


# ***CR 2001/23 - Income tax: capital gains: Employee share scheme: National Australia Bank***

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## Class Ruling

### Income tax: capital gains: Employee share scheme: National Australia Bank

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#### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

## What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. Broadly, it sets out how the capital gains tax cost base of certain employee share scheme shares is worked out.

#### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are
- Division 13A Part III *Income Tax Assessment Act 1936* (ITAA 1936)
  - Part 3-1 *Income Tax Assessment Act 1997* (ITAA 1997)
  - Part 3-3 *Income Tax Assessment Act 1997* (ITAA 1997)

#### **Class of persons**

3. The class of persons to whom this Ruling applies are all Australian resident employees of the National Group (see paragraph 5) who participated in any of the employee share schemes described in the Arrangement part of this ruling.

4. The Ruling applies only to those employees who made an election under section 139E ITAA 1936 to be assessed on the discount given in relation to the shares in the year in which they were acquired by the employee for the purposes of Division 13A ITAA 1936.

5. This Ruling applies to persons who acquired shares under an employee share scheme while they were employees of one or more of the following companies in the National Group:

- National Australia Bank Limited
- National Australia Financial Management Limited
- County Investment Management Limited
- Australian Market Automated Quotation (AUSMAQ) System Limited

## Qualifications

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

7. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 11 to 18 is carried out in accordance with the details of the arrangement provided in this Ruling.

8. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
- (b) this Ruling may be withdrawn or modified.

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## Date of effect

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10. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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## **Arrangement**

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11. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents.

- Application for Class Ruling dated 9 April 2001
- The National Australia Bank Staff Share Allocation Plan (Allocation Plan)
- National Australia Bank Staff Share Allocation Plan Trust Deed (Allocation Trust Deed)
- The National Australia Bank Staff Share Ownership Plan (Ownership Plan)
- National Australia Bank Staff Share Ownership Plan Trust Deed (Ownership Trust Deed)

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

12. The Ruling applies to shares acquired under the National Australia Bank Staff Share Allocation Plan (Allocation Plan) and the National Australia Bank Staff Share Ownership Plan (Ownership Plan) on the following dates:

- 14 November 1997 (the 1997 offer)
- 13 November 1998 (the 1998 offer)
- 12 November 1999 (the 1999 offer)

13. The Ruling does not apply to any other employee share schemes that the National Group has offered or may offer to its employees. The Ruling does not apply to any shares that have been acquired under either the Allocation Plan or the Ownership Plan on any date other than the dates set out in paragraph 12.

### **Allocation Plan**

14. Under the Allocation Plan, all eligible employees of the National Group were offered 25 shares for which they were not required to make any payment. The shares are held in trust (Allocation Trust Deed).

15. Clause 7 of the Allocation Trust Deed restricts the transfer of shares from the Trustee to the employee until the earlier of the expiration of three years or the date the employee ceases employment with the National Group. If the employee ceases employment with the National Group, the employee may give notice to the Trustee requesting that the shares be transferred to them or sold by the Trustee

on their behalf. Upon receipt of the notice the Trustee must transfer the shares to the Employee or sell the shares in accordance with the employee's request.

### **Ownership Plan**

16. Under the Ownership Plan, the Board invited eligible employees to apply for an interest free loan from the National Group under the Loan Scheme to acquire the shares. The National Group paid the loan funds to the Trustee, on behalf of the employee, who used the funds to purchase the shares for the employee (under the National Australia Bank Staff Share Ownership Plan trust). The shares were registered in the name of the Trustee on allotment or purchase. Dividends declared on the shares are applied to repaying the loan. Subsection 139C(3) of the ITAA 1936 does not apply to the shares acquired because the consideration paid by the employees to acquire the shares was less than the market value of the shares at the time that they were acquired.

17. Clause 7 of the Ownership Plan Trust Deed restricts the transfer of shares from the Trustee to the employee. While an employee remains with the National Group, the trustee is not able to sell the shares or transfer the shares to the employee until the share loan is repaid in full. At this point the employee may give notice to the Trustee to either transfer the Ownership Plan shares to them or sell the shares on their behalf.

18. The exceptions to the above paragraph are:

- (a) When an employee ceases employment with the National Group, the Trustee sells the shares and repays the Share Loan. Any balance remaining is paid to the employee. If no amount is outstanding against the Share Loan, the employee may request the shares be transferred to them. No board approval is necessary.
- (b) When an employee requests the Trustee to sell their shares and they still have an outstanding share loan, it is necessary for the Trustee to seek the Board's approval.

### **Ruling**

19. When an employee has made a section 139E ITAA 1936 election for the shares they acquired under the Allocation Plan or the Ownership Plan, the capital gains tax (CGT) cost base of the shares is the section 139FA ITAA 1936 market value on the date they are absolutely entitled as against the Trustee to acquire those shares.

20. The employee share cost base is determined by subsection 130-80(2) ITAA 1997 and will be calculated at the date they acquire those shares, being:

- 1997 Allocation Plan Shares – 14 November 2000
- 1998 Allocation Plan Shares – 13 November 2001
- 1999 Allocation Plan Shares – 12 November 2002
- 1997/1998/1999 Ownership Plan Shares – the date of repayment of the loan.

21. The above dates will apply unless the employee becomes absolutely entitled to the shares at an earlier time. This will occur where the employee ceases employment. For the Ownership Plan, it will also occur where the Trustee sells their shares in accordance with subparagraph 18(b) of this Ruling.

22. Under section 115-25 ITAA 1997, to be eligible for the CGT discount, the employee must hold the shares for at least 12 months from the date they acquire the shares. This will be the date when they acquired the shares for the purposes of CGT being when they become absolutely entitled to the shares as against the trustee.

## **Explanations**

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### **Time of Acquisition by the Employee:**

23. Under subsection 109-5(2) ITAA 1997, the employee is taken to “acquire” the shares for CGT purposes at the time they became absolutely entitled to the shares in accordance with CGT event E5 and subsection 104-75(2) ITAA 1997.

### **Allocation Plan**

24. The employee does not acquire the shares under the Allocation Plan until title is transferred from the trustee either to or on behalf of the employee at the earlier of the end of the three year restriction period or the cessation of their employment with the National Group. At this point, the employee becomes absolutely entitled to the Allocation Plan Shares as against the Trustee.

### **Ownership Plan**

25. The employee does not acquire the shares under the Ownership Plan until title is transferred from the trustee either to or on behalf of the employee.

26. The employee becomes absolutely entitled to the shares and is taken to acquire the shares under section 109-5 ITAA 1997 at the earliest of the following dates:

- The date when the relevant employee's Share Loan is repaid and the employee is able to instruct the Trustee to transfer or dispose of the Ownership Shares without the need for Board approval; or
- The date the employee ceases employment with the National Group, or
- When the Share Loan has not been repaid in full and the employee has requested the Trustee to seek Board approval to dispose of the shares, the employee is taken to have acquired the shares on the date when Board approval is granted.

## **Absolutely entitled beneficiaries**

27. Where the employee is absolutely entitled to shares, but title has not been transferred from the Trustee, section 106-50 ITAA 1997 ensures that any act done by the trustee in relation to the shares shall apply as if the employee had done it.

## **Cost Base of the Shares for the Employee**

28. Where an employee made an election under section 139E ITAA 1936 to be assessed on the discount given in relation to the shares in the year in which they were acquired by the Trustee, subsection 130-80(2) ITAA 1997 states (where relevant) that:

*"The first element of the cost base... of the share... is its market value (worked out under sections 139FA to 139FF of the Income Tax Assessment Act 1936) when you acquired it"*

29. If an employee became absolutely entitled to the 1997 Allocation Plan Shares on 14 November 2000, the employee's Cost Base will be \$28.61, being the section 139FA market value on that date.

30. It is the employee's responsibility as a taxpayer to correctly calculate the cost base of their shares. The National Group has a practice of informing employees of the section 139FA ITAA 1936 market value of shares at the time that the shares are acquired by the employee or sold (if approved by the Board) at the employee's request. The National Group has advised the Australian Taxation Office that it will continue to provide this information to its employees.

**Commencement of the 12 month holding period**

31. Where the shares are disposed of after 11.45 a.m. (by legal time in the Australian Capital Territory) on 21 September 1999, the employee will be entitled to the 50% CGT discount where the requirements of Subdivision 115-A ITAA 1997 are satisfied. In determining whether the 12 month holding rule in section 115-25 ITAA 1997 has been satisfied, the date of acquisition for CGT purposes will be when the employee became absolutely entitled to the shares as against the trustee.

32. Employees may be entitled to choose between the CGT discount and indexation (frozen as at 30 September 1999) where the requirements of Division 114 ITAA 1997 have been met.

**Detailed contents list**

33. Below is a detailed contents list for this Class Ruling:

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## **Commissioner of Taxation**

20 June 2001

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

TR 92/20; TR 92/1; TR 97/16

*Subject references:*

- absolute entitlement
- CGT Discount
- CGT Event
- CGT Event E5
- company
- cost base
- employee share scheme
- share
- trust

*Legislative references:*

- ITAA 1936 139C
- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139FC
- ITAA 1936 139FD
- ITAA 1936 139FE
- ITAA 1936 139FF
- ITAA 1997 104-75
- ITAA 1997 106-50
- ITAA 1997 109-5
- ITAA 1997 114-10
- ITAA 1997 115-25
- ITAA 1997 130-80

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ATO References

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