CR 2015/34 - Income tax: Aristocrat Long Term Incentive Plan

Class Ruling

Income tax: Aristocrat Long Term Incentive Plan

Contents Para

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 provisions

2. The relevant provisions dealt with in this Ruling are:

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Subdivision 83A-B of the ITAA 1997
- Subdivision 83A-C of the ITAA 1997
- section 83A-10 of the ITAA 1997
- section 83A-35 of the ITAA 1997
- section 83A-105 of the ITAA 1997
- section 83A-110 of the ITAA 1997, and
- section 83A-120 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are employees of Aristocrat Leisure Limited (Aristocrat) or its wholly owned subsidiaries who:

- receive performance share rights after 1 July 2009 under one of the following Aristocrat employee share plans:
  - Deferred Equity Short Term Incentive Plan
  - Deferred Equity Employee Plan
  - Special Equity Awards, and
- are residents of Australia within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936*.

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 8 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- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 October 2013. The Ruling continues to apply to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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

8. 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 14 November 2014 (Application)
- the Aristocrat Leisure Limited Long Term Incentive Plan Rules (2012) (Plan Rules)
- the Aristocrat Employee Equity Plan Trust Deed (Trust Deed)
- the pro forma Invitation Letters submitted with the Application, and
- communications with the applicant.

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 Plans

9. The Plans are employee equity plans established by Aristocrat. They include the:

- Deferred Equity Short Term Incentive Plan (DESTIP)
- Deferred Equity Employee Plan (DEEP), and
- Special Equity Awards (SEA).

10. The Plans operate under the Plan Rules.

11. Under the Plans, eligible employees of Aristocrat and its wholly-owned subsidiaries (Aristocrat Group) may be offered performance share rights for nil consideration. Performance share rights (Rights) entitle a Participant to acquire a fully paid ordinary share in Aristocrat subject to the terms of the offer and the Plan Rules.

12. Aristocrat established an employee share trust (the Trust) under the terms of the Trust Deed. The Trust is an Australian resident trust.

13. The Trust Deed allows the trustee of the Trust to acquire, hold and allocate shares in Aristocrat to Participants of the Plans.

Vesting conditions

14. The Rights granted under the Plans are subject to vesting conditions relating to the performance and continued employment of Participants.

15. Participants are required to remain employed by the Aristocrat Group for a period after the grant of the Rights (vesting period) and maintain an acceptable level of performance, achieving performance ratings of 'meets most requirements' or better during this period.

16. Where the vesting conditions are met for the relevant vesting period, the Rights vest and Participants are allocated ordinary shares in Aristocrat according to the number of Rights held.

17. Where vesting conditions are not met for the relevant vesting period, the Rights will lapse and the Participant will not have ordinary shares in Aristocrat allocated to them.

18. The vesting periods for Rights granted under the Plans differ, but the vesting period is always at least 12 months.

19. The vesting period for Rights granted under the DESTIP is separated into two evenly split tranches. The vesting period for the first tranche is 12 months from the date the Rights are granted and the vesting period for the second tranche is 24 months from the date that the Rights are granted.

20. The vesting period for Rights granted under the DEEP is generally 24 months.

21. The vesting period for Rights granted under the SEA vary, however, the minimum vesting period is 12 months.

22. Under certain circumstances a Participant that ceases to be employed by a company within the Aristocrat Group (and is not immediately employed by another company within the Aristocrat Group) prior to the completion of a vesting period, may retain some or all of their Rights if the ceasing of employment is due to a 'qualifying reason'.

23. Qualifying reasons are:

- the death, total and permanent disability or redundancy of a Participant
- a Participant ceasing to be employed by a company in the Aristocrat Group as a result of the company ceasing to be a member of the Aristocrat Group, or a company in the Aristocrat Group selling a business it conducts other than to another company in the Aristocrat Group, and
- any other reason as determined by the Board.

24. Whilst the Board of Aristocrat has a broad discretion to allow a Participant to retain some or all of their Rights despite not meeting all of the vesting conditions, the Board does not and will not routinely exercise this discretion.

25. Immediately after acquisition of the Rights, none of the Participants will hold a beneficial interest in more than 5% of the shares in Aristocrat and are not in a position to cast or control the casting of more than 5% of the votes that may be cast at a general meeting of Aristocrat.

26. The predominant business of Aristocrat is not the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies partnerships or trusts).

Ruling

27. Where a Participant acquires a Right under the Plans, the Right will be an ESS interest acquired under an employee share scheme and Division 83A will apply to the Right.

28. The Participant acquires the ESS interest at the date the Right is granted.

29. The Rights acquired by Participants under the Plans are at a real risk of forfeiture and Subdivision 83A-C will apply to them.

30. No amount is included in a Participant's assessable income in relation to the Rights until the ESS deferred taxing points for the Rights occur.

Commissioner of Taxation
20 May 2015

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.

ESS Interest

31. Under Division 83A an ESS interest in a company is defined under subsection 83A-10(1) as either a beneficial interest in a share in the company or a beneficial interest in a right to acquire a beneficial interest in a share of the company.

32. Under the Plans, Participants are granted rights to acquire shares in Aristocrat for no consideration, subject to the meeting of certain conditions. Those rights constitute a right to acquire a beneficial interest in a share of a company. As a result, Rights granted to Participants are ESS interests for the purposes of subsection 83A-10(1), and are acquired by Participants at the time they are granted by Aristocrat.

33. The Rights are provided to employees of the Aristocrat Group in relation to their employment. Therefore, the Plans are employee share schemes as defined in subsection 83A-10(2).

34. As the Rights are provided to employees for no consideration, the Rights will be acquired at a discount.

Application of Subdivision 83A-C

35. Subsection 83A-25(1) in Subdivision 83A-B requires that assessable income for the income year in which the ESS interest is acquired includes the discount in relation to the interest. However, Subdivision 83A-B will not apply if Subdivision 83A-C applies.

36. Subdivision 83A-C allows for the deferral of tax on the amount assessable in respect of an ESS interest if certain conditions are satisfied. Subdivision 83A-C will apply to defer tax on the amount assessable in respect of Rights if the following conditions in section 83A-105 are satisfied:

- Subdivision 83A-B would, apart from section 83A-105, apply to the Rights, and
- subsections 83A-35(3), (4), (5) and (9) apply to the Rights, and
- there is a real risk that an employee will forfeit or lose the Rights (other than by disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

37. In relation to the first condition, Subdivision 83A-B would, apart from section 83A-105 apply to the performance share rights because they:

- are a beneficial interest in a right to acquire a beneficial interest in an ordinary share of Aristocrat, and
- are provided to employees of the Aristocrat Group under an employee share scheme at a discount.

38. In relation to the second condition, subsections 83A-35(3), (4), (5) and (9) apply to each performance share right granted to a Participant because:

- when the Right is acquired, the Participant is employed by a company in the Aristocrat Group (subsection 83A-35(3))
- all of the Rights acquired under the Plans relate to ordinary shares in the capital of Aristocrat (subsection 83A-35(4))
- the predominant business of Aristocrat is not the acquisition, sale or holding of shares, securities or other investments, directly or indirectly (subsection 83A-35(5)), and
- after the acquisition of the Rights, a Participant will not hold a beneficial interest in more than five per cent of the shares in Aristocrat nor be in a position to cast, or control the casting of, more than five per cent of the maximum number of votes that might be cast at a general meeting of Aristocrat (subsection 83A-35(9)).

Real risk of forfeiture

39. In relation to the third condition, Subdivision 83A-C applies a Right if, under the conditions of the Plan when the Right is granted, there is a real risk that a Participant will forfeit or lose the Right (other than by disposing of it, exercising the right or letting it lapse).

40. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

41. Real risk of forfeiture of an ESS interest acquired under an employee share scheme may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment. In cases where an employee share scheme has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture test', it is not necessary to consider whether the other conditions also satisfies the test.

42. Rights granted under the Plans can only vest where relevant service and performance conditions have been satisfied by the

vesting date. Where the applicable service and/or performance conditions have not been met, the Rights lapse and no shares in Aristocrat will be allocated to the holder of the Rights.

43. As the minimum employment period for Rights granted under the plans is at least 12 months from the date of grant, the Commissioner accepts, subject to the discussion below regarding the discretion of the Board of Aristocrat, that the 'real risk of forfeiture' test is met for Rights granted under the Plans.

44. In circumstances where a Participant ceases employment with the Aristocrat Group for reasons other than through:

- death, permanent disability or redundancy
- a company within the Group ceasing to be a member of the Group, or
- a company in the Group ceasing to be a member of the Group,

the Board of Aristocrat may exercise its discretion to allow a Participant to retain their interest in unvested Rights. Whilst the Board has a broad discretion to allow a Participant to retain some or all of their Rights, this discretion has not and will not be exercised routinely. As the Board's discretion is not routinely exercised, the Commissioner does not consider that the availability of the discretion will prevent the Rights granted under the Plans from being at a real risk of forfeiture.

45. Therefore, Subdivision 83A-C will apply to the Rights and Subdivision 83A-B does not apply. The taxation of the Rights received under the Plans will be deferred until an ESS deferred taxing point occurs.

ESS deferred taxing point

46. As Subdivision 83A-C applies to the Rights granted under the Plans, section 83A-120 will apply to determine the ESS deferred taxing point.

47. Section 83A-120 provides that the ESS deferred taxing point for rights to acquire shares occurs at the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4))
- when the Participant ceases the employment in respect of which they acquired the rights within the meaning of section 83A-330 (subsection 83A-120(5))
- seven years after the Participant acquired the rights (subsection 83A-120(6)), and

- when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share (subsection 83A-120(7)).

48. However, if the Participant disposes of the rights (or shares acquired on exercise of the rights) within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal (subsection 83A-120(3)).

Amount included in assessable income of Participants

49. In accordance with section 83A-110, the amount to be included in assessable income of a Participant in the year in which the ESS deferred taxing point occurs will be the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of the ESS interest.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-35(3)
- ITAA 1997 83A-35(4)
- ITAA 1997 83A-35(5)
- ITAA 1997 83A-35(9)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-25(1)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- TAA 1953

ATO references

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