

CR 2004/2 - Income tax: AXA SA 2002 Traditional Plan Share Offer for Australian employees



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Class Ruling

Income tax: AXA SA 2002 Traditional Plan Share Offer for Australian employees

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax laws**, **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 laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Division 13A of Part III of the ITAA 1936;
 - Subsection 6-5(4) of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - Subsection 6-10(3) of the ITAA 1997;
 - Section 104-10 of the ITAA 1997;
 - Section 104-25 of the ITAA 1997;
 - Section 110-25 of the ITAA 1997;
 - Subsection 112-20(1) of the ITAA 1997;
 - Division 115 of the ITAA 1997;
 - Subsection 116-20(1) of the ITAA 1997;

- Section 43 of the *Fringe Benefit Tax Assessment Act 1986* (FBTAA 1986); and
- Subsection 136(1) of the FBTAA 1986;

Class of persons

3. The class of persons to which this Ruling applies consists of the Australian residents employed by AXA Asia Pacific Holdings Limited and its Australian subsidiaries, AXA Assistance Australia Pty Ltd and AXA Corporate Solutions Asia Pacific Pty Ltd, who participate in the offer under the arrangement described below in paragraphs 9 to 20.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangements identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 9 to 20 in this Ruling.

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

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to arrangements entered into during the income year ending 30 June 2003. This Ruling continues to apply, in respect of tax laws ruled upon, even following 30 June 2003, for arrangements entered during the income year ended 30 June 2003. This is subject to there being no material change in the arrangement or in the class of persons involved in the arrangement. However, this 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Arrangement

9. The arrangement that is the subject of the Ruling is described below. It was entered into when the subscriptions referred to in paragraph 11 below were made by employees. This description is based on the copies of documents listed below. These documents, or the relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of arrangement are:

- AXA Shareplan of October 2002;
- AXA Shareplan 2002 Australian Employee Supplement;
- Translation dated 24 July 2002 of International Group Savings Plan and Addendum No. 1. The Plan was established on 19 October 2001 and subsequently modified on 27 May 2002;
- Translation of draft Regulations dated 22 July 2002 of a **Fonds Commun de Placement d'Entreprise (FCPE)**. (A FCPE is a collective investment vehicle without legal personality used in France to facilitate employee share offers); and
- Translation of Draft Information Notice of 19 July 2002.

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.

Description of the arrangement

10. AXA Shareplan 2002 is an arrangement under which Australian resident employees, together with other employees of the AXA group, could invest in securities concerning a portfolio of AXA SA shares. It is referred to as the '**Traditional Plan**' to distinguish it from the AXA Shareplan 2002 offer known as the '**Investment Leverage Plan**'.

11. Employees who subscribed to the Traditional Plan received units in the AXA Actionnariat II FCPE, hereafter referred to as **the Fund**. The FCPE manager then subscribed for AXA shares on the employees' behalf.

12. The **Subscription Price** of Euros 9.04 paid for each unit was at a discount of 20% to the **Reference Price** of Euros 11.29. The 'Reference Price' was the average trading price of AXA SA shares on the Paris Stock Exchange over the 20 trading days from 25 September 2002 to 22 October 2002.

13. Employees could subscribe for units in the Fund during the period extending from 28 October until 12 November 2002. There was no minimum subscription in the Plan. However, the maximum amount of the employee's total investment under the Investment Leverage Plan and the Traditional Plan could not exceed 25% of their salary.

14. The FCPE manager subscribed for ordinary shares in the capital of AXA SA pursuant to a capital increase in the company made on 20 December 2002. In accordance with French practice, the increase was reserved to company employees of AXA SA on a worldwide basis. The shares are held by the FCPE custodian in the name of the Fund.

15. In consideration for their investment employees were allotted units in the Fund. When a unit is issued, one unit is equivalent to the value of one AXA SA share. However, from that time the value of a unit is the **Net Asset Value (NAV)** as defined under the FCPE Regulations. The NAV of the units is calculated on each trading day using the fluctuating closing price of the AXA SA shares on the Paris Stock Exchange. Under the Plan, dividends received are reinvested in AXA SA shares and the unit holders credited with additional units on account of their entitlements to Fund income.

16. Employees do not get access to AXA SA shares during a **Lock up Period** of approximately five years ending on 1 July 2007. Australian member employees or their legal beneficiaries may only choose to redeem the investment before that time in the event of death, disability or cessation of employment with the AXA SA Australian companies.

17. If the investment is redeemed prematurely, the unit holders will be paid by delivery of the number of AXA SA shares (X) from the Fund's portfolio that the units represent in accordance with the following calculation:

$$X = \frac{A \times B}{C}$$

Where:

A = number of units tendered for redemption

B = NAV upon redemption

C = share price used to value the portfolio on the date of the NAV calculation.

If X is not a whole number of shares, the number is rounded down and the difference paid by a cash payment.

The unit holder or his or her legal beneficiary may arrange to retain the shares and to be able to trade them on the Paris Stock Exchange. Alternatively, if it is desired to sell the shares at the time, the FCPE manager may elect to do so and transfer the sale proceeds to a nominated bank account.

18. At the expiration of the Lock up Period, the unit holder has two options:

- (a) The unit holder may opt to keep the shares in the Traditional Fund. The shares will continue to fluctuate in line with AXA SA performance; or
- (b) The unit holder may opt to withdraw the units. The unit holder will receive AXA SA shares to retain or sell equal to the amount of the number of shares owned multiplied by the NAV on the redemption date, before the deduction of any fees or charges.

19. The investment in the Traditional Plan is not subject to any form of guarantee. If the AXA SA share price has fallen below the Subscription Price when the units are redeemed, the full investment will not be recovered.

20. However, if the share price rises or remains stable compared with the Reference Price, the unit holder will receive the Euro value of the initial investment, the benefit of the initial 20% discount to the Reference Price, the benefit of any price increase above the Reference Price and the benefit resulting from the reinvestment of any dividends in to the Fund.

Ruling

21. When units in the Fund are issued to an Australian resident employee, the units constitute a fringe benefit as defined in subsection 136(1) of the FBTA 1986. Fringe Benefits are exempt from income tax in the hands of the employee under section 23L of the ITAA 1936.

22. Income of the Fund is included in the assessable income of the Australian resident employee in proportion to the number of units they hold in the Fund to the total number of units issued by the Fund. The income is derived by the Australian resident employee when it is received by the Fund and dealt with on his or her behalf by reinvestment and the issue of additional units on account of the reinvested income (subsection 6-5(4) or subsection 6-10(3) of the ITAA 1997 applies).

23. If an Australian resident unit holder redeems his or her units, a CGT event C2 occurs pursuant to section 104-25 of the ITAA 1997. A capital gain results if the capital proceeds exceed the cost base of the units. A capital loss occurs if the capital proceeds are less than the reduced cost base.

24. The capital proceeds of a redemption (CGT event C2) consist of any cash received and the market value of any shares acquired in consideration for the redemption (subsection 116-20(1) of the ITAA 1997 applies).

25. The cost base or reduced cost base of the units redeemed consists of the subscription price paid for the units in the case of units acquired by subscription. For additional units acquired on account of reinvested income, the income so applied forms the cost base (section 110-25 of the ITAA 1997 applies).

26. If an Australian resident unit holder makes a capital gain on redemption of his or her units and the units were acquired 12 months or more prior to the CGT event C2 happening, the gain is a discount capital gain pursuant to Division 115 of the ITAA 1997.

27. If an Australian resident unit holder, having redeemed the units in consideration for AXA SA shares, disposes of the shares, a CGT event A1 happens (refer section 104-10 of the ITAA 1997). The capital gain or capital loss with respect to the disposal is calculated on the basis of the first element of cost base or reduced cost base of the shares being their market value at the date of acquisition. If a capital gain is made, it will be a discount capital gain pursuant to Division 115 if the acquisition of the shares occurred 12 months or more prior to the disposal.

Explanation

Exemption of the benefit from acquisition of units at a discount

28. The provision of units in the Fund to Australian resident employees is a fringe benefit for the purposes of the FBTAA 1986. The provision of the units is a 'benefit' as defined in relation to the employee's employment by the AXA SA employer or its associate.

29. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) of the definition of 'fringe benefit' in section 136; it is not 'a benefit constituted by the acquisition by a person of a share or right under an employee share scheme (within the meaning of Division 13A of Part III of the ITAA 1936)'. In this regard the unit holder's interest under the Fund regulations (a *chose in action*) is not identical with the inherent or underlying interests that the unit holder may have in shares that are part of the net assets. This issue is discussed in greater depth in CR 2003/53 at paragraphs 47 to 56 inclusive.

30. The fringe benefit is classified as an external property fringe benefit, the taxable value of which falls for determination under section 43 of the FBTAA 1986.

31. In accordance with section 23L of the ITAA 1936 Australian resident employees acquiring units in the Fund are exempt from tax on the benefit obtained.

Taxation of dividends

32. Income (principally dividends) received on assets held in the Fund is income in the hands of the unit holder if there is an entitlement thereto under the terms of the investment.

33. In this regard it is accepted that unit holders do not have a shareholder's title to the dividends. The dividends are paid to the custodian bank which receives them in that capacity. The unit holders entitlement to income under the Fund regulations is not a claim for immediate payment of the dividends received by the custodian but a right to have that money reinvested in the Fund on their behalf and in recognition be allocated additional units.

34. It is considered that a unit holder's entitlement incorporating, as it does, an unconditional right to have income reinvested in the Fund on the unit holder's behalf indicates an entitlement to the income as it is received notwithstanding that it cannot be enjoyed as an immediate cash distribution. In accordance with subsections 6-5(4) and 6-10(3) of the ITAA 1997 income is derived by the unit holder when it is received and dealt with on the unit holders behalf. For

further discussion of this issue, see CR 2003/53 at paragraphs 57 to 66.

Capital gains tax

35. The general capital gains tax rules under Parts 3-1 to 3-3 of the ITAA 1997 apply to CGT events in relation to the interests in net assets of the Fund represented by units and shares acquired via redemption of units. The units are not units in a unit trust and Taxation Determination 2000/32 does not apply.

36. Section 104-25 provides that CGT event C2 happens if your ownership of an intangible CGT asset ends by it being redeemed or cancelled. Accordingly when an Australian resident unit holder redeems his or her units there will be a CGT event.

37. If the redemption is satisfied fully or partly by the transfer of AXA SA shares, the capital proceeds with respect to CGT event C2 will include the market value of the shares at the date of the redemption in addition to any money received (refer subsection 116-20(1)).

38. Under Division 110, the cost base or reduced cost base of units acquired by subscription includes the subscription price paid by the employee. The cost base or reduced cost base of units obtained on account of reinvested income is the amount of the reinvested income. In the event that, during the period of the unit holders' membership of the Fund, unit holders' interests have been redenominated by the manager adjusting the number of units in the Fund and accordingly the number held by each unit holder, the original cost base or reduced cost base will be spread over the revised number of units.

39. If a unit holder redeems his or her units for AXA SA shares and subsequently sells the shares, a CGT event A1 occurs pursuant to section 104-10 with respect to the shares. The first element of the cost base or reduced cost base of the shares will be the market value of the shares at the date they were acquired (subsection 112-20(1) applies).

40. For the purposes of Division 115 (discount capital gains) the time of acquisition of units will be the date that the units were subscribed for by the unit holder or in the case of reinvested income when the units are issued.

41. AXA SA shares obtained by redeeming units in the Fund are acquired when they are transferred to the unit holder on or immediately after the redemption time.

Detailed contents list

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Commissioner of Taxation

14 January 2004

Previous draft:

Not previously released in draft form

Related Rulings/Determinations:

CR 2001/1; CR 2003/53; TR 92/1;
TR 97/16; TR 92/20; TD 2000/32

Subject references:

- Acquisition of share or right
- capital gains tax
- CGT event A1
- CGT event C2
- chose-in-action
- cost base
- derivation of income
- discount capital gains
- dividends
- employee savings plan
- employee share schemes
- external property fringe benefit

- reinvested income

- fringe benefit
- Fringe benefits tax
- Fonds Commun de Placement d' Enterprise
- reduced cost base

Legislative references

- ITAA 1936 23L
- ITAA 1936 Div 13A Part 111
- ITAA 1997 Part 3-1
- ITAA 1997 Part 3-2
- ITAA 1997 Part 3-3
- ITAA 1997 6-5(4)
- ITAA 1997 6-10(3)
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 Div 110
- ITAA 1997 110-25
- ITAA 1997 112-20(1)

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|-----------------------|-----------------------|
| - ITAA 1997 Div 115 | - FBTAA 1986 136(1) |
| - ITAA 1997 116-20(1) | - TAA 1953 Part IVAAA |
| - FBTAA 1986 43 | - Copyright Act 1968 |
| - FBTAA 1986 136 | |
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ATO references

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