

# **CR 2011/101 - Income tax: Bostik Australia Pty Ltd: Total S.A. Free Share Plan**

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## Class Ruling

### Income tax: Bostik Australia Pty Ltd: Total S.A. Free 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

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

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

- Division 83-A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-B of Division 83A (Subdivision 83A-B) of the ITAA 1997;
- Subdivision 83A-C of Division 83A (Subdivision 83A-C) of the ITAA 1997;
- section 83A-10 of the ITAA 1997;
- section 83A-35 of the ITAA 1997;
- section 83A-110 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-125 of the ITAA 1997;

- section 83A-315 of the ITAA 1997;
- section 83A-330 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-15 of the ITAA 1997;
- Division 115 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

## **Class of entities**

3. The class of entities to which this Ruling applies comprises employees of Bostik Australia Pty Ltd who:

- received rights under the Free Share Plan (FSP);
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- are not 'temporary residents' within the meaning of that expression in section 995-1(1) of the ITAA 1997.

4. In this Ruling, a person belonging to this class of entities is referred to as an Employee.

## **Qualifications**

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

6. 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 10 to 24 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## **Date of effect**

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9. This Ruling applies from 30 June 2010 to 31 July 2014. The Ruling continues to apply after 31 July 2014 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**

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10. The following description of the scheme is based on information provided by the applicant.

### **Bostik Australia Pty Ltd**

11. Bostik Australia Pty Ltd (Bostik) is a wholly owned subsidiary of Total S.A. (Total), which is located in France.

### **The Free Share Plan**

12. On 30 June 2010, Total granted to each of its employees, including eligible Australian employees of Bostik, rights to 25 free Total shares under the Free Share Plan (the Plan). The rights were granted at a discount to their market value.

13. Immediately after the acquisition of the rights, no Employee had a legal or beneficial interest in more than 5% of the ordinary shares in Total.

14. Immediately after the acquisition of the rights, no Employee was in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of the company.

15. Under the terms of the Plan, Employees were not required to pay or give any consideration for the acquisition of the rights.

16. Employees must hold each right for a compulsory period of two years (the Vesting Period).

17. After the end of the Vesting Period (that is, 1 July 2012), the free shares are to be delivered to the Employees provided they have remained employees of Bostik during the entire Vesting Period. If they are not employed at this time their rights will be forfeited.

18. The delivery of the free shares results in the transfer of full ownership of the free shares to the Employee.

19. Upon transfer to the Employees the free shares will be held in one of the following custody arrangements selected by Total at its discretion:

- Registration of the free shares in an individual account, opened in the books of the account manager responsible for managing the free shares, along with a note mentioning that the transfer of the free shares is prohibited for a period of two years (the Direct Ownership Choice); or
- Grant of the free shares to a collective employee investment fund (*fonds commun de placement d'entreprise*)(FCPE), the assets of which are exclusively invested in TOTAL shares (the FCPE Choice).

20. An FCPE is a collective investment vehicle that is neither a separate legal entity nor a trust according to French law.

21. Once Total makes the Direct Ownership Choice or the FCPE Choice, a two year mandatory holding period will apply such that the Employee will be unable to sell, transfer or otherwise deal with their Total shares or FCPE interest during that time.

22. If Total elects the Direct Ownership Choice, the shares are registered in the Employees individual account effective from 1 July 2012. The Employee would receive dividends and have voting rights in relation to the shares.

23. If Total elects the FCPE Choice, the shares that are received by the Employee after the end of the Vesting Period are allocated to an FCPE and the Employee acquires an interest in the FCPE.

24. The Employee acquires an interest in the FCPE in the form of units, with the number of units issued calculated with reference to a subscription price and the value of the Total shares allocated to the FCPE at the time of allocation.

## Ruling

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25. An Employee who received rights under the Free Share Plan has acquired ESS interests in terms of subsection 83A-10(1).

26. Subdivision 83A-C applies in relation to the rights. No amount will be included in the Employee's assessable income in relation to the rights until the ESS deferred taxing point occurs.

27. The ESS deferred taxing point will be determined in accordance with section 83A-120.

28. Where the rights vest and Total has made the FCPE Choice, the Employee will have an ESS deferred taxing point occur immediately after the end of the Vesting Period (that is, 1 July 2012).

29. Where the rights vest and Total has made the Direct Ownership Choice, the Employee will have an ESS deferred taxing point at the earliest of the following times:

- when the employee ceases employment with Bostik Australia Pty Ltd [subsection 83A-120(5)]; or
- immediately after the end of the period where disposal restrictions apply to the shares acquired under the Direct Ownership Choice [subsection 83A-120(7)].

However, where the Employee disposes of the share within 30 days of the first occurrence of one of the abovementioned times, the ESS deferred taxing point will instead be the time of disposal [subsection 83A-120(3)].

30. The subsequent receipt of either a share or FCPE unit is not a fringe benefit for the purposes of the FBTAA.

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**Commissioner of Taxation**

30 November 2011

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## Appendix 1 – Explanation

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❶ *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.*

### **Application of Division 83A**

31. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

32. An ESS interest in a company is defined in subsection 83A-10(1) as a beneficial interest in:

- (a) a share in the company; or
- (b) a right to acquire a beneficial interest in a share in the company.

33. The rights issued under the Plan are rights to acquire a beneficial interest in a share in the company. At the end of the Vesting Period the delivery of the free shares to the Employee results in the transfer of full ownership of the free shares to the Employee.

34. An employee share scheme is defined in subsection 83A-10(2) as a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment.

35. Thus, where under the Plan an Employee is issued rights, they will acquire an ESS interest under an employee share scheme.

36. Where an ESS interest is acquired under an employee share scheme at a discount on or after 1 July 2009, the discount in relation to the ESS interest is included in the assessable income of an employee, in accordance with Division 83A.

37. As Employees acquired the rights at a discount then, pursuant to subsection 83A-20(1), Subdivision 83A-B will apply to the rights acquired by Employees under the Plan, unless Subdivision 83A-C applies.

### **Assessability of rights under Subdivision 83A-C**

38. Subdivision 83A-B will apply to a right granted to an Employee under the Plan, unless Subdivision 83A-C applies.

39. 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 applies, and Subdivision 83A-B does not apply, to an ESS interest which is a right if the following conditions are satisfied:

- (a) subdivision 83A-B would, apart from section 83A-105, apply to the interest; and

- (b) subsections 83A-35(3), (4), (5) and (9) apply to the interest; and
- (c) there is a real risk that an Employee will forfeit or lose the interest (other than by disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

40. In relation to the first condition, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the right because the right:

- is a beneficial interest in a right to acquire a beneficial interest in an ordinary share of Total; and
- is provided to employees of Total or a Total group company in relation to their employment, and will be provided for nil consideration (that is, at a discount).

41. In relation to the second condition, subsections 83A-35(3), (4), (5) and (9) apply to each right granted to an Employee because:

- when the right is acquired, the Employee is employed by a Total group company (83A-35(3));
- all of the ESS interests available for acquisition under the Plan relate to ordinary shares in the capital of Total (83A-35(4));
- the predominant business of Total is not the acquisition, sale or holding of shares, securities or other investments, directly or indirectly (83A-35(5)); and
- after the acquisition of the right, the Employee will not hold a beneficial interest in more than five per cent of the shares in Total 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 Total (83A-35(9)).

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

### ***Real risk of forfeiture***

43. The Explanatory Memorandum (EM) to the *Tax Laws Amendment (2009 Budget Measures No.2) Bill 2009*, which inserted Division 83A into the ITAA 1997, explains the real risk of forfeiture test at paragraph 1.156 as follows:

The 'real risk of forfeiture test' does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, real is regarded as something more than a mere possibility. Something is not a real

risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

44. 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.

45. As rights acquired by Employees are subject to a vesting period which is greater than 12 months (that is, they will lapse if the employee ceases employment prior to vesting) the Commissioner accepts that the rights granted under the Plan will be subject to a real risk of forfeiture and the condition in subsection 83A-105(3) is met.

46. As a result, Subdivision 83A-C applies to rights granted under the Plan, and Subdivision 83A-B does not apply. The taxation of discounts received under the Plan will be deferred until a deferred taxing point.

## **ESS deferred taxing point**

47. The ESS deferred taxing point for a right is worked out under section 83A-120. It will be at the earlier of the following times:

- before exercise of the right, the time when there is no longer a real risk of forfeiting or losing the right (other than by disposing of it, exercising it or letting it lapse) and there is also no genuine restriction on disposal of the right;
- the time when there is no longer a real risk of forfeiting or losing the right (other than by disposing of it, exercising it or letting it lapse); and there is also no genuine restriction on exercising the right; and there is no real risk that if you exercise the right you will forfeit or lose the share (other than by disposing of it) and there is also no genuine restriction on disposal of the share;
- the time when an Employee ceases the employment in respect of which they acquired the right, within the meaning of section 83A-330; or
- seven years after the Employee was granted the right.

48. If the Employee disposes of the share acquired on exercise of the right within 30 days after the first occurrence of one of the above times, the ESS deferred taxing point will instead be the time of the disposal.

49. Under the terms of the Plan, the right itself can never be disposed of (other than by being forfeited or being exercised).

50. At the conclusion of the Vesting Period, there is no longer a real risk of forfeiture of the right.

### **FCPE Choice**

51. At the vesting time, one of the choices available to Total for each right is to have a share allocated to an FCPE.

52. The FCPE is a contractual arrangement formed with the intention of creating a situation of common ownership of an investment portfolio.

53. The unit holder's interest under the Fund's regulations is, in essence, a fractional interest in net assets with rights to a share of reinvested income. This interest (*a chose in action*) is not identical with the inherent or underlying interest that the unit holder may have in shares that are part of the net assets. It is considered that, even if under French law the unit holders may be regarded as co-owners, the interest in shares cannot be severed and dealt with separately for the purpose of the application of the Australian taxation law.

54. The FCPE concept, being a collective investment vehicle that is neither a separate legal entity nor a trust according to French law, is analogous in some respects to a partnership, although it is not actually a partnership.

55. The unit holder's interest is comparable to the interest of a partner in a partnership. In this regard, the dicta of the majority in *FC of T v. Everett* (1980) 143 CLR 440; 10 ATR 608; 80 ATC 4076 lends support to the view expressed in paragraph 53 above: '...the partner's fractional interest [in the partnership] is an entire *chose in action*; it is capable of division by assignment into further fractions, but it is not capable of division by assignment so that the right to participate in partnership profits which is inherent to the interest is hived off from the rest of that interest. Consequently, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.' (at 450; 613; 4081).

56. Accordingly, the property right that a unit holder may have in particular assets, for example shares, cannot be substituted for the entire *chose*. In other words, the relevant interest is that arising from the provision of the units, not a benefit associated with any inherent or underlying property.

57. Where the FCPE Choice is made and the Employee acquires an FCPE unit upon exercising the right, the Employee is taken to have disposed of his share in return for the interest in the FCPE.

58. An ESS deferred taxing point could not have arisen prior to this time in respect of the right because:

- prior to the end of the Vesting period there was a real risk that the right would be forfeited;
- at no time was the right able to be disposed of;

- the seven year period starting when the Employee acquired the right had not yet ended; and
- if an Employee ceased employment prior to the end of the Vesting period they would have forfeited the right and Division 83A (apart from Subdivision 83A-E) would be taken to never have applied to the right in accordance with section 83A-310

59. Consequently, the ESS deferred taxing point for the right will occur immediately after the end of the Vesting period in accordance with subsection 83A-120(7).

### ***Direct Ownership Choice***

60. Where the Direct Ownership Choice is made, an interest in a share is acquired by the Employee upon exercising the right.

61. The terms of the Plan are such that the Employee cannot dispose of the share until a further two years have elapsed.

62. As the right has already been exercised an ESS deferred taxing point for the right will arise at the earliest of the following times:

- when the disposal restrictions applying to the share no longer apply; or
- when the employee ceases employment with Bostik; or
- seven years after the Employee was granted the right.

63. As the disposal restrictions will be lifted four years after the Employee was granted the right, the ESS deferred taxing point will occur either when the disposal restrictions are lifted or when the Employee ceases the employment with Bostik.

64. If an Employee ceased employment prior to the end of the Vesting period they would have forfeited the right and Division 83A (apart from Subdivision 83A-E) would be taken to never have applied to the right in accordance with section 83A-310. Therefore, a deferred taxing point can only occur in respect of ceasing employment where the Employee ceases the employment after the end of the Vesting period but before the disposal restrictions are lifted.

65. Therefore, the ESS deferred taxing point for the right will occur when the disposal restrictions are lifted unless the Employee ceases employment with Bostik prior to that time but after the end of the Vesting period in which case the ESS deferred taxing point for the right will be the time when the Employee ceases employment.

### **Amount to be included in assessable income**

66. In accordance with section 83A-110 the amount to be included in assessable income at the ESS deferred taxing point will be the market value of the ESS interest reduced by the cost base of the interest.

67. As the rights were granted for nil consideration and no exercise price is payable on exercise of the rights, the cost base of the interest will be nil.

### ***Determining the market value***

68. The term 'market value' is not defined for the purposes of Division 83A and therefore the ordinary meaning of market value is used for determining the value of ESS interests.

69. However, subsection 83A-315(1) provides that when determining 'market value' for the purposes of Division 83A, an amount specified as market value in the regulations is to be used, if the regulations specify such an amount.

70. Subregulation 83A-315.01(1) of the *Income Tax Assessment Regulations 1997* (ITAR) applies to unlisted rights that must be exercised within ten years of acquisition and therefore applies to rights granted under the Plan. Under this regulation an Employee can choose to value their right at either:

- the market value according to its ordinary meaning; or
- the amount determined by the application of the rest of the regulations in Division 83A of the ITAR.

71. However, an Employee must use the market value of the right, according to its ordinary meaning, if the deferred taxing point occurs on the day the Employee disposes of the right.

72. Similarly, an Employee must use the market value of the share acquired on exercise of the right if the deferred taxing point occurs on the day the Employee disposes of that share. If the disposal is at arm's length then the Commissioner will accept the amount received as being the market value.

73. Regulation 83A-315.03 of the ITAR provides that if the lowest amount that must be paid to exercise a right to acquire a beneficial interest in a share is nil, the value of the right on a particular day is the same as the market value of the share on that day.

74. As an Employee is not required to pay an exercise price for a right granted under the Plan, the value of the right at the ESS deferred taxing point is the same as the market value of a share on that day.

### **Fringe Benefits Tax**

75. The provision of a right under the Plan is not a fringe benefit due to the exclusion in paragraph (h) of the definition of 'fringe benefit' in subsection 136(1) of the FBTA. That paragraph excludes a benefit constituted by the acquisition of an ESS interest under an employee share scheme.

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76. The subsequent receipt of a share on exercise of the right (if the Direct Ownership Choice is made) or a FCPE unit (if the FCPE Choice is made) is also not a fringe benefit because it directly arises from, and is merely a conversion of, the initial right.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- employee share schemes

*Legislative references:*

- ITAA 1997 Division 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-35
- ITAA 1997 83A-110
- ITAA 1997 83A-120
- ITAA 1997 83A-125
- ITAA 1997 83A-315
- ITAA 1997 83A-330
- ITAA 1997 110-25

- ITAA 1997 110-55
- ITAA 1997 112-15
- ITAA 1997 Div 115
- ITAA 1997 130-80
- FBTA 136(1)
- TAA 1953
- Copyright Act 1968

*Case references:*

- FC of T v. Everett (1980) 143 CLR 440; 10 ATR 608; 80 ATC 4076

*Other references:*

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No.2) Bill 2009

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ATO references

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