ITAA 1997 will happen on the lapse of an option but the participant will make neither a capital gain nor a capital loss in relation to the lapse.

Commissioner of Taxation
22 April 2009

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.

Share acquired under the plan

80. The discount given in relation to a share acquired under an employee share scheme is included in the assessable income of the employee, in accordance with Subdivision B of Division 13A.

81. The applicant has advised that the shares acquired under the plan meet the conditions of section 139CD and will therefore be qualifying shares.

82. Where a share is a qualifying share, the year of income in which the discount is included in an employee's assessable income and the amount of the discount included will depend upon whether the employee makes a section 139E election in the year of income that the share is acquired.

83. A participant will acquire a share under the plan, for the purposes of Division 13A, when the participant acquires a beneficial interest in the share, which is when the trustee allocates a share for the benefit of a participant.

84. The Commissioner considers that for the purposes of Division 13A and the CGT provisions, forfeiture conditions imposed under the plan will cease to have effect at the time that the board approves a withdrawal notice submitted by an applicant. At this time, the trustee is required to comply with such a notice and transfer shares to the participant or a nominee or sell the shares on behalf of the participant.

Where section 139E election made

85. The *Tax Laws Amendment (Budget Measures) Act 2008* amended section 139E of the ITAA 1936 to require a taxpayer to make an election in their income tax return for the year of income in which the shares are acquired. The amendment applies in relation to the 2008-09 and subsequent income years. Previously, a taxpayer was required to make the election in writing in an approved form (refer to Taxation Determination TD 97/23).

86. An employee can elect under section 139E that subsection 139B(2) applies in respect of all shares or rights acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the employee's assessable income in the year of income in which the share is acquired.

87. The amount of the discount to be included is calculated in accordance with subsection 139CC(2) and is the market value of the share at the time it is acquired by the employee less any consideration paid or given by the employee for the acquisition of the share.

88. Shares will be acquired by the trustee with funds contributed by the NHC group. The applicant has advised that the contributions will be funded by way of an effective SSA within the meaning of paragraphs 19 to 23 of TR 2001/10. A participant will not otherwise be required to contribute any funds to acquire shares.

89. Consideration for the purposes of subsection 139CC(2) does not include an amount sacrificed under an effective SSA. As a participant will not otherwise be required to contribute any funds, no consideration will be paid or given by the participant for the purposes of subsection 139CC(2).

90. Therefore, the discount to be included in the participant's assessable income, will be an amount equivalent to the market value of the share at the time it is acquired.

91. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. As NHC shares are listed on the ASX, section 139FA determines how the market value will be calculated.

Capital gains tax

92. When the board approves a withdrawal notice, a participant becomes absolutely entitled to a share and CGT event E5 happens under subsection 104-75(1) of the ITAA 1997. For similar reasons to those outlined in paragraph 89 of this Ruling a share is acquired for no expenditure for the purposes of subsection 104-75(6) and therefore any capital gain or capital loss the participant makes is disregarded.

93. CGT event A1 in section 104-10 of the ITAA 1997 happens on the disposal of a share to another entity. The calculation for a capital gain or a capital loss is described in subsection 104-10(4).

94. The market value calculation in section 139FA of the ITAA 1936 applies because the share will be listed on the ASX. Subsection 130-80(3) of the ITAA 1997 then uses that market value as the first element of the cost base and the reduced cost base of the share.

95. Under subsection 130-80(3) of the ITAA 1997 the market value is calculated at the time the share was allocated for the benefit of the participant because that was the point in time that the participant first acquired a beneficial interest in the share.

96. The acquisition time for the purposes of Subdivision 115-A of the ITAA 1997 is determined under subsection 115-30(1), item 8, of the ITAA 1997.

97. The acquisition time is the time when the acquirer first acquired a beneficial interest in the share which is, in this Ruling, when the trustee allocated the share for the benefit of the participant. Where a participant disposes of a share more than 12 months after the time when the trustee allocated the share for the benefit of the participant, any capital gain from the disposal will be a discount capital gain.

Forfeiture of shares

98. Where a section 139E election has been made and a participant forfeits a share, as described in paragraph 17 of this Ruling, Division 13A does not provide for the discount to be excluded or excised from the participant's assessable income.

Capital gains tax

99. Where a participant forfeits their interest in the trust (being their beneficial interest in the shares) before the participant becomes absolutely entitled to the shares, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3).

100. The first element of the cost base and reduced cost base of an interest in the trust is nil under subsection 110-25(2) of the ITAA 1997.

101. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends under section 116 -30 of the ITAA 1997.

102. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Where no section 139E election made

103. Where a participant does not make an election under section 139E, the discount given in relation to the share will be included in their assessable income under subsection 139B(3) in the year of income in which the cessation time occurs.

104. As shares acquired under the plan may be forfeited, the cessation time for a share is determined in accordance with subsection 139CA(2) and will be the earliest of:

- the time when the participant disposes of the share;
- the time when the participant ceases to be employed within the NHC group within the meaning of subsection 139CA(3);
- the time when the forfeiture conditions cease to have effect, that is, the time when the board approves the withdrawal notice; or
- the end of the 10 year period commencing when the participant acquired the share under the plan.

105. The amount of the discount to be included in a participant's assessable income is determined under section 139CC and will depend upon whether the share is disposed of in an arm's length transaction at or within 30 days of the cessation time.

Capital gains tax

106. When the board approves a withdrawal notice, a participant becomes absolutely entitled to a share and CGT event E5 happens under subsection 104-75(1) of the ITAA 1997. For similar reasons to those outlined in paragraph 89 of this Ruling, a share is acquired for no expenditure for the purposes of subsection 104-75(6) and therefore any capital gain or capital loss the participant makes is disregarded.

Disposal within 30 days at arm's length

107. Where the participant disposes of a share in an arm's length transaction at or within 30 days after the cessation time, the amount of the discount to be included in the participant's assessable income is calculated under subsection 139CC(3). The discount will be the amount or value of any consideration received on the disposal of the share reduced by the amount or value of any consideration paid or given by the taxpayer as consideration for the acquisition of the share.

108. In accordance with paragraph 89 of this Ruling, a participant does not provide any consideration for the acquisition of a share under the plan. Therefore, the discount is the amount or value of any consideration received by the participant for the disposal.

Capital gains tax

109. Where a participant disposes of a share to another entity CGT event A1 in section 104-10 of the ITAA 1997 happens.
Subsection 130-83(2) of the ITAA 1997 applies to CGT event A1.

110. Section 130-83 of the ITAA 1997 is applicable, instead of section 130-80 of the ITAA 1997, because the share is a qualifying share within the meaning of section 139CD of the ITAA 1936 and an election is not made under section 139E of the ITAA 1936, thus fulfilling the conditions in subsection 130-83(1) of the ITAA 1997. Where the share is disposed of in an arm's length transaction at the cessation time, or within 30 days after that time, subsection 130-83(2) of the ITAA 1997 disregards any capital gain or loss made from CGT event A1.

Forfeiture of shares

111. Where a section 139E election has not been made and a participant forfeits a share that is held by the trustee, the Commissioner accepts the forfeiture is an arm's length disposal of the share for the purposes of subsection 139CC(3). As no consideration will be received by the participant for the forfeiture of the share, no amount will be included in the assessable income of the participant for the purposes of subsection 139B(3).

Capital gains tax

112. Where a participant forfeits their interest in the trust (being their beneficial interest in the shares) before the participant becomes absolutely entitled to the shares, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3).

113. The first element of the cost base and reduced cost base of an interest in the trust is nil under subsection 110-25(2) of the ITAA 1997.

114. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends under section 116 -30 of the ITAA 1997.

115. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Disposal after 30 days or a non-arm's length disposal

116. Where the participant does not dispose of the share in an arm's length transaction at or within 30 days after the cessation time, the discount to be included in the participant's assessable income is calculated in accordance with subsection 139CC(4). The discount is the market value (as calculated under section 139FA) of the share at the cessation time reduced by the amount of any consideration paid or given by the taxpayer as consideration for the acquisition of the share.

117. In accordance with paragraph 89 of this Ruling, a participant does not provide any consideration for the acquisition of a share under the plan. Therefore, the discount is the market value (as calculated under section 139FA) of the share at the cessation time.

Capital gains tax

118. CGT event A1 in section 104-10 of the ITAA 1997 happens where a share is disposed of to another entity and subsection 104-10(4) describes the calculation of the capital gain or capital loss.

119. Where the share is not disposed of in an arm's length transaction at the cessation time, or within 30 days after that time, subsection 130-83(3) of the ITAA 1997 provides that the first element of the cost base and reduced cost base of a share is the market value of the share calculated under section 139FA of the ITAA 1936 at the cessation time.

120. The acquisition time for the purposes of Subdivision 115-A of the ITAA 1997 is not determined by subsection 115-30(1), item 8, of the ITAA 1997 because an election under section 139E of the ITAA 1936 has not been made. The acquisition time is determined under subsection 109-5(2) of the ITAA 1997 with the relevant CGT event being CGT event E5 in section 104-75 of the ITAA 1997. The acquisition time is therefore when absolute entitlement occurs.

Options acquired under the ESOP

121. Where an employee acquires a right to acquire a share under an employee share scheme, the discount given in relation to the right is included in the assessable income of the employee, in accordance with Subdivision B of Division 13A.

122. The applicant has advised that the options acquired under the ESOP are rights acquired under an employee share scheme and meet the conditions of section 139CD, and are therefore, qualifying rights for the purposes of Division 13A.

Transition of administration of options into the plan

123. The transition or transfer of an option into the plan is an administrative step, and the terms of the ESOP will remain unchanged for all options issued under the ESOP, whether or not an option is actually transitioned into the plan. Therefore, it is accepted that this process does not for Division 13A purposes, constitute a disposal of the option and it remains a qualifying right for the purposes of section 139CD.

Capital gains tax

124. A CGT event does not happen to an option on the transition of the option into the plan because the terms and conditions applying to that option under the ESOP remain unchanged.

Where no section 139E election made

125. Where a participant has not made an election under section 139E in respect of an option acquired under the ESOP, the discount given in relation to the option will be included in their assessable income under subsection 139B(3), in the year of income in which the cessation time occurs.

126. The cessation time for an option is determined in accordance with section 139CB and will be the earliest of:

- the time when the participant ceases to be employed within the NHC group (within the meaning of subsection 139CB(2));
- if the option is exercised and a share is acquired, the time when the share ceases being subject to forfeiture, that is, the time when the board approves a withdrawal notice; or
- the end of the 10 year period starting when the participant acquired the option under the ESOP.

Capital gains tax

127. When the board approves a withdrawal notice, a participant becomes absolutely entitled to a share and CGT event E5 happens under subsection 104-75(1) of the ITAA 1997 in relation to a share acquired from the exercise of an option. Subsection 104-75(6) is not applicable because an amount has been paid in exercising the option to acquire the share.

128. The conditions in paragraph 130-90(1A)(a), subsection 130-90(2), and subparagraph 130-90(3)(a)(ii) of the ITAA 1997, are satisfied in the circumstances of this Ruling. Any capital gain or capital loss the participant makes under subsection 104-75(5) of the ITAA 1997 will be disregarded under subsection 130-90(1) unless the exercise price of the participant's option exceeds the trustee's cost base for the share, under subsection 130-90(4).

Disposal within 30 days at arm's length

129. Where a participant disposes of a share acquired as a result of the exercise of an option, in an arm's length transaction at, or within 30 days after the cessation time, the discount assessable under subsection 139CC(3) will be the amount or value of any consideration received on the disposal of the share less the amount or value of any consideration paid to exercise the option.

Capital gains tax

130. Where a participant disposes of a share to another entity, CGT event A1 in section 104-10 of the ITAA 1997 happens. CGT event A1 is covered by subsection 130-83(2) of the ITAA 1997. Section 130-83 of the ITAA 1997 is applicable because the share has been acquired by exercising an option that is a qualifying right within the meaning of section 139CD of the ITAA 1936 and an election is not made under section 139E of the ITAA 1936. Where the share is disposed of in an arm's length transaction at the cessation time, or within 30 days after that time, subsection 130-83(2) of the ITAA 1997 disregards any capital gain or loss made from CGT event A1.

Forfeiture of shares

131. Where a participant forfeits a share (that is held by the trustee on their behalf) acquired as a result of the exercise of an option, the Commissioner accepts that the forfeiture will constitute an arm's length disposal and will be a cessation time for the purposes of paragraph 139CB(1)(c). As such, the discount given in relation to the share will be determined under subsection 139CC(3). As no consideration will be received by the participant upon forfeiture of the share, no amount is included in the assessable income of the participant for the purposes of subsection 139B(3).

Capital gains tax

132. Where a participant forfeits their interest in the trust (being their beneficial interest in the shares) before the participant becomes absolutely entitled to shares acquired from the exercise of options, CGT event C2 will happen under subsection 104-25(1) of the ITAA 1997. The participant makes a capital gain where the capital proceeds from the forfeiture are more than the cost base of their interest or a capital loss where the capital proceeds are less than the reduced cost base of their interest, under subsection 104-25(3).

133. The first element of the cost base and reduced cost base of an interest in the trust is the amount paid to exercise the options under subsection 110-25(2) of the ITAA 1997.

134. The capital proceeds from CGT event C2 happening is the market value of the interest at the time that it ends under section 116 -30 of the ITAA 1997.

135. Where a participant forfeits their interest in the trust more than 12 months after the time at which the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Disposal after 30 days or a non-arm's length disposal

136. Where the cessation time occurs and the share acquired as a result of the exercise of the option is not disposed of by the participant in an arm's length transaction at, or within 30 days after the cessation time, the discount assessable under subsection 139CC(4) will be the market value of the share at the cessation time less the amount or value of any consideration paid to exercise the option.

137. The market value of the share acquired as a result of exercising the option is calculated in accordance with Subdivision F of Division 13A.

Capital gains tax

138. CGT event A1 in section 104-10 of the ITAA 1997 happens where a share is disposed of to another entity and subsection 104-10(4) describes the calculation of the capital gain or capital loss.

139. Where the cessation time occurs after the exercise of an option and the share is not disposed of in an arm's length transaction at the cessation time, or within 30 days after that time, subsection 130-83(3) of the ITAA 1997 applies. The first element of the cost base and reduced cost base of the share is the market value of the share calculated under section 139FA of the ITAA 1936 at the cessation time.

140. The CGT event C2 that happens under paragraph 104-25(1)(e) of the ITAA 1997 when the option is exercised is disregarded under subsection 134-1(4) of the ITAA 1997.

141. The acquisition time is determined under subsection 109-5(2) of the ITAA 1997, with the relevant CGT event being CGT event E5 in section 104-75 of the ITAA 1997. Subsection 115-30(1), item 8, of the ITAA 1997 is not applicable because an election under section 139E of the ITAA 1936 has not been made and the share is not acquired under an employee share scheme, being instead a share acquired on the exercise of an option acquired under an employee share scheme. The acquisition time is therefore when absolute entitlement occurs.

Lapse of option

142. Where an option lapses, the option is considered to be a right lost without being exercised and section 139DD applies to deem the option to never have been acquired by the participant, for the purposes of Division 13A. Therefore, no amount is included in the assessable income of the participant under subsection 139B(3).

Capital gains tax

143. CGT event C2 in section 104-25 of the ITAA 1997 will happen on the lapse of an option. However, the participant will make neither a capital gain nor a capital loss in relation to the lapse as the cost base of the option and the capital proceeds from CGT event C2 happening are nil.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/10; TR 2006/10;
TD 97/23

Subject references:

- acquisition of shares
- capital gains tax
- CGT discount
- CGT cost base
- CGT events
- cessation
- disposal of shares
- employee share ownership
- employee share schemes & options
- qualifying rights
- qualifying shares
- salary sacrifice
- share discounts on employee share schemes

Legislative references:

- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv B
- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(3)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)(c)
- ITAA 1936 139CB(2)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139DD
- ITAA 1936 139E
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139FA
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(1)(e)
- ITAA 1997 104-25(3)
- ITAA 1997 104-75
- ITAA 1997 104-75(1)
- ITAA 1997 104-75(5)
- ITAA 1997 104-75(6)
- ITAA 1997 109-5
- ITAA 1997 109-5(2)
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 116-30
- ITAA 1997 130-80
- ITAA 1997 130-80(3)
- ITAA 1997 130-83
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- ITAA 1997 130-83(3)
- ITAA 1997 130-90
- ITAA 1997 130-90(1)
- ITAA 1997 130-90(1A)(a)
- ITAA 1997 130-90(2)
- ITAA 1997 130-90(3)(a)(ii)
- ITAA 1997 130-90(4)
- ITAA 1997 134-1(4)
- TAA 1953
- Copyright Act 1968
- Tax Laws Amendment (Budget Measures) Act 2008

ATO references

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