In detail

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ESS - Safe-harbour valuation methods

Learn how start-up companies with ESS interests can use safe harbour valuation methods to value unlisted shares.

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Learn about tax rules applying to employee share scheme interests acquired before 1 July 2009.

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Employer reporting requirements

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Find out about restrictions and forfeitures relating to employee share schemes.

ESS - Rollover relief

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Employee Share Schemes foreign income exemption for Australian residents and temporary residents

Work out tax treatment of employee share schemes for temporary residents and Australian residents in foreign service.

ESS - Employee share scheme benefits provided to non-employees

Learn when shares or stapled securities given to non-employees are treated as employee share scheme interests.

QC 82044

Key ESS changes in detail

Understand how tax treatment of employee share schemes (ESS) changed on 1 July 2015.

Last updated 1 October 2025

Changes to tax treatment of ESS

Changes to the tax treatment of employee share schemes (ESS) took effect on 1 July 2015.

These changes apply to ESS interests (shares, stapled securities and rights to acquire them) issued on or after that date. There are changes to some existing rules as well as new concessions for employees of start-up companies.

Employment ceasing on or after 1 July 2022 will no longer be a deferred taxing point.

Changes to existing rules

The main changes to the existing rules are to the:

- timing of the deferred taxing point for ESS interests acquired under tax-deferred schemes, including increasing the maximum deferral to 15 years
- test for significant ownership and the voting rights limitations have been eased
- tax refund, a refund is possible in some circumstances where an employee acquires rights but chooses not to exercise them.

Deferred taxing point

The taxing point in **tax-deferred** schemes has become the earlier of:

- when there is no risk of forfeiting the ESS interests and any restrictions on their sale are lifted
- in the case of rights, when the employee has exercised them and there is no risk of forfeiting the resulting share and no restriction on disposing of that share
- when the employee ceases the relevant employment (employment ceasing on or after 1 July 2022 will no longer be a deferred taxing point.)
- 15 years after the ESS interests were acquired.

Significant ownership test

The significant ownership and voting rights test has changed. All interests in the company, including rights to acquire shares, are taken into account (previously only share ownership was considered). However, an employee can acquire up to 10% ownership in the company or control up to 10% of the voting rights before their holding is considered significant and makes them ineligible for concessional treatment.

Tax refund

A refund of tax paid at the taxing point is possible if an employee acquires rights and later chooses not to exercise them or allows them to be cancelled. However, as before, a refund is not available if the employee share scheme is structured to directly protect the employee from a fall in the market value of the shares.

Concessions for start-up companies

The discount provided for eligible ESS interests won't be taxed under the ESS regime, as long as the eligibility criteria are met.

Any gain or loss on disposal of the rights or shares will be assessed under the capital gains tax regime. When working out if the 50% CGT discount applies, the period of ownership of a share acquired on exercise of a right is taken to have started when the right was acquired.

Eligibility criteria for start-up concessions

In addition to the general conditions that apply to all concessional schemes, the following specific conditions apply to the start-up concession:

Start-up company

Start up companies:

- must not be listed on any stock exchange
- all companies in the corporate group must have been incorporated for less than 10 years
- aggregated annual turnover must not exceed $50 million.

Employer

The employing company must be an Australian resident company.

Scheme

Employees must hold ESS interests for at least 3 years.

ESS interests

A share must be provided at a discount no greater than 15% of the market value.

A right must have an exercise price (or strike price) that is greater than or equal to the market value of an ordinary share in the issuing company.

Assistance for start-up companies

There are approved market valuations methods start-up companies can use to value their unlisted shares.

We have developed a set of standard documents to help start-up companies establish an ESS, including a model option plan and a standard letter for offering employees an ESS interest in the company.

ESS – standard documents for the start-up concession

These templates assist eligible start-up companies to establish and operate an employee share scheme.

Last updated 7 August 2023

Standard document templates to assist eligible start-up companies establish and operate an employee share scheme (ESS).

Standard documents

The standard documents require updates to include amendments to the *Corporations Act 2001* and ASIC Class Order CO 14/1001 that apply from 1 March 2023.

If you want to use the documents prior to published updates, you should seek advice on the suitability of these documents for any offers of ESS interests.

The standard documents are:

- Employee Option Plan (DOCX, 313KB)
- Employee Option Plan offer letter (DOCX, 258KB)
- Employee share schemes: start-up companies (PDF, 398KB) – an instruction guide on how to use the above documents
- Employee Share Plan (DOCX, 315KB)
- Employee Share Plan offer letter (DOCX, 262KB).

Using the standard documents

These standard documents are not designed to meet all the requirements of every company.

The standard Plans and Offer letters have been provided in Word format, so that you can download and alter them to suit your circumstances.

We can't recommend or endorse any one product or service over another and will not be responsible for any loss, damage, cost or expense in connection with using this application.

We have not carried out any testing of the listed applications and do not carry out any form of security testing of developer products or services.

If you intend to use the interactive application, you are encouraged to ask the developers about the security aspects of their products and the services they provide.

For more information on ESS for employers of start-ups, see:

- ESS – Safe harbour valuation methods
- ESS – Employers
- ESS – Reporting requirements for employers

QC 45991

ESS – Safe-harbour valuation methods

Learn how start-up companies with ESS interests can use safe harbour valuation methods to value unlisted shares.

Last updated 1 October 2025

Determine the market value of shares

A start-up company wishing to make an offer of employee share scheme (ESS) interests under an ESS need to determine the market value of its shares to show that it satisfies the conditions of the start-up concession.

Our legislative instrument LI 2025/19: Methods for Valuing Unlisted Shares for the Employee Share Scheme start-up concession provides approved market valuation methods you can use. If you choose to use one of these methods, you have the certainty that we will accept the valuation (referred to as a 'safe-harbour' valuation).

The approved market valuation methods can be used for:

- ESS interests that are in the form of shares – showing that the discount doesn't exceed 15% of the market value of the share at the time it is acquired.
- ESS interests that are in the form of options – showing that the exercise price of the options is at least equal to the market value of the underlying shares when the option is acquired.

Safe harbour methods

The legislative instrument sets out 2 safe harbour methods.

Method one – Comprehensive method

This method allows a company's Chief Financial Officer or a qualified independent valuer to determine the market value of shares. This valuation must take into account a range of commercial and financial factors, including the company's assets, market comparables, control premiums, discounts for lack of marketability, key person risks, and projected future cash flows. To ensure governance and transparency, the valuation must be formally endorsed by the company's board through a written resolution.

Method two – Net tangible asset method

This method offers a simplified approach based on the company's net tangible assets. This option is only available to companies that meet specific eligibility criteria, such as not having raised more than $10 million in capital over the past 12 months, being either not more than 7 years old or classified as a small business entity, and having prepared or intending to prepare a financial report for the relevant year.

Under this method, the company calculates its net tangible assets, adjusts for any preference share obligations, and divides the result by the number of relevant shares on issue.

Using an alternative valuation method

The legislative instrument recognises that companies may sometimes use a valuation method that differs from the 2 approved methods outlined in the instrument. You will still be protected under the instrument if you use an alternative method as long as it produces a market value that is not less than the value that would have resulted from using an approved method that you were eligible to lose.

This flexibility ensures that companies are not penalised for using a more conservative valuation approach, provided it results in a higher or equivalent value. For example, if a company uses a method tailored to its specific circumstances – such as a discounted cash flow model or a valuation prepared for capital raising purposes – and that method produces a higher value than either method one or method two, the valuation will still be considered compliant.

For more information see:

- ESS – Market value of listed shares and stapled securities
- Market valuation for tax purposes

QC 45990

ESS interests with a taxing point before 1 July 2009

Learn about tax rules applying to employee share scheme interests acquired before 1 July 2009.

Last updated 22 April 2020

The tax rules applying to employee share scheme interests (ESS interests) acquired under an ESS before 1 July 2009 that also had a taxing point before 1 July 2009 are different to the current rules.

This information explains those rules – which were contained in former Division 13A of Part III of the *Income Tax Assessment Act 1936* – with examples of some common issues. We recommend you read it in conjunction with the Guide to capital gains tax.

The Division 13A rules were repealed, effective from 14 December 2009. Division 83A of the *Income Tax Assessment Act 1997* contains rules that apply to ESS interests (shares or rights) acquired on or after 1 July 2009.

The Division 83A rules also apply to some shares or rights that were acquired before 1 July 2009 under transitional rules. These shares and rights are known as transitioned interests. However, the Division 13A rules are still relevant to determining if the interests you acquired before 1 July 2009 are transitioned interests. The Division 13A rules continue to apply (despite its repeal) to shares or rights that did not transition to the new rules. The latest possible deferred taxing point for these interests was 30 June 2019. This means there will be no income reportable on these interests in the 2019–20 income year and onwards.

For ESS interests acquired before 1 July 2009 to which a cessation time has not yet happened, the deferred taxing point will be calculated with reference to the rules in Division 13A. However, these ESS interests, as well as all ESS interests acquired on or after 1 July 2009 under Division 83A, will be subject to the new CGT rules outlined under Division 83A. This document contains information about the CGT rules that apply to ESS interests with a cessation time prior to 1 July 2009.

Find out about:

- What are transitioned interests?
- What are not transitioned interests?
- Acquiring shares or rights from an ESS
- Qualifying shares or rights
- Cessation time
- Disposing of shares or rights acquired from an ESS
- Stapled securities and rights to acquire them

See also:

- Employees
- Stapled securities and rights to acquire them

What are transitioned interests?

The new rules in Division 83A apply to shares or rights (ESS interests) that you acquired before 1 July 2009 if:

- they are qualifying shares or rights under the old rules**, and**

- you have not elected to be taxed upfront under the rules, **and**
- a cessation time has not happened to the shares or rights before 1 July 2009 under the old rules.

Under the transitional rules, some of the old rules in Division 13A are preserved. Also, some of the new rules do not apply, or are modified in the way that they apply to a transitioned interest.

What are not transitioned interests?

The old rules continue to apply to:

- a share or right that was not qualifying under the old rules
- a qualifying share or right where you elected to be taxed upfront under the old rules
- a qualifying share or right where a cessation time had happened to the share or right before 1 July 2009 under the old rules.

Acquiring shares or rights from an ESS

You acquire shares or rights from an ESS if the shares or rights are acquired, whether directly or indirectly, in relation to your employment or in relation to any services you provide. If you pay any money, or provide any other consideration, to acquire the shares or rights, the consideration must be less than the market value of the shares or rights at the time you acquire them.

Amounts you forgo under an effective salary sacrifice arrangement (see paragraphs 19 to 23 in TR 2001/10) do not form part of the consideration provided to acquire shares or rights from an ESS.

The date you acquire shares or rights may not necessarily be when the shares or rights are granted or issued to you. You acquire a share or a right when:

- the share or right is transferred to you, other than by a share issue
- in the case of a share, the share is allotted to you
- in the case of a right, your employer or another person creates a right (to acquire a share) in you
- you otherwise acquire a legal interest in the share or right

- you acquire a beneficial interest in the share or right.

In relation to rights, determining the date a right is created in you will depend on the facts of each case. You may receive rights to acquire shares under an individual employment contract or under a broad based employee share plan. Generally, your rights will be acquired from an ESS when your employment contract is entered into or when you accept an offer received under an employee share plan.

However, your rights to acquire shares may also be subject to shareholder approval or your employer may retain the right to determine whether you ultimately receive shares or a cash equivalent. Under these circumstances, you will not acquire a right (to acquire a share) until shareholder approval is given or your employer decides that your rights will be satisfied by shares and not cash.

See also:

- TD 2014/21EC: *Income tax: where a right to acquire a beneficial interest in a share is granted subject to shareholder approval, is the right an 'indeterminate right'* within the meaning of subsection 83A-340(1) of the *Income Tax Assessment Act 1997*?

Under some ESS, you may be able to nominate an associate to acquire the shares or rights. Special rules apply in this circumstance.

The transitional rules affecting ESS include a rule for indeterminate rights. Indeterminate rights are those rights you acquire from an employer where your entitlement to a share or a specific number of shares is uncertain. For example, you may be provided with a right to acquire, at a future time:

- shares with a specified total value, rather than a specified number of shares
- a number of shares to be determined at a later time
- either shares or cash (at the discretion of the employer), or
- shares or a cash equivalent (where the entitlement to shares is subject to shareholder approval).

If you acquired the indeterminate right before 1 July 2009, and the right becomes a right to acquire a share on or after 1 July 2009, the old rules will apply as if the right had always been a right to acquire the share from the time that the indeterminate right was acquired.

So, if the discount on your rights would have been assessable at acquisition, it will need to be included in the income year the rights were acquired. If under the old rules, tax is deferred on the right beyond 1 July 2009, the right will be transitioned into the new rules consistent with other transitioned interests.

Example 1: Acquiring rights

Saskia signs an employment contract with her new employer, Delco Corporate, on 10 March 2005. The contract states that Saskia's remuneration package will consist of a salary, car allowance, cash bonus and 10,000 rights to acquire shares in the company (at no cost to Saskia). The rights to acquire shares, however, are subject to shareholder approval at the next annual general meeting (AGM). If the shareholders do not approve the rights to acquire shares, the contract provides that Saskia will instead receive an equivalent amount of cash remuneration.

On 16 May 2005, the shareholders at the AGM give their approval for the rights to acquire shares.

The point at which Saskia acquires the rights from an ESS is when the rights (to acquire shares) are created 16 May 2005, when the shareholders give their approval.

When are shares or rights considered to be not acquired from an ESS

Shares or rights will not be considered to be acquired from an ESS in **either** of the following situations:

- if you pay money or provide other consideration to acquire shares or rights that is equal to, or more than, their market value at the time they are acquired
- when you exercise rights that you acquired from an ESS – the shares that you acquire from exercising these rights are not considered to also be acquired from an ESS.

While Division 13A does not apply to these shares or rights, the shares or rights may still be assessable under other provisions of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* (including the CGT provisions).

In some circumstances, a right acquired from an ESS that later lapses may also be deemed not to have been acquired.

See also:

- Lapsing of rights

Determining the market value of shares and rights

Division 13A sets out a number of valuation rules to determine the market value of shares or rights acquired from an ESS. The rules that will apply to determine the market value of shares or rights will depend on whether or not shares or rights are listed on an approved stock exchange.

If asked, your employer must provide information to enable you to calculate the market value of shares or rights.

Listed shares or rights

If the shares or rights are traded on an approved stock exchange, you can determine the market value of the shares or rights by using the five-day weighted average, which is the prices at which the shares or rights were traded over a one week period. That is, an average that takes into account the proportional relevance of the volume of shares traded at different prices, ending on the date the shares or rights are being valued for (for example, on the date the shares or rights are acquired).

If, during the one week period, the shares or rights have not been traded, the market value is taken to be the last offer price to buy the shares or rights in that period. If no offers have been made, then the market value of the shares or rights must be determined in accordance with the market valuation rules for unlisted shares or rights.

If listed shares offered from an ESS are acquired in accordance with a wider public offering of shares, different valuation rules may apply.

Unlisted shares or rights

The market value of unlisted shares is determined by **either** of the following:

- an arm’s length value of the share, made by a registered company auditor in a written report
- in accordance with a reasonable method approved by us.

The market value of unlisted rights will be the **greater** of the following two amounts:

- the market value of the underlying shares (on the date the rights are being valued for) less the lowest exercise price. If the lowest exercise price is nil or can't be determined, then the rights are treated as having the same market value as the underlying shares, **or**
- the value determined by using the formula and tables set out in sections 139FJ to FN of the *Income Tax Assessment Act 1936*. Additionally, if the life of the rights is more than 10 years, an arm's length value must also be determined by a qualified valuer in a written report. The arm's length value must be used if it is greater than the value determined using the formulas and tables (based on an exercise period of 10 years).

Tax implications of acquiring shares or rights from an ESS

In addition to any capital gains tax that may apply when you dispose of shares or rights from an ESS, you must include in your assessable income what's known as the 'discount' received on the shares or rights.

Generally, the discount is included in your assessable income in the income year you acquire the shares or rights. The amount of the discount is calculated at the date the shares or rights are acquired and is the difference between the market value of the shares or rights and the consideration, if any, that you provide to acquire them.

However, if the shares or rights are qualifying shares or rights, there are two alternative tax concessions that may be available to you when calculating and including the discount in your assessable income.

See also:

- Qualifying shares or rights

Example 2: Discount assessable on non-qualifying shares

Eliza acquires 800 employee class shares for free from her employer, Qbiz, on 10 March 2008 at a market value of $2.50 per share. The employee class shares are not ordinary shares because they have preferential rights to the payment of dividends. Therefore, they are not qualifying shares and the discount will need to be included in Eliza's assessable income in the year she acquired the shares.

Eliza calculates the discount as:

- market value on acquisition of the shares (800 shares at $2.50 each) is $2,000
- *less* consideration paid to acquire shares is Nil
- discount equals $2,000

Eliza includes the discount of $2,000 in her assessable income for the 2008 income year.

Refer to Example 13 to understand Eliza's CGT implications when she sells the shares.

Tax implications if your associate acquires shares or rights from an ESS

If you negotiate for an associate to acquire shares or rights from an ESS (in relation to your employment or services you provide), the tax law still requires you to include the discount in your assessable income rather than your associate's.

Example 3: Rights allocated to associate

As part of his remuneration package, Derek negotiates for his spouse, Sally, to acquire 700 rights from his employer, D2D Finance Company, on 21 September 2007. The rights provided to Sally are in relation to Derek's employment. As a result, even though Sally acquires the rights from an ESS, Derek will need to include the discount related to these rights in his assessable income for the 2008 income year.

Shares or rights acquired by your associate will not be qualifying shares or rights.

See also:

- Shares or rights acquired by your associate

Lapsing of rights

If you acquire rights from an ESS, you will be treated as never acquiring the rights if **both** of the following two requirements are satisfied:

- you lose the rights without having exercised them, **and**
- the company, in which you had rights to acquire shares, was your employer (or was the holding company of your employer) at the time you acquired the rights.

If you satisfy these requirements and have previously included the discount related to the rights in your assessable income, you can amend your assessment to exclude the discount. The normal time limits for amending prior-year assessments (generally two years) will not apply.

If you negotiated for an associate to acquire the rights, you will not be able to amend prior-year assessments to exclude the discount from your assessable income if the rights are later lost. This is because it is your associate, not you, who acquired the rights, and your associate was not employed by the company when the rights were issued.

Example 4: Rights lapsing

Following on from Example 1, Saskia, an employee of Delco Corporate, acquires 10,000 rights to acquire shares in Delco on 16 May 2005 for nil consideration. One of the conditions of the ESS requires Saskia to forfeit ownership of the rights if Delco's share price does not reach $2 per share within three years of Saskia acquiring the right.

Saskia's rights do not satisfy the conditions to be qualifying rights. This means she must include the discount in her assessable income in the income year she acquires the shares. As a result, Saskia includes the discount on the rights when she lodges her tax return for the 2005 income year.

On 16 May 2008, three years after Saskia acquired the rights, Delco's share price has not reached $2 per share. As per the share scheme conditions, Saskia forfeits ownership of the rights.

Because Saskia has lost the rights without having exercised them and, at the time the rights were originally acquired, she was employed by the company in which she had a right to acquire a share, Saskia satisfies the requirements to be treated as never having acquired the rights.

Accordingly, Saskia requests an amendment to remove the discount from her assessable income for the 2005 year. Even though the request is outside the normal two-year time limit for amending prior-year assessments, the time limit does not apply to the removal of the discount.

Example 5: Alienated rights lapsing

Following on from Example 4, if, instead of acquiring the rights, Saskia had allocated the rights to her spouse, Jason, Saskia would still be required to include the discount related to the rights in her assessable income for the 2005 income year.

However, if Jason forfeits ownership of the rights three years later because Delco’s share price does not reach $2, Saskia will not be able to amend her 2005 assessment to remove the discount related to the rights. This is because Jason does not satisfy the requirements to treat the right as never having been acquired, because he was not employed by Delco at the time he acquired the rights.

Qualifying shares or rights

A share in a company will be a qualifying share if it satisfies all of the following requirements:

- the share is acquired by you from an ESS
- the company is your employer or your employer's holding company
- the shares or rights to shares available from the ESS are ordinary shares or rights to ordinary shares
- after acquisition of the share, you do not hold a legal or beneficial interest of more than 5% of the shares in the company
- after acquiring the share, you are not in a position to cast, or control the casting of, more than 5% of the votes at the company's general

meeting

- when you acquired the share, at least 75% of the permanent employees of your employer were, or at some earlier time had been, entitled to acquire shares or rights to shares from an ESS of your employer or its holding company.

A qualifying right must satisfy the same requirements, except the last requirement above.

Shares or rights acquired by your associate

To be a qualifying share or right, one of the requirements is that the company in which the shares or rights are issued is the employer of the person who acquires the shares or rights (or is the holding company of the employer).

If your associate acquires the shares or rights in relation to your employment or services and is not an employee of the company or holding company issuing the share or right, the shares or rights will not be qualifying shares or rights.

This means that you, as the person required by law to include the discount in your assessable income, must include the discount in the income year in which your associate acquires the shares or rights.

> Example 6: Rights acquired in relation to associate's employment
>
> Following on from Example 3, Sally acquires 700 rights in relation to the employment of her spouse, Derek. These rights are not qualifying rights because Sally is not an employee of D2D Finance Company. As a result, Derek includes the discount on the 700 rights in the income year that Sally acquires the rights, which is the 2008 income year.

Tax concessions available for qualifying shares and rights

The first concession available for qualifying shares or rights is that you can defer including the discount in your assessable income until a later year of income, up to a maximum of 10 years. The year you must include the discount in your assessable income will be the year in which an event, known as a cessation time, occurs.

Instead of deferring the discount, the second concession allows you to elect to be assessed upfront on all qualifying shares or rights you acquired in the income year. By making an election (often referred to as a section 139E election), the discount will be included in your assessable income in the year you acquire the qualifying shares or rights. Under this concession, if certain conditions, known as 'exemption conditions', are satisfied, you are only required to include the discount in your assessable income to the extent that it is greater than $1,000.

The deferral of the discount is the default concession for qualifying shares and rights. This means that, unless you make an election, the discount on all qualifying shares or rights will not be assessed until a cessation time occurs. The $1,000 exemption is not available if the discount is declared at cessation time.

Electing to have qualifying shares or rights assessed in the year you acquire them

For 2008–09, if you want to be assessed upfront on the discount you receive on qualifying shares or rights, you must make an election in your tax return for that year. If you make an election, the election will apply to all qualifying shares or rights you acquired in that income year.

To make an election in your 2008–09 tax return, you must complete two labels at question 24 'Other Income':

- you must indicate 'yes' that you want to make an election, **and**
- you must include the assessable discount amount for all qualifying shares and rights you acquired in the income year.

If you do not make an election, the discount will not be included in your assessable income until the income year in which an event, known as a cessation time occurs.

Making an election at a later time

The Commissioner of Taxation has discretion to allow you to make an election at a later time.

When considering whether to exercise the discretion, the Commissioner will consider the following factors:

- the circumstances which led to you not making the election in the required timeframe for the relevant income year

- your explanation of the time delay between lodging your income tax return and the date of your request to make a late election
- whether it would be fair and equitable in the taxpayer's circumstances for the Commissioner to exercise his discretion.

If you want the ATO to consider allowing you to make a late election, you must make a request in the approved form.

Obtaining exemption for the first $1,000 of the discount

The $1,000 exemption applies if you have elected to be assessed on the discount of qualifying shares or rights upfront, and if the ESS from which you acquire the shares or rights meets the following conditions:

- the scheme did not have any conditions that could result in any employee forfeiting ownership of the shares or rights
- the scheme was operated so that no recipient would be permitted to dispose of the shares or rights (or shares acquired on exercise of the rights) before the earlier of
  - three years after their acquisition (or for shares acquired on exercise of the rights, three years after acquisition of the rights)
  - the time their employment ceased with the employer
- the ESS operated on a non-discriminatory basis (including the provision of financial assistance in respect of the acquisition of shares or rights) meaning:
  - participation in the scheme is open to at least 75% of permanent employees
  - the time for acceptance of each offer is reasonable
  - the essential features of each offer are the same for at least 75% of permanent employees.

If you have acquired separate share or right issues in an income year, and only one issue meets the exemption conditions, the discount can only be reduced in relation to the issue of shares or rights that meets the exemption conditions. Refer to Example 8.

Exemption is automatic in some circumstances

For 2008–09, you are deemed to have made an election if:

- your qualifying shares or rights are from an ESS that meets the exemption conditions, and
- the total discount related to the shares or rights is not more than $1,000.

This means that you are not required to make an election in your tax return for these qualifying shares or rights, nor are you required to include the discount in your assessable income.

See also:

- Example 7

However, if you have acquired shares or rights that meet the exemption conditions, and the discount is more than $1,000, you will still need to make an election as well as return the amount of the discount in excess of the $1,000 exemption in your tax return in the year you acquire the shares or rights.

For income years prior to 2008–09, you still need to make an election before lodging your tax return even if your total discount amount on all qualifying shares or rights acquired in the year is $1,000 or less, and the exemption conditions have been met.

Calculating the discount when you make an election

The discount is calculated as at the date the shares or rights are acquired, and is the market value of the shares or rights less any consideration you provide to acquire the shares or rights. If the ESS from which the shares or rights are acquired meets the exemption conditions, the total discount is also reduced by $1,000.

Example 7: Calculating the discount on qualifying shares assessed upfront

Peter acquires 1,000 qualifying shares for free from his employer, ABC Bank, on 30 August 2008, at a market value of $1 per share. ABC Bank's ESS satisfies the exemption conditions.

Peter calculates the discount as:

- market value on acquisition of the shares (1,000 shares at $1 each) of $1,000
- *less* consideration paid to acquire shares is Nil
- discount equals $1,000
- *less* reduction amount of $1,000
- discount included in assessable income equals is Nil

Because the total discount of the qualifying shares is $1,000 or less and the exemption conditions have been satisfied, Peter is deemed to have made an election to assess the discount upfront in the 2009 income year, the year he acquired the shares. Because the $1,000 exemption has reduced the discount to nil, he does not need to include the discount in his assessable income.

See Example 14 for CGT implications when Peter sells his shares.

Example 8: Calculating the discount on qualifying rights assessed upfront

Shaun acquires 500 qualifying rights for free from his employer, United Power, on 10 September 2008, at a market value of $1 per right. The ESS does not satisfy the exemption conditions.

On 16 October 2008, Shaun begins work with a new unrelated employer, Energy Online, and acquires 500 qualifying rights for free, at a market value of $2 per right. The ESS satisfies the exemption conditions so that the first 1,000 of the discount is not assessable.

When Shaun lodges his tax return for the 2009 year, he makes an election to assess the discount on all qualifying shares and rights upfront.

Shaun calculates his discount as:

- market value of United Power rights at acquisition date (500 rights at $1 each) is $500
- *less* consideration paid to acquire the rights is Nil

- market value of Energy Online rights at acquisition date (500 rights at $2 each) is $1,000
- *less* consideration paid to acquire the rights is Nil
- total discount is $1,500
- *less* reduction amount for Energy Online rights is $1,000
- discount amount included in assessable income equals $500

Shaun includes the discount of $500 in his assessable income for the 2009 year.

See Example 15 to see the CGT implications when Shaun disposes of his rights.

Cessation time

The 'cessation time' will differ, depending on whether shares or rights have certain restrictions or conditions attached to them.

Shares

For shares that have no restrictions preventing their disposal and no conditions that may result in you forfeiting the share, the cessation time is when you acquire the shares.

For shares that do have such restrictions or conditions, the cessation time is the **earliest** of the following:

- when you dispose of the shares
- the later of when the disposal restrictions cease to have effect and the forfeiture conditions cease to have effect in relation to the shares
- when your employment in respect of which the shares were acquired ceases
- 10 years from the date you acquired the shares.

Rights

The cessation time for rights is the **earliest** of the following:

- when you dispose of the rights (other than by exercise)

- when your employment in respect of which the rights were acquired ceases
- when the rights are exercised, if the shares that are acquired by exercising the rights have no restrictions or conditions affecting their subsequent disposal or you forfeiting ownership of the shares
- if there are such restrictions or conditions on the shares acquired by exercising the rights, when the last of the restrictions or conditions cease to have effect
- ten years from the date you acquired the rights.

Disposal restrictions

Disposal restrictions are restrictions imposed by the employer or administrator of the ESS that prevent the employee from disposing of shares for a certain period of time. The time disposal restrictions cease to have effect may be relevant to determining your cessation time.

Disposal restrictions will cease to have effect on the date you are first able to dispose of your shares. If you choose not to dispose of your shares at this time, and at a later time the shares again become restricted, the cessation time will still be the first date on which you were able to dispose of the shares.

Example 9a: Determining the cessation time for rights with disposal restrictions and trading windows

Giles acquires 1,000 rights from his employer Fine Fashion Limited, on 29 October 2006, under an ESS. The rights can be exercised in one year's time and expire after three years. The ESS restricts disposal of the shares resulting from the exercise of the rights for two years after exercise. However, the scheme also provides two trading windows during the restriction period – one on 29 October 2007, and one on 29 October 2008. On those dates, the restrictions are lifted for a period of five working days.

Giles exercises the rights on 5 May 2008. Because he is prevented from disposing of the shares, the cessation time happens on 29 October 2008 provided he is still employed until this time – that is, the disposal restrictions cease to have effect on the first date on which Giles is able to dispose of the shares.

Example 9b: Determining the cessation time for shares or rights where board approval to trade is required

Lisa acquires shares from her employer Xyco Limited, on 29 October 2006, under an ESS. The ESS restricts disposal of the shares for a period of three years. However, the scheme also provides three trading windows during the three-year restriction period which commences on 30 March 2007, 30 March 2008, and 30 March 2009, for a period of five days. In accordance with the employer's policy on insider trading, certain employees must request the Xyco Limited board's approval to dispose of their shares during the trading windows by submitting a request and stating that at the time they do not believe they are in possession of material non-public information.

On 30 March 2007, the first trading window opens. Lisa is an employee covered by the insider trading policy; however, she is not in possession of material non-public information at the time of the trading window. Lisa chooses to keep her shares and does not request approval to dispose of them. Because Lisa is still employed, the cessation time for Lisa's shares will be 30 March 2007 – that is, the first date on which she could have disposed of her shares by requesting approval, even though she chose not to do so. If Lisa was in possession of material non-public information at the time of the trading window, she would still be subject to disposal restrictions until the first time she is able to dispose of her shares.

Calculating the discount at cessation time

The method for calculating the discount at cessation time will depend on whether you dispose of the shares or rights (or the shares acquired as a result of exercising the rights) within 30 days of the cessation time.

If you dispose of the shares or rights at arm’s length within 30 days of cessation time, the discount is calculated as the amount of any consideration you receive for their disposal minus any consideration you provided to acquire the shares or rights.

If you don't dispose of shares or rights at arm's length or within 30 days of the cessation time, the discount is calculated as the market value of the share or right (or the market value of the share acquired as a result of exercising the right) at cessation time minus any consideration you provided to acquire the shares or rights.

In relation to rights, the discount is also reduced by any amount you pay to exercise the right.

Example 10: Calculating the discount on qualifying shares disposed of within 30 days

Joe acquires 1,000 qualifying shares for free from his employer, ABC Bank, on 30 August 2006, at a market value of $1 per share. The shares are subject to disposal restrictions. Joe does not make an election to assess the discount upfront.

On 15 September 2007, Joe ceases employment with ABC Bank and the disposal restrictions on the shares are lifted. Joe sells the shares at arm's length on 20 September 2007 for $5 per share.

Joe has a cessation time on 15 September 2007, the date he ceases employment. Because Joe sells his shares five days later at arm's length, Joe calculates the discount using the consideration he receives when disposing of his shares:

- consideration received for disposal of the shares (1,000 shares at $5 each) is $5,000
- *less* consideration paid to acquire shares is Nil
- discount equals $5,000

Joe includes the discount in his assessable income for the year in which the cessation time occurred, the 2008 income year.

See Example 16 for CGT implications for Joe upon the disposal of the shares.

Example 11: Calculating the discount on qualifying rights not disposed of within 30 days

Margaret acquires 500 qualifying rights for free from her employer, Seekco Mining, on 10 October 2007, at a market value of $1 per right. Margaret does not make an election to assess the discount on the rights upfront.

Margaret exercises the rights on 1 May 2008. She pays an exercise price of $2 per right to acquire 500 shares at a market value of $17 per share. The shares have no restrictions on their disposal. Margaret sells the shares on 13 June 2008 for $18 per share, incurring a brokerage fee of $50 on the sale of the shares.

Margaret has a cessation time of 1 May 2008, on the date she exercises the rights. Because Margaret does not sell the shares she acquires from exercising the rights within 30 days of the cessation time, she calculates the discount using the market value of the shares she acquired at cessation time:

- market value of the shares at cessation time (500 shares at $17 each) is $8,500
- *less* consideration paid to acquire rights is Nil
- consideration paid to exercise the rights (500 rights at $2 each) is $1,000
- discount equals $7,500

Margaret includes the discount of $7,500 in her assessable income for the year in which cessation time occurs, the 2008 income year.

See Example 17 for CGT implications for Margaret when she sells her shares.

Deducting brokerage costs when calculating the discount

You cannot include brokerage costs when determining the amount of the discount to include in your assessable income. However, if you dispose of your shares (including shares that you acquired via the exercise of your rights) or rights within 30 days of the cessation time, any brokerage costs you incur as a result of selling your shares or rights are a deductible expense under section 8-1 of the *Income Tax Assessment Act 1997*.

If you do not dispose of your shares or rights within 30 days of the cessation time, you cannot include brokerage costs as a deductible expense. However, when you dispose of the shares or rights, you will be able to include brokerage costs as part of your cost base when calculating your capital gain or loss.

See also:

- Example 17

Disposing of shares or rights acquired from an ESS

CGT implications

Subdivision 130-D of the *Income Tax Assessment Act 1997* contains special rules for ESS to ensure there is no double taxation on income resulting from the acquisition and disposal of shares or rights acquired from these schemes.

When a CGT event happens to a share or right acquired from an ESS, the capital gain or loss will need to be calculated in accordance with the rules applicable to that event. However, the CGT implications will vary depending on the CGT event that occurs, and whether you have elected to assess the discount upfront or defer assessing the discount until a cessation time occurs.

CGT implications when exercising rights to acquire shares

While a CGT event happens when you exercise rights to acquire shares (CGT event C2: cancellation, surrender or similar ending), any capital gain or loss is disregarded. However, when you dispose of the shares you have acquired through the exercise of the rights, you will need to account for any capital gain or loss.

See also:

- Example 15

Entitlement to the 50% CGT discount

Regardless of how the discount has been assessed, if you hold the shares or rights for 12 months or longer, you are eligible for the

50% discount on any capital gains you make on the disposal of the shares or rights.

CGT implications for shares or rights acquired by your associate

If you negotiate for shares or rights from an ESS (that are provided in relation to your employment or to services you provide) to be acquired by your associate rather than yourself, you will not have any capital gains tax implications. However, as explained in Tax implications if your associate acquires shares or rights from an ESS, you will still be liable to include the income related to acquiring the shares or rights in your assessable income.

Your associate will need to consider the CGT implications when they dispose of the shares or rights.

If you allocate shares or rights to an associate after you have acquired them, you will have CGT implications because you have disposed of the shares or rights by providing them to your associate.

Example 12: CGT implications when rights acquired by associate

Following on from Example 6, Sally acquires 700 rights for nil consideration from D2D Finance Company in the 2008 income year. The rights are provided in relation to her spouse Derek's employment with D2D Finance Company. Derek includes the discount related to the rights in his assessable income for the 2008 income year. Because Derek did not acquire the rights before allocating them to Sally, he does not have any CGT implications.

When Sally disposes of the rights to acquire shares in D2D Finance Company, or when she sells the underlying shares (that she acquires from exercising the rights), she will need to calculate the CGT gain or loss in accordance with the rules applicable to the CGT event that occurs.

CGT implications when disposing of shares or rights on which the discount was assessed upfront

If you are assessed on the discount upfront on your shares or rights, you will need to account for any capital gain or loss when a CGT event happens in relation to those shares or rights.

When calculating the capital gain or loss, the relevant market value to include as the first element of the cost base or reduced cost base will be the market value of the shares or rights on the date you acquired them. The acquisition date of shares, which were attained by exercising rights that were acquired under an ESS, is the date the rights were exercised.

Example 13: CGT implications for non-qualifying shares

Following on from Example 2, Eliza sells her 800 shares on 10 November 2008 for $3 per share, incurring a $50 brokerage fee on the sale. A CGT event – A1 (disposal of CGT asset) – happens on the sale of Eliza's shares.

Eliza works out the cost base of her shares by including their market value on acquisition, $2,000 (800 shares × $2.50), and the $50 brokerage fee.

Eliza's capital gain is:

- capital proceeds (800 shares at $3 each) is $2,400
- *less* cost base
  - market value of the shares (800 shares at $2.50 each) is $2,000
  - brokerage fee is $50
- capital gain equals $350

Eliza includes the capital gain of $350 in her assessable income in the year the CGT event A1 happened, which is the 2009 income year. Eliza cannot use the 50% discount method to calculate her net capital gain because she did not own the shares for at least 12 months.

Example 14: CGT implications for qualifying shares that are assessed upfront

Following on from Example 7, Peter sells his shares on 5 September 2008 for $5 per share, incurring a $50 brokerage fee on the sale. A CGT event – A1 (disposal of CGT asset) – happens on the sale of Peter's shares.

Peter works out the cost base of the shares by including their market value on acquisition, $1,000 (1,000 shares × $1), and the $50 brokerage fee.

Peter's capital gain is:

- capital proceeds (1,000 shares at $5 each) is $5,000
- *less* cost base
  - market value of the shares (1,000 shares at $1 each) is $1,000
  - brokerage fee is $50
- capital gain equals $3,950

Peter includes the capital gain of $3,950 in his assessable income in the year the CGT event A1 happened, which is the 2009 year. Peter cannot use the 50% discount method to calculate his net capital gain because he did not own the shares for more than 12 months.

Example 15: CGT implications for rights that are assessed upfront and on the disposal of the underlying shares

Following on from Example 8, Shaun exercises his rights from United Power on 12 March 2009 and pays an exercise price of $2 per share to acquire 500 shares.

A CGT event – C2 (cancellation, surrender or similar ending) – happens on the exercise of the United Power rights. However, under the CGT rules, the capital gain or capital loss is disregarded.

On the same day, Shaun sells the United Power shares he acquired via the exercise of rights for $4 per share, incurring a

$50 brokerage fee on the sale. A CGT event – A1 (disposal of a CGT asset) – happens when the shares are sold.

Shaun works out the cost base of the shares acquired as a result of exercising the rights by including the market value of the rights on acquisition, $500 (500 rights × $1), the exercise price paid, $1,000 (500 rights × $2) and the $50 brokerage fee.

Shaun's capital gain is:

- capital proceeds (500 shares at $4 each) is $2,000
- *less* cost base:
  - market value of the rights (500 rights at $1 each) is $500
  - exercise price of the rights (500 rights at $2 each) is $1,000
  - brokerage fee is $50
- capital gain equals $450

Shaun includes the capital gain of $450 in his assessable income for the 2009 year. Shaun cannot use the 50% discount method to calculate his net capital gain because he did not own the shares for at least 12 months.

CGT implications when disposing of shares or rights on which the discount was assessed at cessation time

When you are assessed on the discount received on qualifying shares or rights at cessation time, whether there are any CGT implications when you dispose of the shares or rights (or the shares acquired via the exercise of the rights) will depend on how long you hold onto the shares or rights after the cessation time.

The capital gain or loss is disregarded if, within 30 days of cessation time, the following CGT events happen (at arm's length):

- A1 (disposal of CGT asset)
- C2 (cancellation, surrender or similar ending)
- E1 (creating a trust over a CGT asset)
- E2 (transferring a CGT asset to a trust)

- E5 (beneficiary becoming entitled to a trust asset)
- I1 (taxpayer stops being an Australian resident).

The capital gain is disregarded because any change in value on the shares or rights is assessed as the discount at cessation time.

If a CGT event happens to shares or rights after 30 days of the cessation time, you will need to account for any capital gain or loss. When calculating your capital gain or loss, you will need to include the market value of the shares or rights at cessation time as the first element of your cost base or reduced cost base.

Example 16: CGT implications for qualifying shares disposed within 30 days of cessation time

Following on from Example 10, Joe sells his shares on 20 September 2007, five days after he has a cessation time. He receives $5 per share and incurs a brokerage fee of $50 on the sale.

When Joe sells his shares, a CGT event – A1 (disposal of CGT asset) – happens. However, the capital gain or capital loss from the CGT event is disregarded because the sale of the shares happened within 30 days of the cessation time.

Example 17: CGT implications for qualifying rights and underlying shares not disposed of within 30 days of cessation time

Following on from Example 11, Margaret exercises 500 rights on 1 May 2008. She pays an exercise price of $2 per right to acquire 500 shares, at a market value of $17 per share. The shares have no restrictions on their disposal.

When Margaret exercises her rights, a CGT event – C2 (cancellation, surrender or similar ending) – happens on the exercise of the rights. However, under the CGT rules, the capital gain or capital loss is disregarded.

Margaret sells the shares she acquires on 13 June 2008 for $18 per share, incurring a brokerage fee of $50 on the sale of the shares. A CGT event – A1 (disposal of CGT asset) happens when Margaret sells her shares.

Because Margaret did not dispose of the shares she acquired through the exercise of the rights within 30 days of the cessation time, she will need to calculate her CGT gain or loss.

Margaret calculates her cost base for the shares by including their market value on the date she acquired them (which is the cessation time of the rights, being the day the rights are exercised). The market value at cessation time is $8,500 (500 shares × $17). The cost base also includes the brokerage fee of $50.

Margaret's capital gain is:

- capital proceeds (500 shares at $18 each) is $9,000
- *less* cost base
  - market value of the shares (500 shares at $17 each) is $8,500
  - brokerage fee is $50
- capital gain equals $450

Margaret includes the capital gain in her assessable income in the year the CGT event A1 happened, the 2008 income year. Margaret cannot use the 50% CGT discount to calculate her net capital gain because she did not own the shares for at least 12 months.

Stapled securities and rights to acquire them

Stapled securities are created when two or more different securities are contractually bound together so they cannot be sold separately. Many different types of securities can be stapled together. A common example of a stapled security is when a share in a company is stapled to a unit in a finance trust.

From 1 July 2006, the ESS rules also apply to certain stapled securities and rights to acquire stapled securities.

Tax implications of acquiring stapled securities (or rights to acquire them) from an ESS

If you acquire stapled securities, or rights to acquire stapled securities, the ESS rules in Division 13A will assess any discount you receive on the stapled securities or rights to acquire stapled securities if **all** of the following requirements are satisfied:

- you acquire the stapled securities, or the rights to acquire stapled securities, on or after 1 July 2006, in respect of your employment
- each stapled security includes one ordinary share in a company, and one or more interests in a company or unit trust
- the stapled securities are listed for quotation on the official list of the Australian Securities Exchange as a stapled security
- the stapled securities, or the rights to acquire stapled securities, meet the qualifying conditions in Division 13A.

If you satisfy these requirements, Division 13A will apply to the stapled securities, or rights to acquire stapled securities, in the same way as it applies to qualifying shares and rights acquired from ESS. This means that you may be entitled to use the tax concessions available under Division 13A.

See also:

- Tax concessions available for qualifying shares and rights

However, there are some modifications to the qualifying conditions and cessation times for stapled securities and rights to acquire stapled securities. These modifications are further explained below.

If your stapled securities, or rights to acquire stapled securities, do not satisfy all of the above requirements, the individual interests of the stapled securities are treated separately for tax purposes.

Example 18: Non-qualifying stapled securities acquired from an ESS

Ramon acquires 300 stapled securities for free from his employer ABC Co. Each stapled security consists of ordinary shares in ABC Co, and units in the ABC Unit Trust. The stapled securities do not meet the qualifying conditions in Division 13A because Ramon holds more than 5% of the ordinary shares in ABC Co.

Because the stapled securities do not meet the qualifying conditions, Division 13A will not apply to the stapled securities as a whole. Instead, Division 13A will only assess the discount received on the ordinary share component of the stapled securities. The units in the unit trust will be assessable under other provisions of the income tax law.

Qualifying stapled security or a qualifying right to acquire a stapled security

The qualifying conditions that apply to shares or rights acquired from an ESS also apply to stapled securities and rights to acquire stapled securities.

See also:

- Qualifying shares or rights

However, because stapled securities, and rights to acquire stapled securities, can consist of shares or units in different entities, the following qualifying conditions have been modified:

- the requirement that at least 75% of the permanent employees of the employer had been entitled to participate in an ESS is modified so that it only applies to the stapled entity that is your employer, rather than to all of the stapled entities
- the requirement that you do not hold more than 5% legal or beneficial interest in the company is modified so that it is satisfied if you do not hold more than 5% of the shares in any company that is a stapled entity, and more than 5% of the units in any unit trust that is a stapled entity of the stapled security
- the requirement that you do not control more than 5% of the voting rights in the company is modified so that it only applies to your interests in the companies with ordinary shares that form part of the stapled security.

Example 19: Modifications to qualifying conditions

Megan, an employee of Apco Limited, acquires 1,000 stapled securities for free in relation to her employment. Each stapled security comprises an ordinary share in Apco Limited and a unit in the Apco Trust.

80% of Apco Limited's permanent employees have been entitled to participate in an ESS run by the company. In contrast, only 40% of the permanent employees of the trustee of the Apco Trust have been entitled to participate in an ESS.

As an employee of Apco Limited, Megan will satisfy the requirement that at least 75% of employees of her employer were entitled to participate in an ESS.

However, if Megan were an employee of the trustee of the Apco Trust, her stapled securities would not be qualifying because less than 75% of the trustee's employees have been entitled to participate in an ESS.

Cessation time for stapled securities or rights to acquire them

The events that trigger a cessation time for qualifying shares and rights also apply to stapled securities and rights to acquire stapled securities.

See also:

- Cessation time

In addition, stapled securities and rights to acquire stapled securities have two more events that will trigger a cessation time:

- when any part of the stapled security ceases to be stapled together
- when the stapled security ceases to be listed for quotation on the official list of the Australian Securities Exchange as a stapled security.

CGT implications when disposing of stapled securities or rights acquired from an ESS

The CGT rules that apply to qualifying shares and rights also apply to each CGT asset in a stapled security. However, the CGT implications will vary, depending on the CGT event that occurs and whether you have been assessed on the discount from your stapled securities or rights upfront, or have deferred assessing the discount until a cessation time occurs.

- Disposing of shares or rights

For stapled securities or rights to acquire stapled securities that are not assessed under Division 13A, capital gains and losses are determined separately for each security stapled together.

See also:

- Stapled securities
- Guide to capital gains tax
- ESS – Foreign income exemption for Australian residents and temporary residents

For help applying this information to your own situation, phone us on **13 28 61** between 8.00am and 6.00pm, Monday to Friday.

QC 16652

Employee share scheme news and updates

News and updates for lodging ESS reports.

Last updated 7 July 2026

Email alert

Subscribe to our email alert by emailing ato-ess@ato.gov.au. The email alert contains updates on information about employee share scheme (ESS) reporting.

Updates

Approved valuation methods for accessing the ESS start-up concession

Legislative Instrument ESS 2015/1 ceased to be in force as of 1 October 2025 and has been replaced by Legislative Instrument LI 2025/19: Methods for Valuing Unlisted Shares for the Employee Share Scheme start-up concession. The new instrument was introduced to ensure continuity of approved valuation methods for companies offering Employee Share Scheme (ESS) interests under the ESS start-up concession.

LI 2025/19 substantially replicates the provisions of the repealed ESS 2015/1. It continues to provide 2 approved safe harbour valuation methods, now renumbered as Method One (comprehensive method) and Method Two (net tangible assets method). These methods are binding on the Commissioner when applied in accordance with the conditions set out in the instrument.

The new instrument maintains the position that companies can use a different valuation method, as long as it gives a market value that's at least as high as what they would get using one of the approved methods. If it does, that alternative method will be binding on the Commissioner.

For more information see ESS – Safe harbour valuation methods.

New reporting specification for 2017–18

For electronic reporting specification (ERS) reporters, the 2017–18 and subsequent financial years ESS reports must be lodged using the ESS annual report specification v3.1.2.

The File transfer testing and lodging facilities are now available for 2017–18 financial year tests and lodgments.

Online form

The online form has been updated with some improvements and new reporting requirements for the 2017–18 financial year. The online form option is only available to employers reporting up to 50 employees with no more than three schemes to be reported for any employee.

For more information see:

- Lodging files using the online form function
- Online services for business

Common reporting questions

Difference between acquisition date and plan date

- For taxed up front schemes the acquisition date is the same as the plan date.
- For deferral schemes the acquisition date is the grant or offer date.

The plan date is the vesting date or taxing event date in the financial year of reporting.

For more information see ESS – Reporting requirements for employers.

Acquisition Price fields – Do I report the individual price of the ESS interest or the individual price multiplied by the number of interests?

On page 13 of the ESS annual report specification v3.1.2 under the *Description of terms used in data record specifications*, subheading 'N' there is an explanation that any reference to shares or options (a plural amount) is a reference to the cumulative total. For example:

- numbers of shares acquired under a start-up concession – 3,055
- market value of individual shares acquired under a start-up concession – $2.69.

Market value of shares acquired under a start-up concession: $8,217.95. This value is truncated (as only whole dollars are reported), so the value to report in this field is: 8217

We acquire shares on a monthly basis. Can we aggregate the share purchases for the year and report them in one Employee Details Data Record?

No. For the 2017–18 financial year onwards, there is a requirement to separately report the acquisition price for shares acquired under taxed up front and deferral schemes.

As this data will be used by the ATO to support taxpayer voluntary compliance by providing information related to capital gains tax events, each share issue (that is different acquisition date) will need to be reported in a separate *Employee details data record*.

Currently, the field definition for Plan date (6.60 of the ESS annual report specification v3.1.2), provides where there is more than one taxing point during the year, enter the date of the first taxing point.

This concession applied only where all other reportable elements were the same. So if 2 separate share issues have different acquisition dates, they can't be aggregated, even if the *Plan reference identifier* is the same. An update will be made to the *Plan date* definition in the ERS to clarify this reporting requirement.

Common lodgment questions

Unable to see the ESS online form in the ATO online services

Providers reporting through ATO online services must ensure they have the correct permissions set in **Access Manager** to prepare and lodge ESS reports. Your access administrator can log in to **Access Manager** to set these permissions.

Online form not loading

Check that you are using Firefox as the default browser.

Why does a tax agent need to have the income tax role selected to view the online form?

Tax agents are required to make sure their client is registered in their client list. They need an **Income Tax role** added to the client profile to access the ESS online form through Online services for agents.

For more information see How to lodge your ESS annual report electronically.

Common errors

TFNs must not be used as the employee identifier

When reporting ESS data, a unique employee identifier must be reported in the *Employee details data record* for each employee. The unique identifier is referred to as the *Reporting party employee identifier* – see field definition 6.31 of the ESS annual report specification v3.1.2 . An employee's tax file number (TFN) must not be used as the identifier. The employee’s TFN is reported at the *Employee tax file number* field – see field definition 6.30 of the ESS annual report specification v3.1.2.

Using the employee’s TFN as the *Reporting party employee identifier* is a breach of the *Taxation Administration Act 1953* (TAA). Subsection 8WB(1) of the TAA provides that a TFN can’t be used for any purpose other than fulfilling taxation obligations as permitted by law.

If you don't have unique employee identifiers in place, you must allocate each employee with a unique (alphanumeric) identifier to use for ESS reporting purposes. Once an identifier has been allocated to an employee – it must be used as the identifier for the same employee on all subsequent ESS reports.

Reporting for foreign providers

If the Provider of the ESS is an overseas entity, that entity’s details are reported in the *Reporting party identity data record*. The name of the overseas entity must be reported in the *Name* field and the address of the overseas entity must be reported in the address fields, see field definitions 6.7 and 6.22 – 6.26 of the ESS annual report specification v3.1.2. If the overseas entity doesn't have an ABN, the *Australian business number (ABN)* field is zero filled.

If the overseas entity has an ABN and lodges their own report, details for the overseas entity should be provided in the *Intermediary data record* and in the *Reporting party identity data record*.

If the data for an overseas entity is lodged by an Australian affiliate or another third party, details for the affiliate or third party should be provided in the *Intermediary data record*.

Requests for extensions of time to lodge for overseas providers

If asking for an extension of time to lodge for an overseas provider, the requesting email must state the overseas reporting party's name, not the Australian entity.

Lodging the ESS annual report

The ESS annual report is due **14 August**. Both the file transfer and online form reporting methods must be lodged through ATO online services.

For more information see:

- Online services for business
- Online services for agents

Help with lodging

If you need help with lodging, you can contact us by:

- email ato-ess@ato.gov.au
- phone **1800 072 681**.

System maintenance

Details of planned outages and key updates to ATO online services are published at System maintenance.

QC 27281

ESS – Indeterminate rights

Outlines the definition and tax treatment of indeterminate rights.

Last updated 1 April 2022

The definition of indeterminate rights and tax treatment are explained on this page.

What are indeterminate rights

Division 83A of the *Income Tax Assessment Act 1997*:

- contains employee share scheme rules (ESS rules) that apply to shares, rights and stapled securities acquired on or after 1 July 2009
- introduces the concept of an indeterminate right being a beneficial interest in a right that may later become a right to acquire a

beneficial interest in a share

- is taken to have applied as if the right had always been an ESS interest (a right to acquire a share where such a right is acquired after 30 June 2009).

For example, a company may grant rights to acquire:

- shares with a specified total value, rather than a specified number of shares
- an indeterminate number of shares, the number being dependent on the share price at a time in the future
- either shares or cash (at the discretion of your employer).

These rights are known as **indeterminate rights**.

The indeterminate rights may become rights to acquire shares upon the occurrence of certain events, including:

- when shares are provided in satisfaction of the rights
- when the company makes a decision to satisfy the rights with shares
- when the number of shares that will be provided in satisfaction of the rights can be determined.

Examples of what are and are not indeterminate rights

- Example 1: At employer's discretion, employee receives shares
- Example 2: At employer's discretion, employee receives cash
- Example 3: Employee has a deferred taxing point in earlier income year
- Example 4: Indeterminate rights are forfeited or lapse
- Example 5: Number of shares cannot be determined at grant
- Example 6: Rights to shares vest subject to performance conditions
- Example 7: Rights to shares granted subject to shareholder approval
- Example 8: Shareholder approval to grant rights to shares in future

Example 1: At employer's discretion, employee receives shares

Example 1: At employer's discretion, employee receives shares

On 30 March 2012, Tim is granted rights by his employer, Tea Leaf Ltd, to 1,000 shares in Tea Leaf Ltd. However, company management reserves the right to grant Tim the cash value of the shares, rather than actual Tea Leaf Ltd shares.

The rights are provided in relation to Tim's employment with Tea Leaf Ltd, and Tim does not pay anything for them. Tim will forfeit the rights if he ceases employment within three years of the date of grant.

On 31 March 2015, shares are transferred to Tim in satisfaction of his rights.

The rights are not rights to acquire shares at the time they are granted to Tim. However, when the shares are transferred to Tim on 31 March 2015, the ESS rules treat the rights as if they had been rights to acquire shares since 30 March 2012.

Example 2: At employer's discretion, employee receives cash

Example 2: At employer's discretion, employee receives cash

The facts are the same as for Example 1, except that on 31 March 2015 Tim receives cash to satisfy his rights. Tim is not assessed under the ESS rules. Instead, Tim is assessed on the cash received as salary and wages under the relevant provisions of the income tax law in the year in which he receives the cash.

Example 3: Employee has a deferred taxing point in earlier income year

Example 3: Employee has a deferred taxing point in earlier income year

On 15 February 2011, Sofia is granted rights by her employer, Metals Ltd, to acquire either 1,000 shares in Metals Ltd or a cash equivalent. The rights are provided in relation to Sofia's employment with Metals Ltd, and she does not pay anything to acquire the rights.

The rights vest in three years' time if performance hurdles are satisfied. Metals Ltd will decide whether to give Sofia shares or cash once the performance hurdles have been met. Metals Ltd will advise their employees of this decision before the actual transfer of shares or payment of cash.

Sofia ceases employment on 31 March 2013. She is entitled to keep her rights, which remain subject to satisfaction of the same performance hurdles.

On 20 March 2014, Metals Ltd determines that the performance hurdles have been met. They advise Sofia they will transfer shares in Metals Ltd to her in satisfaction of her rights.

The rights are not rights to acquire shares at the time they are granted to Sofia. However, when Metals Ltd make their decision to issue shares on 20 March 2014, the ESS rules treat Sofia's rights that were granted on 15 February 2011 as if they had always been rights to acquire shares.

In this case, the rights were acquired under a tax-deferred scheme. Sofia's taxing point for the rights occurred when she ceased employment on 31 March 2013. She amends her 2012–13 tax return and includes the discount for the rights.

Employment ceasing on or after 1 July 2022 will no longer be a deferred taxing point

Example 4: Indeterminate rights are forfeited or lapse

Example 4: Indeterminate rights are forfeited or lapse

The facts are the same as for Example 3, except that the performance hurdles are not met and Sofia's rights are forfeited. Sofia's rights never become rights to acquire shares, so she is not taxed under the ESS rules.

Example 5: Number of shares cannot be determined at grant

Example 5: Number of shares cannot be determined at grant

On 15 October 2015, Krystal is granted rights under a tax-deferred scheme to acquire shares in her employer, Design Ltd, in three years' time. At the time that Krystal acquires the rights, she holds more than 10% of the shares in Design Ltd. The rights are provided in relation to Krystal's employment with the company – she does not pay anything for the rights.

The rights are indeterminate rights because the number of shares that Krystal is entitled to acquire will be determined on 30 October 2018. This is in accordance with a formula that depends on the share price of the company at that future time. At the time the rights are granted (October 2015), the number of shares that may be acquired cannot be determined.

On 30 October 2018, the number of shares that Krystal is entitled to acquire under the formula is worked out to be 5,000.

The rights are not rights to acquire shares at the time they are granted to Krystal. However, when the number of shares that Krystal is entitled to acquire is determined, the rights become rights to acquire 5,000 shares. The ESS rules apply to the rights as if the rights acquired on 15 October 2015 had always been rights to acquire shares.

Although the rights were granted under a tax-deferred scheme, the conditions for deferral were not satisfied at the time the rights were acquired because Krystal held greater than 10% of the shares in Design Ltd. As a result, the discount for the rights is assessable in the year of acquisition, which is in the 2015–16 income year.

Krystal requests an amendment to her income tax return for 2015–16 income year to include the discount.

Example 6: Rights to shares vest subject to performance conditions

Example 6: Rights to shares vest subject to performance conditions

James is granted 5,000 rights to shares in his employer company, Artco, on 31 May 2015. The rights will vest in three years. The exercise of rights is subject to the company meeting certain performance conditions and James remaining an employee of Artco during the vesting period. James will be entitled to the 5,000 shares if all performance conditions are met; if the performance conditions are only partially met, only a proportionate percentage of the rights will vest. The rights will lapse if performance conditions are not met or James ceases employment within three years of the date of grant.

The rights granted to James are rights to shares, not to indeterminate rights. The rights are subject to real risk of forfeiture, so the rights are granted under a tax-deferred scheme. Any discount in respect of the rights is assessed at the deferred taxing point.

Example 7: Rights to shares granted subject to shareholder approval

Example 7: Rights to shares granted subject to shareholder approval

Kale enters into an employment contract with his employer, Travel Ltd, on 5 May 2014. Under that contract, he is granted rights to acquire 1,000 shares subject to shareholder approval. If shareholder approval is not obtained, the company will pay Kale a cash equivalent. Kale does not pay the company anything for these rights.

The rights in the employment contract are indeterminate rights, not rights to acquire shares at the time they are granted to Kale.

On 10 November 2014, the company holds its AGM and shareholders approve the grant of rights to Kale. The ESS rules apply to Kale's rights as if they had always been rights to acquire shares from the time that Kale entered into the employment contract on 5 May 2014. In this case, the rights are acquired under a taxed-upfront scheme. Kale includes the discount for the rights in his assessable income in the 2013–14 income year, being the year in which he acquired the rights under his employment contract.

For more information, see TD 2016/17 *Income tax: in what circumstances does a contractual right, which is subject to the satisfaction of a condition, become a right to acquire a beneficial interest in a share for the purposes of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*

Example 8: Shareholder approval to grant rights to shares in future

Example 8: Shareholder approval to grant rights to shares in future

The shareholders of Health Research Ltd resolve at the company's AGM on 22 November 2014 to authorise the company to grant rights to acquire shares to key employees, including Brin.

On 15 August 2015, Health Research Ltd enters into a contract with Brin granting her rights to acquire shares in the company.

Brin does not acquire indeterminate rights when the AGM is held. At the AGM, the shareholders resolve to approve the company granting rights to shares in the future. No rights are created in Brin at that time. She acquires rights to shares on 15 August 2015 when she enters into a contract with Health Research Ltd. The ESS rules apply to determine when Brin will be assessed on the rights acquired.

Example 9: A right that only later becomes an indeterminate right

Example 9: A right that only later becomes an indeterminate right

On 1 July 2016, Richard is advised by his employer, Ferries Ltd (Ferries), that he may be entitled to a maximum of $50,000 worth of shares and or cash. To receive this incentive:

- his individual performance must meet management expectations
- he must remain employed by Ferries until 1 July 2018
- Ferries must meet its financial targets
- the Remuneration Board must make a decision to pay incentives to eligible employees for the financial year, by December 2018. This decision is made entirely at the Board's discretion and it is Ferries' intention that no right is granted to Richard before then.

Richard remains employed by Ferries. On 1 August 2018, after Ferries' AGM, he is advised that he has performed to management expectations and Ferries has met its financial targets. The Board decides it will pay Richard the full $50,000 worth of incentives. The Board has yet to decide whether the incentives will be paid in cash, shares or a combination of both.

On 1 December 2018, the Board determines Richard will receive his incentive in the form of $10,000 cash and rights to acquire shares worth $40,000.

On 10 December 2018, Richard receives the cash and rights. Richard must remain with Ferries for a further six months before he can exercise the rights to acquire shares.

As the Board has the complete discretion over whether Richard receives any incentive and, if so, what that incentive will be, he has no right or entitlement on 1 July 2016.

When the Board makes the decision to pay incentives on 1 August 2018 and Richard has met the other conditions to receive his incentive, he has a contractual right to enforce the payment of an incentive at the value of $50,000 at that time.

When the Board later determines Richard will receive $40,000 of rights to acquire shares, the ESS rules treat these rights as if they had been rights to acquire shares since 1 August 2018, when the decision to pay incentives was made.

Example 10: An indeterminate right with limited board discretion

Example 10: An indeterminate right with limited board discretion

On 1 July 2016, Marta is granted rights to a maximum of 100,000 shares by her employer, Tents Ltd (Tents). The rights are provided in relation to Marta's employment with Tents and she does not pay anything for the rights. The rights are subject to a number of conditions, including:

- Marta and Tents must meet certain performance targets.
- Marta must remain employed by Tents until 1 July 2018.
- The Remuneration Board has a discretion to reduce, in part or in full, the number of rights that would otherwise vest (having satisfied the other conditions) in certain circumstances.

Marta remains employed by Tents. On 1 August 2018 she is advised that all of the performance targets have been met and the Board has determined that only 80,000 rights will vest on that date. (That is, the Board exercised its discretion to reduce the number of rights that will vest). Marta now has 80,000 rights to acquire shares in Tents.

The rights granted on 1 July 2016 are conditional and also subject to the exercise of the Board's discretion. Marta does not have any rights to acquire shares at that time.

When Marta is advised on 1 August 2018 that her 80,000 rights have vested, the ESS rules treat those rights as if they had always been rights to acquire shares, from 1 July 2016.

Example 11: Creation of indeterminate right at beginning of performance period, employee receives cash or shares

Example 11: Creation of indeterminate right at beginning of performance period, employee receives cash or shares

On 1 July 2016 Raj, an employee of Ultra Research Ltd (Ultra Research), is provided with an award letter advising of his eligibility to participate in the company's incentive scheme. The award letter states that Raj will potentially receive cash and shares subject to the terms of the scheme. The rights are provided in relation to Raj's employment with Ultra Research and he does not pay anything to acquire the rights.

Raj's maximum incentive under the scheme is $50,000. He will receive this as 50% cash and 50% shares, to the extent that he meets specific performance goals for the financial year. The Remuneration Board has a discretion under the scheme to determine the level of performance and resulting incentive. However, Ultra Research's intention is that participants in the incentive scheme receive a conditional right to receive cash and shares when they are given the award letter at the start of the year.

In August 2017, Raj is advised that he has met all of his performance goals and his conditional entitlement has vested in full. In September 2017, Raj receives $25,000 cash and 5,000 Ultra Research shares valued at a total of $25,000 (based on Ultra Research's share price in September 2017). Under the terms of the scheme, Raj cannot sell his shares for a further 12 months.

On 1 July 2016, Raj acquired a right which comprised of a conditional right to receive up to $25,000 in cash and up to $25,000 of Ultra Research shares. When the number of shares is determined in September 2017, the ESS rules treat the original right acquired on 1 July 2016 as if it had always been rights to acquire 5,000 Ultra Research shares.

Example 12: Creation of indeterminate right at beginning of performance period, employee receives shares

Example 12: Creation of indeterminate right at beginning of performance period, employee receives shares

Assume in Example 11 that Raj's award letter of 1 July 2016 had advised the potential award of $50,000 would be wholly satisfied in shares.

On 1 July 2016, Raj acquires an indeterminate right which is a conditional right to receive up to $50,000 of Ultra Research shares at a later date. When the number of shares is determined at that later date, the ESS rules treat Raj's right, granted on 1 July 2016, as if it had always been a right to acquire that number of shares.

Transitional treatment of indeterminate rights

What are transitioned interests?

Transitional interests are shares or rights to shares that you acquired under an employee share scheme before 1 July 2009 if all of the following apply:

- they are qualifying shares or rights under the rules in former Division 13A of the *Income Tax Assessment Act 1936*
- the shares or rights are not covered by an election under the former Division 13A rules
- a cessation time has not happened to the shares or rights before 1 July 2009 under the former Division 13A rules.

Under the transitional rules, some of the rules in former Division 13A are preserved. Also, some of the rules in Division 83A do not apply, or are modified in the way that they apply to a transitioned interest.

How do the transitional provisions apply to indeterminate rights?

If you received indeterminate rights before 1 July 2009 that are later treated as rights to acquire shares under an employee share scheme after 1 July 2009, you must include the discount you received on those rights as part of your assessable income.

The year in which you include the discount depends upon whether the indeterminate rights are treated as qualifying rights and whether you elected to be taxed upfront for the year you acquired the indeterminate rights. If the former Division 13A rules result in tax being deferred to a time after 1 July 2009, the rights will be transitioned into the Division 83A rules and treated like other ESS interests as detailed above.

As a result, at the time the indeterminate rights become rights to acquire shares, you may be required to amend your income tax assessment for an earlier year to include the discount amount, either for the year in which the rights were acquired or in the year in which the cessation time or deferred taxing point occurred.

Section 139E elections

If you acquired qualifying shares or rights before 1 July 2009, the default taxation position was that you were assessable on any discount given at the cessation time. The former Division 13A rules gave you the opportunity to make an election under section 139E to have the discount given in relation to qualifying shares or rights assessed in the income year of acquisition. When an election is made, it operates to assess the discount given in relation to all qualifying shares and rights you acquired in that year.

Where a taxpayer fails to make the section 139E election either at the right time or in the approved form, they can seek the Commissioner of Taxation's discretion to accept a later election. If the discretion is exercised, the taxpayer may then make the section 139E election to have the discount assessed in the income year of acquisition.

There is no provision in the tax law or any other law administered by the Commissioner for the taxpayer to revoke an election made, nor does the Commissioner have the power to revoke the election.

Qualifying and non-qualifying shares and rights

A share in a company will be a qualifying share under the former Division 13A rules if it satisfies **all** of the following requirements:

- the share is acquired by you under an employee share scheme
- the company is your employer or your employer's holding company
- the shares or rights to shares available from the employee share scheme are ordinary shares or rights to ordinary shares

- after acquisition of the share, you do not hold a legal or beneficial interest of more than 5% of the shares in the company
- after acquiring the share you are not in a position to cast, or control the casting of, more than 5% of the votes in the company's general meeting
- when you acquired the share, at least 75% of the permanent employees of your employer were, or at some earlier time had been, entitled to acquire shares or rights to shares from an employee share scheme of your employer or its holding company.

A qualifying right must satisfy the same requirements, except the last requirement above.

For more information on the application of the previous ESS rules, see ESS interests with a taxing point before 1 July 2009.

Election made in the year the indeterminate rights were acquired

If you acquired shares or rights in addition to your indeterminate rights in an income year before 2009–10 and you made a section 139E election in respect of the shares or rights, you must amend your earlier year's income tax return to include the discount given in relation to your indeterminate rights when they become rights to acquire shares.

Example: Taxpayer makes an election in the year in which they acquired the indeterminate rights

Sharon acquires 1,000 qualifying shares and a number of indeterminate rights in the 2008–09 income year. She makes a section 139E election for that income year and the discount for the 1,000 qualifying shares is included in her assessable income.

In the 2009–10 income year, Sharon's indeterminate rights become rights to shares, and she receives another 1,000 shares. Under the transitional provisions, her indeterminate rights are considered to have been acquired in the 2008–09 income year. Because Sharon made a section 139E election for the 2008–09 income year, she amends her assessment for the 2008–09 income year to include the discount in relation to those indeterminate rights in the acquisition year.

Indeterminate rights acquired before 1 July 2009 are non-qualifying when they become rights to shares

If any shares or rights you receive are non-qualifying, any discount amounts will be assessable in the year of acquisition. As a result, if you acquired indeterminate rights that become rights to shares in a later income year, you must amend your earlier year's income tax assessment to include the discount given in relation to your indeterminate rights, if those rights to shares are considered non-qualifying.

Cessation time before 1 July 2009 – indeterminate rights became rights to shares after 1 July 2009

Where you receive indeterminate rights, and a cessation time has occurred before the indeterminate rights become rights to shares, the taxing point will be the date of cessation, provided the rights are qualifying rights and you did not make a section 139E election.

Where a section 139E election was made for the year the indeterminate rights were acquired, the taxing point will be in the year of acquisition.

Example: Taxpayer allowed to keep indeterminate rights after resignation

Ben acquires 1,000 qualifying shares and a number of indeterminate rights in the 2007–08 income year. Ben resigns from his employment in the 2008–09 income year and is allowed to keep the indeterminate rights.

In the 2011–12 income year, Ben's indeterminate rights become qualifying rights to shares, and he receives another 1,000 shares.

Under the transitional provisions, Ben's indeterminate rights are considered to have been acquired in the 2007–08 income year. Because the rights are qualifying rights, and Ben did not make a section 139E election for that income year, his indeterminate rights are taxed at the cessation time, which is termination of employment. As a result, Ben amends his assessment for the 2008–09 income year to include the discount given.

Taxpayer received only indeterminate rights and would like to make a later election

Where you only received indeterminate rights in an income year prior to 1 July 2009, and those rights later become qualifying rights to acquire shares after 30 June 2009, you may request the Commissioner's discretion to allow a later election to be made for the acquisition year.

The Commissioner will exercise the discretion on a case-by-case basis.

Example: Taxpayer received only indeterminate rights and would like to make a later election

Michael is granted indeterminate rights in the 2008–09 income year. He does not acquire any other employee share scheme interests in that income year and, as a result, he can not make a section 139E election.

In 2010–11, the indeterminate rights became qualifying rights to acquire shares and are taken to have been acquired in the 2008–09 year. Michael may request the Commissioner's discretion to allow a later section 139E election for the year of acquisition.

The Commissioner will exercise their discretion on a case-by-case basis.

Taxpayer was deemed to have made an election in the year they acquired indeterminate rights

For the 2008–09 income year only, you are deemed to have made an election if you acquired qualifying shares or rights under an employee share scheme that meet the exemption conditions and the total discount related to the shares or rights is not more than $1,000. This means that you are not required to make an election in your tax return for these qualifying shares or rights, nor are you required to include the discount in your assessable income.

In order to be deemed to have made an election in the 2008–09 income year, the employee share scheme under which the shares or rights are acquired must meet **all** of the following conditions:

- The scheme did not have any conditions that could result in any employee forfeiting ownership of the shares or rights.
- The scheme was operated so that no recipient would be permitted to dispose of the shares or rights (or shares acquired on exercise of the rights) before the earlier of
  - three years after their acquisition (or for shares acquired on exercise of the rights, three years after acquisition of the rights)
  - the time the employee's employment ceased with the employer.
- The employee share scheme operated on a non-discriminatory basis (including the provision of financial assistance in respect of the acquisition of shares or rights), which means that
  - participation in the scheme is open to at least 75% of permanent employees
  - the time for acceptance of each offer is reasonable
  - the essential features of each offer are the same for at least 75% of permanent employees.

Where you acquire shares or rights with a total discount of less than $1,000 under a scheme that meets the exemption conditions, in the 2008–09 income year, you are deemed to have made an election under section 139E.

If, when the indeterminate rights later become rights to acquire shares and the total discount in the acquisition year increases to more than $1,000, you will no longer be deemed to have made an election.

As a result, where the rights are qualifying, you will either have to request the Commissioner's discretion to allow a later election or amend the relevant income tax assessments to include the discount income in the year in which the cessation time occurred. If a later election is not requested, the discount in respect of the shares or rights acquired under a scheme that met the exemption conditions will be assessable in the year in which the cessation time occurred.

Shortfall interest charge – for indeterminate rights acquired before 1 July 2009

Where your amendment results in a tax shortfall amount, you may be liable to interest charges on the shortfall. However, remission of interest charges will be considered with your amendment request.

Where you request an amendment to your income tax assessment to include income from indeterminate rights, shortfall interest will generally be remitted in full where you did so because of **one** of the following circumstances:

- you made a section 139E election in the income year in which you acquired the indeterminate rights
- your indeterminate rights are not qualifying and the discount must be included in the acquisition year
- you had a cessation time or deferred taxing point in an income year before the year in which your indeterminate rights became rights to acquire shares and the discount income is assessable in that earlier income year.

Where we amend your income tax assessment to include income from indeterminate rights as a result of allowing a later election, we will generally remit the shortfall interest in full to the extent that it relates to the discount included for the indeterminate rights.

In these circumstances, the Commissioner will remit the shortfall interest to the **earlier** of either:

- the time when the amended assessment is made
- the due date for lodgment (or within such further time as the Commissioner allows) following the income year that the indeterminate rights became rights to shares.

If we allow a later section 139E election in circumstances where you would have had a cessation time or deferred taxing point in an income year prior to your rights becoming rights to shares, we will generally remit the shortfall interest as follows.

The shortfall interest will be remitted in full from the time that income tax was due to be paid on the assessment for the year in which the cessation time or deferred taxing point occurred until the **earlier** of either:

- the time when the amended assessment is made
- the due date for lodgment (or within such further time as the Commissioner allows) following the income year that the

indeterminate rights became rights to shares.

Employer reporting obligations

From 1 July 2009, as an employer, you are subject to reporting obligations if, under an employee share scheme, you provide ESS interests to your employees or to their associates. These reporting obligations also apply to indeterminate rights.

Timing for reporting of indeterminate rights

Transitioned interests

If your employee acquires rights before 1 July 2009, which after 30 June 2009 become rights to acquire shares that are qualifying, and a possible cessation time happens to those rights after 30 June 2009 (whether or not the employee made an election), you are required to provide an ESS statement to your employees. You also need to provide an ESS annual report to the Commissioner for the income year in which the possible cessation time occurs.

There is no reporting requirement if the rights are not qualifying, or if the cessation time for the rights occurred before 1 July 2009.

For more information on the application of the previous ESS rules, see ESS interests with a taxing point before 1 July 2009.

Taxed-upfront scheme

If, after 30 June 2009, your employee acquires indeterminate rights which later become rights to acquire shares under a taxed-upfront scheme, you must:

- if the indeterminate rights become rights to shares in the same income year in which the employee acquired the indeterminate rights, give the information to the employee in an ESS statement by 14 July and to the Commissioner in the ESS annual report by 14 August after the end of the income year, and
- if the indeterminate rights become rights to shares after the end of the income year in which the employee acquired the indeterminate rights, give the employee an amended ESS statement and give the Commissioner an amended ESS annual report for the acquisition

year within 30 days of the indeterminate rights becoming rights to shares.

Tax-deferred scheme

If, after 30 June 2009, your employee acquires indeterminate rights which later become rights to shares under a tax-deferred scheme, you must:

- If the deferred taxing point occurs in a financial year **before** the indeterminate rights become rights to shares
  - give the employee an amended ESS statement for the year in which the deferred taxing point occurred, within 30 days of the indeterminate rights becoming rights to shares, and
  - give us an amended ESS annual report for the year in which the deferred taxing point occurred, within 30 days of the indeterminate rights becoming rights to shares.

- If the deferred taxing point occurs **during** the income year in which the indeterminate rights become rights to shares
  - give the employee information on the rights in their ESS statement by 14 July
  - give us information on the rights in the ESS annual report before 14 August.

- If the deferred taxing point occurs **after** the income year in which the indeterminate rights become rights to shares
  - give the employee information on the rights in their ESS statement for the year in which the deferred taxing point occurs, and
  - give us information on the rights in the ESS annual report for the year in which the deferred taxing point occurs.

ESS – Rollover relief

Tax relief under the employee share scheme (ESS) rules if you received replacement shares or rights.

Last updated 7 February 2017

If you acquired shares or rights under an employee share scheme (ESS) and a corporate restructure or takeover happens, tax relief may be available under the ESS rules if you received replacement shares or rights.

From 1 July 2004 rollover relief applies if all of the following occur:

- you acquired shares, stapled securities or rights (including options) to acquire them (ESS interests) under an employee share scheme (ESS) and have deferred declaring the discount on those ESS interests as income until the cessation time or deferred taxing point
- there is a 100% corporate takeover or a corporate restructure that is a merger, a demerger or other form of restructure that results in you acquiring replacement shares or rights in the new company
- as a result of the corporate takeover or restructure, your ESS interests were replaced, wholly or partly, by ESS interests in one or more companies (the new company) that match the ESS interests you held in an old company or group (the old company)
- as a result of the corporate takeover or restructure, you no longer hold the ESS interests in the old company
- after the corporate takeover or restructure, you are an employee of
  - the new company
  - a subsidiary of the new company
  - a holding company of the new company
  - a subsidiary of the holding company of the new company
- without rollover relief, you would have had a cessation time or deferred taxing point because of the corporate takeover or restructure.

Rollover relief may also be available if:

- you acquired ESS interests before 1 July 2009 and made an election to include the discount as income in the year that you acquired the ESS interests, or
- you acquired the ESS interests under a section 26AAC ITAA 1936 ESS, and
- you were subject to a corporate restructure.

Before 1 July 2004, a corporate restructure could trigger a cessation time if you disposed of your ESS interests in the old company or your employment ceased at the time of the corporate restructure. The law has been changed so that ESS interests held by you may no longer have a cessation time as a result of a corporate restructure that happens after 30 June 2004.

Rollover relief conditions

From 1 July 2006 the ESS rules, and related capital gains tax treatment, will apply to certain stapled securities that both:

- include an ordinary share (acquired after 30 June 2006)
- are listed for quotation on the official list of the Australian Securities Exchange.

If you acquire qualifying ESS interests (ESS interests that meet certain qualifying conditions), you will not be required to declare the discount on those ESS interests as assessable income until cessation time (up to 10 years from the date of acquisition – earlier if certain events happen). Alternatively, you can elect to declare the discount as income in the year in which you acquired the ESS interests.

The rules are different depending on when you acquired your ESS interests and when the takeover or restructure affecting them occurred.

Acquisition before 1 July 2009, takeover or restructure before 1 July 2009

Where you have not elected to declare the discount at acquisition and a cessation time has not already occurred in relation to your ESS interests in the old company, you can receive rollover relief where a corporate takeover or restructure results in those ESS interests being replaced by ESS interests in the new company. Rollover relief applies if your replacement ESS interests:

- match the ESS interests in the old company, and
- meet certain conditions.

Your replacement ESS interests in the new company that are matching ESS interests are treated as if they are a continuation of your ESS interests in the old company. You can continue to defer declaring the discount as income for up to 10 years after the time you acquired the original ESS interests in the old company.

Acquisition after 30 June 2009, takeover or restructure after 30 June 2009

If you acquire ESS interests, you are required to report the discount as income received at acquisition. However, where specified criteria are met, you may be eligible to defer declaring the discount. The discount on those ESS interests will be reported at a deferred taxing point.

If you have deferred declaring the discount as income and a deferred taxing point has not already occurred in relation to your ESS interests in the old company, you can receive rollover relief where a corporate takeover or restructure results in those ESS interests being replaced by ESS interests in the new company. Rollover relief applies if your replacement ESS interests:

- match the ESS interests in the old company, and
- meet certain conditions under the new ESS provisions.

Your replacement ESS interests in the new company that are matching ESS interests are treated as if they are a continuation of your ESS interests in the old company.

You can continue to defer declaring the discount as income for up to 15 years (seven years for ESS interests acquired before 1 July 2015) after you acquired the original shares or rights in the old company.

Acquisition before 1 July 2009, takeover or restructure after 30 June 2009

Where a takeover or restructure occurs after 30 June 2009 to ESS interests acquired before 1 July 2009, follow the rules for ESS interests acquired after 30 June 2009.

Rollover relief FAQs

Frequently asked questions about rollover relief include:

Does rollover relief apply to all types of corporate takeovers or restructures?

No. Rollover relief does not apply to all types of corporate takeovers or restructures. It applies to 100% takeovers, mergers, demergers or other forms of restructure that result in you acquiring replacement ESS interests in the new company.

What are matching ESS interests?

Matching ESS interests are the ESS interests you received in the new company that replace the ESS interests you had before the corporate takeover or restructure.

To be eligible to continue to defer your discount, the value of matching ESS interests, together with any cash or other consideration provided to you, should be no more than the value of your ESS interests in the old company immediately before the corporate takeover or restructure happened.

In relation to stapled securities or rights to acquire stapled securities, rollover relief can also apply to the replacement of:

- a share with a stapled security
- a stapled security with a different stapled security, and
- a stapled security with a share.

Are there conditions that need to be met for rollover relief to apply?

Yes. The conditions that need to be met for rollover relief to apply to you are all of the following:

- immediately before the corporate takeover or restructure, you held shares or rights in the old company that you acquired under an ESS
- at or about the time you acquired the matching ESS interests, you were an employee of the new company (or its holding company or subsidiary)
- your matching ESS interests are ordinary shares or rights to acquire ordinary shares
- without the rollover relief, you would have had a cessation time or deferred taxing point resulting from the corporate takeover or restructure, and
- at the time you acquired the matching ESS interests
  - you did not hold a legal or beneficial interest in more than 10% of the shares in the new company (5% if you acquired the interests before 1 July 2015)
  - you did not control more than 10% of the maximum voting rights in the new company (5% if you acquired the interests before 1 July 2015).
  - Your 10% ownership and voting rights includes the ownership and voting rights of your associates. It also includes the ownership of shares and the voting rights you would have if you exercised any rights you hold to acquire shares in the new company.

How does the rollover relief operate?

On a corporate takeover or restructure, if you receive matching ESS interests in the new company that replace ESS interests in the old company and the conditions for rollover relief are satisfied, rollover relief will be provided by treating your:

- matching ESS interests as if they were a continuation of your ESS interests in the old company, and
- employment with the new company (or its holding company or subsidiary) as a continuation of your employment in the old company (or its subsidiary).

Does rollover relief apply if you receive matching ESS interests, cash and other consideration in a corporate takeover or restructure?

Yes. Rollover relief applies to the extent that your matching ESS interests are regarded as a continuation of your ESS interests in the old company. You will have a cessation time or deferred taxing point for your ESS interests in the old company to the extent that you receive for the disposal of those ESS interests:

- cash or other consideration, or
- matching ESS interests that are not treated as a continuation of your ESS interests in the old company - for example, if you are not an employee of the new company (or the new company's holding company, subsidiary or subsidiary of its holding company).

How is a payment by you for ESS interests in the old company apportioned?

Where you paid an amount to acquire ESS interests in the old company, the payment is apportioned between:

- your matching ESS interests in the new company, that are treated as a continuation of your ESS interests in the old company, and
- anything else that matches your ESS interests in the old company, including:
  - cash or other consideration you received under the corporate takeover or restructure
  - other matching ESS interests you hold in companies (including the old company) immediately after the corporate takeover or

restructure.

The apportionment is based on their market values immediately after the corporate takeover or restructure. This allows you to apportion your payment between your ESS interests in the old company that have rollover relief and those that have a cessation time or deferred taxing point.

Where you acquired different parcels of ESS interests in the old company at different prices, you need to apportion the payment based on an average of those prices. (See Examples to demonstrate how this applies to you.)

Will rollover relief be available where the matching ESS interests do not have the same restrictions or conditions as the ESS interests in the old company?

If you acquire matching ESS interests before 1 July 2009 and they do not have the same restrictions or conditions attached to them, rollover relief is still available provided you satisfy the conditions for rollover. Relief will be available for you until the cessation time or deferred taxing point occurs.

For matching ESS interests acquired after 30 June 2009, rollover relief will only apply where the new interests can reasonably be regarded as matching the old interests.

Will you have capital gains tax (CGT) consequences from the corporate restructure where rollover relief applies?

No. You disregard any capital gain or loss that results from the happening of a CGT event on a corporate takeover or restructure where rollover relief applies to you.

Examples – rollover relief

Example 1: Application of rollover relief to takeovers

Fred acquires 1,000 shares in company A under an ESS. He defers declaring his discount as income. Two years later, company B buys all shares in company A under a takeover. Fred's shares in company A which had a market value of $1 at the takeover time are replaced with 2,000 shares in company B which had a market value of $0.50 at the takeover time. Following the takeover, Fred is employed by company B. Fred satisfies the conditions for rollover relief.

Before takeover	After takeover
Company A Fred: • employed by company A • holds 1,000 × $1 shares in company A.	**Company B** Fred: • employed by company B • holds 2,000 × $0.50 shares in company B.

Fred is entitled to rollover relief. This is achieved by treating:

- the 2,000 matching shares in company B as if they were a continuation of the 1,000 shares in company A
- his employment with company B as a continuation of his employment with company A.

Example 2: Application of rollover relief to restructure

Steve acquires 1,000 shares in company D under an ESS for $500. He defers declaring his discount as income.

Three years later, company E buys all shares in company D under a takeover providing consideration of 80% shares and 20% cash.

Steve's 1,000 shares in company D which had a market value of $1 at the takeover time are replaced with 1,600 shares in company E which had a market value of $0.50 at the takeover time and $200 cash. Following the takeover, Steve is employed by company E.

Before takeover	After takeover

Company D	Company E
Steve: • employed by company D • holds 1,000 × $1 shares in company D.	Steve: • employed by company E • holds 1,600 × $0.50 shares in company E and $200 cash.

Steve's tax position after the restructure is:

- the 1,600 matching shares in company E – rollover relief applies as these shares are treated as if they were a continuation of the 800 shares in company D (80% of 1,000 shares) and his employment with company E is treated as a continuation of his employment with company D.
- the $200 cash – a cessation time will occur for 200 shares in company D (20% of 1,000 shares) because these shares were replaced by cash. The $200 cash matches the value of the 200 shares in company D (200 shares × $1).

  As Steve paid $500 for the 1,000 shares in company D, he will apportion this payment as follows:

- $400 (80% of $500) to the shares in company D that received rollover relief
- $100 (20% of $500) to the shares in company D that have a cessation time or deferred taxing point. Steve will include a discount of $100 ($200 less $100) in his assessable income in the income year of the takeover.

Example 3: Application of rollover relief to restructures

Julie acquires 1,000 shares in company X under an ESS for $1,000. She defers declaring her discount as income.

Company X is subsequently restructured, with 60% becoming company Y and 40% becoming company Z.

Julie is employed by company Y after the restructure. Julie's 1,000 shares in company X which had a market value of $8 at the restructure time are replaced with 1,200 matching shares in company Y which had a market value of $4 at the restructure time and 800 matching shares in company Z which had a market value of $4 at the restructure time.

Before takeover	After takeover
Company X Julie: • employed by company X • holds 1,000 × $8 shares in company X.	**Company Y** Julie: • employed by company Y • holds 1,200 × $4 shares in company Y. Company Z Julie: • holds 800 × $4 shares in company Z.

Julie's tax position after the restructure is:

- the 1,200 matching shares in company Y – rollover relief applies as these shares are treated as if they were a continuation of the 600 shares in company X (60% of the 1,000 shares) and her employment with company Y is treated as a continuation of employment with company X
- the 800 matching shares in company Z – a cessation time or deferred taxing point will occur for the 400 shares in company X (40% of 1,000 shares) because there is no continuation of employment in company X.

  As Julie paid $1,000 for the 1,000 shares in company X, Julie will apportion this payment as follows:

- $600 (60% of $1,000) to the shares in company X that received rollover relief
- $400 (40% of $1,000) to the shares in company X that have a cessation time or deferred taxing point. Julie will include a discount of $2,800 ($4 × 800 shares in company Z less $400)

in her assessable income in the income year of the restructure.

See also:

- ESS – Employees
- ESS interests with a taxing point before 1 July 2009

QC 27176

ESS – Foreign income exemption for Australian residents and temporary residents

Work out tax treatment of employee share schemes for temporary residents and Australian residents in foreign service.

Last updated 7 May 2020

This page explains the tax treatment of employee share schemes (ESS) for temporary residents and Australian residents engaging in foreign service.

You will not have to pay tax on most of your foreign service income if you are either:

- an individual who is a resident of Australia for tax purposes
- satisfy the requirements of being a temporary resident.

Temporary residents and employee share schemes

You are a temporary resident of Australia if you hold a temporary visa granted under the *Migration Act 1958* and neither you nor your spouse are Australian residents under the *Social Security Act 1991*.

Some companies encourage their employees to take part in employee share schemes (ESS). This is where they acquire shares, stapled securities, or rights to acquire them (ESS interests), at a discount.

When an employee who is a temporary resident acquires ESS interests for their employment before or after coming to Australia, the discount for employment services performed in Australia is taxed in accordance with ESS rules.

If part of the employment under which the employee received the ESS interests is performed outside Australia, only a portion of the discount is taxed in Australia. This is the case whether the discount is taxed on acquisition of the ESS interests, when the person becomes employed in Australia, or at a later time.

See also:

- Foreign income exemption for temporary residents – introduction
- Employees – ESS

Temporary residents who become employees in Australia

When an employee who is a temporary resident acquires ESS interests before coming to Australia and continues the employment or service connected to the ESS interests whilst in Australia, ESS rules may apply from the time they begin work in Australia.

If you are a temporary resident, look at your own circumstances in conjunction with your employee share plan to determine whether the time after you became an employee in Australia is related to your ESS interests.

You will not be taxed under ESS rules if, when you become an employee in Australia, no forfeiture conditions remain on the ESS interests you hold. However, if a condition of your employee share plan is that ESS interests may be forfeited unless you undertake further employment or services, a portion of the discount will generally be assessable in Australia under the ESS rules.

The ESS interests will be assessed either:

- in the year you become an employee in Australia for the first time
- where the ESS interests were acquired before 1 July 2009 – at a cessation time for qualifying ESS interests – where a section 139E

election was not made (when you first became an employee in Australia)

- where the ESS interests acquired after 30 June 2009 – at a deferred taxing point.

If the ESS interests are assessed in the year you became an employee in Australia, the discount will be calculated by reference to the market value at the time you originally acquired the ESS interests.

Capital gains tax (CGT) implications

Once the discount for an ESS interest has been taxed under the ESS rules, any future gain or loss is then taxed under the capital gains tax (CGT) regime or other rules such as the trading stock provisions. A capital gain or loss will only arise when a CGT event occurs, such as the sale of the ESS interest or your departure from Australia.

The consequences of the CGT event depend on whether:

- the ESS interest has the necessary connection with Australia (for CGT events which occurred before 12 December 2006), or is taxable Australian property (for CGT events which occurred on or after 12 December 2006)
- you made an election to include the discount as income on acquisition (for ESS shares and rights acquired before 1 July 2009) or deferred declaring the discount until a later time
- you are a resident or non-resident of Australia for tax purposes or have become a permanent resident.

The cost base of ESS interests depends on when the discount is taxed. If the discount given for the ESS interests was taxed at acquisition, the cost base for CGT purposes will be the market value when you became a temporary resident or the market value at acquisition if you acquired them while you were a temporary resident. If the ESS interests were taxed at cessation or at a deferred taxing point, the cost base will be the market value at cessation or the deferred taxing point.

Find out about:

- CGT events occurring before 12 December 2006
- CGT events occurring on or after 12 December 2006

- CGT events occurring between 12 December 2006 and 30 June 2009

CGT events occurring before 12 December 2006

ESS interests with a necessary connection with Australia

If you are a temporary resident and a CGT event happened to an ESS interest you hold that has the necessary connection with Australia, those ESS interests are subject to the CGT rules.

ESS interests without a necessary connection with Australia

If you elected to pay tax upfront

If you were a temporary resident when the CGT event happened to the ESS interests, you will only be taxed on the gain or loss from the CGT event happening to the ESS interests that relate to your employment in Australia, as they have the necessary connection with Australia. The remaining gain or loss will be disregarded.

To determine how much of the gain or loss relates to your employment in Australia, refer to the discount you recorded under the ESS rules for the ESS interests. If only a portion of the discount was assessable in Australia because part of the employment under which you received the ESS interests was performed outside Australia, the same proportion of the capital gain or loss will be assessable in your Australian income tax return.

If you were a permanent Australian resident for tax purposes when the CGT event happened (and had previously been a temporary resident), the capital gain or loss would be the sum of:

- the portion of the capital gain or loss accrued up to the time you became a permanent Australian resident that related to working in Australia, and
- the capital gain or loss that accrued from the time you became a permanent Australian resident.

If you were taxed at cessation

If you were a temporary resident when the CGT event happened to the ESS interests, you will only be taxed on the gain or loss from the CGT event happening to the ESS interests that relate to your employment in

Australia, as they have the necessary connection with Australia. The remaining gain or loss will be disregarded.

If you were a permanent Australian resident for tax purposes when the CGT event happened to the ESS interests (and had previously been a temporary resident), the capital gain or loss will be the gain or loss that accrued from the time you became a permanent Australian resident for tax purposes.

CGT events occurring on or after 12 December 2006

ESS interests that are taxable Australian property

The temporary resident provisions do not change the way the CGT rules apply to ESS interests which are taxable Australian property. If a CGT event happens to these ESS interests, the capital gain or loss will be assessable in your Australian income tax return, in the income year when the CGT event occurred.

If you were a temporary resident when the CGT event happened, you will only be taxed on the gain or loss from ESS interests that relate to your employment in Australia. The remaining gain or loss will be disregarded.

To determine how much of the gain or loss relates to your employment in Australia, refer to the discount you recorded under the ESS rules for the ESS interests. If only a portion of the discount was assessable in Australia because part of the employment under which you received the ESS interests was performed outside Australia, the same proportion of the capital gain or loss will be assessable in your Australian income tax return.

ESS interests that are not taxable Australian property

If the tax was paid on acquisition

If you are a permanent Australian resident for tax purposes at the time the CGT event happens to the ESS interests (and had previously been a temporary resident), the capital gain or loss is the sum of:

- the portion of the capital gain or loss accruing up to the time you became a permanent Australian resident that relates to Australian employment

- all the capital gains or losses accrued from the time you became a permanent Australian resident.

If the taxation of the discount was deferred

If you are a temporary resident at the time the CGT event happens to the ESS interests and the ESS interests are not taxable Australian property, you will not be required to record a capital gain or loss in your Australian income tax return.

If you are a permanent Australian resident for tax purposes at the time the CGT event happens to the ESS interests and had previously been a temporary resident, the capital gain or loss is the gain or loss that accrued from the time you became a permanent Australian resident.

CGT events occurring between 12 December 2006 and 30 June 2009

If you were a temporary resident at the time the CGT event happened to the ESS interests, you will only be taxed on the gain or loss from the CGT event happening to the ESS interests that relate to your employment in Australia. The remaining gain or loss will be disregarded.

To determine how much of the gain or loss relates to your employment in Australia, refer to the discount you recorded under the ESS rules for the ESS interests. If only a portion of the discount was assessable in Australia because part of the employment under which you received the ESS interests was performed outside Australia, the same proportion of the capital gain or loss will be assessable in your Australian income tax return.

Residents with foreign service income

If you are an Australian resident and you acquired ESS interests during your engagement in foreign service, the discount received on those ESS interests may be exempt from tax. In order to be exempt, you must have been engaged in foreign service for a continuous period of not less than 91 days.

The exemption will not be available if your ESS interests are exempt from tax in the foreign country only because of one or more of the following reasons:

- a double tax agreement with Australia or a law giving effect to a double tax agreement
- the foreign country does not impose income tax on employment or personal services income, or similar income, or
- a law of the foreign country or an international agreement to which Australia is a party, which deals with diplomatic or consular privileges and immunities, or privileges and immunities for people connected with international organisations (such as the United Nations).

ESS interests acquired after 30 June 2009

In addition, for ESS interests acquired after 30 June 2009, for foreign service performed after 30 June 2009, the ESS interests will not be exempt unless the continuous period of foreign service is directly related to:

- the delivery of Australia's overseas aid program by your employer
- the activities of your employer in operating a developing country relief fund or a public disaster relief fund
- the activities of your employer being a prescribed institution that is exempt from Australian income tax
- your deployment outside Australia by an Australian government (or an authority thereof) as a member of a disciplined force,
- an activity of a kind specified in the regulations.

These additional requirements do not apply to:

- ESS interests acquired before 1 July 2009 for foreign service performed before, on or after 1 July 2009
- ESS interests acquired after 30 June 2009 for foreign service performed before 1 July 2009.

See also:

- Section 23AG of the Income Tax Assessment Act 1936
- Foreign income exemption for temporary residents – introduction
- Employees
- Guide to capital gains tax

- PAYG withholding from interest, dividends and royalties paid to non-residents

QC 27184

ESS – Benefits provided to non-employees

Learn when shares or stapled securities given to non-employees are treated as employee share scheme interests.

Last updated 7 February 2017

This information explains when shares, stapled securities or rights to acquire them, provided to individuals or their associates who are not employees will be treated as employee share scheme interests (ESS interests) acquired under an employee share scheme (ESS).

This applies to ESS interests acquired on or after 1 July 2009.

The value of ESS interests are assessed to an individual employee at acquisition or, in some circumstances, at a later time. This tax treatment can also apply to non-employees and in particular, independent contractors, company directors, labour hire arrangements and other individuals generating personal services income.

ESS interests provided to associates

If an individual fits any of the types of non-employees described below, the employee share scheme (ESS) rules will still apply to the individual – even if shares, stapled securities or similar rights are not provided to them personally, but instead are provided to their associate.

An associate of an individual is broadly defined and includes:

- relatives
- if the individual is in a partnership – the partnership, the other partners and their spouses and children

- the trustee of a trust under which they or an associate benefit
- a company under their control or control by an associate.

Independent contractors

An individual who provides services to another entity under a contract or an agreement and who is partly or fully rewarded for those services with shares, stapled securities or rights to acquire them from that entity, is assessable on the value of those benefits as ESS interests.

An individual provides services to another entity if it is due to a direct arrangement between them. If carrying on a business, such an individual is sometimes called a sole trader.

Example 1 – Shares provided to an independent contractor under an employee share scheme

Martin is a geologist who provides freelance consultancy services to various mining companies. He operates as a sole trader and is not an employee under the ordinary meaning of the word. One of his clients, a listed public company, pays for his services with a combination of $40,000 and the issue of 20,000 shares.

The employee share scheme rules apply to Martin even if he is not considered to be an employee for any other purpose. He will be assessable on the value of those shares, in accordance with the employee share scheme tax rules.

Example 2 – Shares provided to an associate of an independent contractor

As in Example 1 above, Martin provides consultancy services to a publicly listed company. However, instead of personally receiving the shares, Martin nominates his family trust as the recipient of the shares.

Martin is still assessable on the value of those shares, in accordance with the employee share scheme tax rules.

Company directors

A company director who receives shares, stapled securities or rights to acquire them from a company, in connection with their role as a director of that company, is assessable on the value of these benefits as ESS interests. This is the case regardless of whether they receive any other remuneration for their services as a director.

Example 3 – Options provided to a company director

Rachel is appointed to the board of a biotechnology company. Along with other directors and key executives, she is issued options as part of an incentive program designed to reward recipients if the company is successful. She does not receive any other remuneration as a director.

The employee share scheme rules apply to Rachel. She will be assessable on the value of those options, in accordance with the employee share scheme tax rules.

Example 4 – Options provided to an associate of a company director

As in Example 4 above, Rachel is appointed to the board of a biotechnology company. The company issues options as part of an incentive program designed to reward recipients if the company is successful. At Rachel's request, the company issues the relevant options to her spouse.

The employee share scheme rules apply to Rachel. She will be assessable on the value of the options, in accordance with the employee share scheme tax rules.

Labour hire arrangements

Individuals working under labour hire arrangements who receive shares, stapled securities or rights to acquire them from the labour hire firm, in connection with work arranged by the firm, are assessable on the value of those benefits as ESS interests.

Example 5 – Shares provided in connection to a labour hire arrangement

IT Provider Ltd keeps a database of skilled persons who are available for their services to be provided to third parties. IT Provider Ltd contracts with a major bank to provide programming services and arranges for Richard, a computer programmer, to perform some of the work.

IT Provider Ltd pays Richard for his work. In addition, to reward past work and encourage Richard's loyalty for the future, IT Provider Ltd issues him $2,000 worth of shares in the company.

The employee share scheme rules apply to Richard. He will be assessable on the value of the shares, in accordance with the employee share scheme tax rules.

Other personal services income

Some consultants or contractors operate through a company, partnership or trust. A special tax regime may apply to personal services income earned by these entities.

If the personal services income rules apply to assess the income of a company, partnership or trust back to an individual who performed the services, then the employee share scheme rules do not apply to that individual.

Example 6 – No personal services business

Genevieve works as a civil engineer in the construction industry. She operates through her associated company, Gengine Pty Ltd.

Gengine contracts with Big Gas Ltd to provide services on a large project throughout the 2010–11 year. The work is performed by

Genevieve and, as a result of the tax rules on personal services income, Genevieve is assessed on income derived under the contract.

Big Gas Ltd operates an employee share scheme. It issues shares to its employees and to some key contractors, including Gengine Pty Ltd.

The employee share scheme rules will not apply to Genevieve in relation to the shares acquired by Gengine Pty Ltd. However, the value of the shares may be assessable to Genevieve through the operation of other taxing provisions.

See also:

- Personal services income

QC 23916

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