



Lapsed and forfeited employee share scheme interests

The tax treatment of lapsed and forfeited employee share scheme interests acquired under an employee share scheme (ESS).

Last updated 17 September 2020

You may be entitled to exclude the discount from your assessable income and receive a refund of taxes paid if you received a discount under an employee share scheme (ESS) and included it in your assessable income for:

- shares, stapled securities or rights to acquire shares or stapled securities (ESS interests) and your interests are subsequently forfeited
- a right that has been forfeited, lapsed, expired or lost (without the right having been disposed of or exercised).

See also

- [ESS – Employees](#)
- [ESS interests with a taxing point before 1 July 2009](#)

ESS interests acquired after 30 June 2009

ESS interests acquired from 1 July 2015, between 1 July 2009 and 30 June 2015 or by an associate.

Examples – no disposal permitted

11 examples where the employee share scheme (ESS) doesn't permit disposal of the rights.

Rights acquired before 1 July 2009



How the previous employee share scheme (ESS) rights apply to rights acquired before 1 July 2009.

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ESS interests acquired after 30 June 2009

ESS interests acquired from 1 July 2015, between 1 July 2009 and 30 June 2015 or by an associate.

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ESS interests acquired by an associate

ESS interests acquired from 1 July 2015

For ESS interests acquired from 1 July 2015, a refund is available if:

- the conditions of the scheme did not directly protect you (the employee) from a fall in the market value of the interest (market risk)
- the forfeiture or loss was not the result of a choice you made, except where the choice was either
 - to cease employment

- not to exercise the right before it lapsed or to allow the right to be cancelled if the ESS interest is a right.

If you receive valuable consideration for no longer holding the interest, we may not consider your ESS interests forfeited or lost. The consideration you receive may be taxable as the disposal of your ESS interests can be the deferred taxing point.

If you are entitled to exclude the discount, you are treated as never having acquired your ESS interests. You may request an amendment of your assessment to exclude the discount previously included in your assessable income. There is no time limit for amending an assessment to exclude an amount from assessable income for an ESS interest which is forfeited or lost.

Where a refund is not available, you may be able to claim a capital loss under the capital gains tax provisions.

ESS interests acquired between 1 July 2009 and 30 June 2015

For ESS interests acquired between 1 July 2009 and 30 June 2015, a refund is available only if:

- the conditions of the scheme did not directly protect you (the employee) from a fall in the market value of the interest (market risk)
- you had no choice but to forfeit or lose the ESS interests (except when the choice was to cease employment).

If you receive valuable consideration for no longer holding the interest, we may not consider your ESS interests forfeited or lost. The consideration you receive may be taxable as the disposal of your ESS interests can be the deferred taxing point.

You may request an amendment of your assessment to exclude the discount previously included in your assessable income. There is no time limit for amending an assessment to exclude an amount from assessable income for an ESS interest which is forfeited or lost.

Where a refund is not available, you may be able to claim a capital loss under the capital gains tax provisions.

ESS interests acquired by an associate

If an associate acquires ESS interests, which are provided in relation to your employment or services, the ESS rules require you (rather than your associate) to include the discount in your assessable income. Associates can include a spouse, child, company or trustee of a trust (other than the trustee of an employee share trust).

If you have included a discount in your assessable income for the ESS interests and the ESS interests are subsequently forfeited or lost, you will be entitled to exclude the discount from your assessable income (rather than the assessable income of your associate), provided the conditions for obtaining a refund are met.

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Examples – no disposal permitted

11 examples where the employee share scheme (ESS) doesn't permit disposal of the rights.

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In the following examples about rights, the scheme does not permit disposal of the rights.

Example 1: Shares – genuine performance hurdle not met – eligible for refund

Conner is granted shares in his employer Furniture Ltd under an ESS.

The shares are held in an employee share trust for three years and there is a real risk that the shares will be forfeited if a performance hurdle is not met or if Conner ceases employment within that three-year period. At the end of the three-year period, the shares will be transferred to Connor.

After two years, Connor ceases employment because of serious illness and a good leaver clause allows him to keep his shares subject to the performance hurdle being met.

Ceasing employment triggers the deferred taxing point and Connor includes the discount on the shares in his assessable income in the year he ceases employment.

At the end of the three-year period Furniture Ltd does not achieve the performance hurdle and Connor's shares are forfeited.

Connor is able to request an amendment to exclude the discount from his assessable income for the income year in which he ceased employment.

Example 2: Rights – genuine performance hurdle not met – eligible for refund

Hunter is granted rights to acquire shares in his employer Gym Ltd under an ESS.

The scheme is a deferral scheme as the rights are subject to a real risk of forfeiture.

Under the conditions of the scheme Hunter's rights will lapse if Gym Ltd does not achieve a specified performance hurdle over a three-year period.

Hunter ceases employment after one year and is allowed to keep his rights. Ceasing employment triggers the deferred taxing point and he includes the discount on the rights in his assessable income in the year he ceases employment.

At the end of the three-year period Gym Ltd does not achieve the performance hurdle and Hunter's rights lapse.

Hunter is able to request an amendment to exclude the discount from his assessable income for the income year in which he ceased employment.

The rights were lost because of a genuine performance hurdle and not a condition of the scheme that protected Hunter against market risk.

Example 3: Choice not to exercise rights – no refund (2011 income year)

Leigh is granted rights to acquire shares in his employer Welding Ltd under an ESS in the 2011 income year.

The scheme is a taxed-upfront scheme not eligible for reduction.

Leigh includes the discount on his 2011 tax return.

The rights will lapse if not exercised by 10 May 2013.

In the 2013 income year, the market value of Welding Ltd shares falls dramatically and by May 2013, it is below the exercise price.

Leigh decides not to exercise the rights and they subsequently lapse.

As Leigh has chosen not to exercise the rights, he is not entitled to exclude the discount he included on his 2011 tax return.

Example 4: Choice not to exercise rights – refund (2016 income year)

Brodie is granted rights to acquire shares in his employer Pixel Cats Ltd under an ESS in the 2016 income year.

The scheme is a taxed-upfront scheme eligible for reduction.

Brodie includes the discount on his 2016 tax return.

The rights will lapse if not exercised by 8 March 2020.

In the 2020 income year, the market value of Pixel Cats Ltd shares falls dramatically and by March 2020, it is below the exercise price.

Brodie decides not to exercise the rights and they subsequently lapse.

As Brodie made a choice not to exercise his rights and that choice was made in relation to rights he acquired after 30 June

2015, he is entitled to exclude the discount he included on his 2016 tax return.

Example 5: Rights not exercisable and choice to cease employment – eligible for refund (2012 income year)

Hilda is granted rights to acquire shares in her employer Cookie Ltd under an ESS in the 2012 income year.

The scheme is a tax-deferred scheme as the rights are subject to a real risk of forfeiture.

The rights are exercisable 10 years after the rights are granted. The rights will be forfeited if Hilda ceases employment with Cookie Ltd within 10 years.

After seven years Hilda is still employed. As the maximum deferral period is seven years in relation to rights acquired in the 2012 income year, Hilda pays tax on the discount at this time.

After nine years, Hilda resigns from her employment at Cookie Ltd. The rights are forfeited because of Hilda's choice to cease employment.

Hilda can exclude the discount she had included in her assessable income.

If Hilda had acquired her rights in the 2016 or later income year, the maximum deferral period would have been 15 years.

Example 6: Rights exercisable and ceasing employment – no refund (2013 income year)

Zintra is granted rights to acquire shares in her employer Food Ltd under an ESS, in the 2013 income year.

The scheme is a deferral scheme as the rights will be forfeited if Zintra ceases employment within one year.

After the one-year period, the rights can be exercised for a period of three years. However, Zintra's rights will lapse if:

- she ceases employment before exercising the rights, or
- she does not exercise the rights within four years of the rights being granted.

Zintra's deferred taxing point occurs after one year. Zintra includes the discount for the rights in her assessable income for this income year.

One year later, Zintra ceases employment without having exercised her rights.

We consider that the loss of the rights is the result of Zintra's choice not to exercise her rights and her cessation of employment.

As Zintra had a choice to exercise her rights before she ceased employment, she can't exclude the discount she had included in her assessable income.

Example 7: Rights exercisable and ceasing employment – refund (2016 income year)

If Zintra (from Example 6 above) had acquired her rights in the 2016 income year, rather than the 2013 income year, she would have been entitled to a refund.

Zintra made a choice not to exercise her rights before she ceased employment but under the ESS rules that apply to ESS interests acquired from 1 July 2015, Zintra is entitled to a refund where she has made a choice not to exercise her rights before they lapse.

Example 8: Rights exercisable and ceasing employment – no refund (2014 income year)

Braden is granted rights to acquire shares in his employer Landscape Ltd under an ESS, in the 2014 income year.

The scheme is a tax-deferred scheme as Braden has a real risk of forfeiting the rights if he ceases employment within one year of being granted the rights.

After the one-year period, the rights cannot be exercised for a further two years unless Braden ceases employment. If Braden ceases employment in the two-year period he has three months from the time that he ceases employment to exercise the rights. If the rights are not exercised before the end of the three-month period they will lapse.

Braden ceases employment after two years. This is Braden's deferred taxing point and he includes the discount in his assessable income. Braden does not exercise his rights within the three-month period after he ceases employment and his rights lapse.

The loss of Braden's rights is the result of Braden's choice not to exercise the rights within the three-month period. We consider this to be Braden's choice, even if he intended to exercise the rights but did not get around to it or he forgot to do so. Therefore, he can't exclude the discount he had included in his assessable income.

Example 9: Rights exercisable and ceasing employment – refund (2017 income year)

If Braden from example 6 above had acquired his rights in the 2017 income year, rather than the 2014 income year, he would have been entitled to a refund.

Braden made a choice not to exercise his rights within three months of ceasing employment but under the ESS rules that apply to ESS interests acquired from 1 July 2015, Braden is entitled to a refund where he has made a choice not to exercise his rights before they lapse.

Example 10: Condition of the scheme that protects the employee from market risk – no refund

Remy is granted rights to acquire shares in her employer Electricity Ltd under an ESS.

The rights will be forfeited if she ceases employment with Electricity Ltd within one year of being granted the rights.

After the one-year period, the rights can be exercised if the market price of Electricity Ltd shares is above the exercise price.

The rights will lapse if not exercised within four years of them being granted.

Remy ceases employment with Electricity Ltd two years after the rights are granted.

She has not been able to exercise the rights because of the condition requiring the market price of Electricity Ltd shares to exceed the exercise price.

Remy's deferred taxing point arises on cessation of employment and she includes an amount for her rights in her assessable income.

At the end of the four-year period, Remy's rights lapse because the market price never exceeds the exercise price.

Remy cannot exclude the discount from her assessable income because the loss of the rights is a result of a condition of the ESS that had the direct effect of protecting Remy against market risk.

Example 11: Cancellation of rights for valuable consideration – no refund

Charlotte is granted rights to acquire shares in her employer Georgia Ltd under an ESS in the 2017 income year.

The scheme is a tax-deferred scheme as Charlotte has a real risk of forfeiting the rights if she ceases employment within three years of being granted the rights.

Two years later, Georgia Ltd is taken over by Rachael Ltd. Charlotte's rights are cancelled and she receives a cash payment equal to the market value of her rights.

The cancellation of Charlotte's rights is the deferred taxing point as she has disposed of them. The cash payment is assessable to her. The rights have not been forfeited because Charlotte has received valuable consideration for the cancellation.

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Rights acquired before 1 July 2009

How the previous employee share scheme (ESS) rights apply to rights acquired before 1 July 2009.

Last updated 17 September 2020

For a right acquired before 1 July 2009, the previous ESS rules continue to apply to rights that are forfeited or lost. A refund is only available where both:

- you lose the right without having exercised it
- the company that granted the right was your employer or a holding company of your employer when the right was acquired.

The previous ESS rules did not apply to the forfeiture of shares.

You may request an amendment of your assessment to exclude the discount previously included in your assessable income. There is no time limit for amending an assessment to exclude an amount from assessable income for a right acquired before 1 July 2009 which is lost.

Under the previous ESS rules, a refund was available if the rights were lost because an employee chose not to exercise the rights or because

the conditions of the scheme protected the employee from a fall in the market value of the rights.

You may not forfeit or lose your rights if you receive valuable consideration for no longer holding the rights.

See also

For information on the previous ESS rules for lapsed and forfeited rights:

- ESS interests with a taxing point before 1 July 2009
- ATO ID 2003/189 – *Income tax: employee share scheme: employee loses rights for no valuable consideration*
- ATO ID 2001/699 (Withdrawn) – *Income tax: employee share scheme (accessibility of options received prior to redundancy)*

Rights acquired by your associate before 1 July 2009

If your associate acquires rights under an employee share scheme, which were provided in relation to your employment, under the previous ESS rules you (rather than your associate) have to include the discount in your assessable income in the year the rights were acquired by your associate. An associate can be a spouse, child, company or trustee of a trust.

If your rights are subsequently lost, you will not be entitled to exclude the discount from your assessable income.

See how we treat eligibility for a refund in the following examples:

- [Example 1: Forfeiture and lapse of rights – eligible for refund](#)
- [Example 2: Forfeiture and lapse of rights – eligible for refund](#)
- [Example 3: Forfeiture of rights – no refund](#)

Example 1: Forfeiture and lapse of rights – eligible for refund

Millie is granted rights in her employer Blue Skies Ltd under an ESS before 1 July 2009.

The rights are qualifying and Millie elects to be taxed at acquisition.

In the 2010 income year, some of Millie's rights are forfeited when she ceases employment and some of her rights lapse because she does not exercise them within the exercise period.

Millie loses the rights without having exercised them and she was an employee of Blue Skies Ltd when the rights were acquired. Therefore, she can exclude the discount on the rights from her assessable income for the acquisition year.

Example 2: Forfeiture and lapse of rights – eligible for refund

Jake is granted rights in his employer Earth Ltd under an ESS before 1 July 2009.

The rights will lapse if not exercised before 1 January 2012.

The rights are qualifying and Jake does not elect to be taxed at acquisition. Jake does not have a cessation time before 1 July 2009.

In the 2011 income year, Jake ceases employment with Earth Ltd triggering a deferred taxing point (cessation time). Jake includes the discount for the rights in his assessable income for the 2011 income year.

In the 2012 income year, Jake's rights lapse because he does not exercise them.

As Jake loses the rights without having exercised them and he was an employee of Earth Ltd when the rights were acquired, he can exclude the discount he had previously included in his assessable income.

Example 3: Forfeiture of rights – no refund

Wilfred is an employee of Bird Mania Ltd.

An associate of Wilfred is granted rights in Bird Mania Ltd under an ESS, in the 2005 income year, in relation to Wilfred's employment.

The rights are non-qualifying, as Bird Mania Ltd is not the employer of the associate. Therefore, Wilfred includes the discount on the rights on his 2005 tax return.

In the 2011 income year, the rights lapse without being exercised.

Wilfred does not meet the eligibility criteria for a refund of tax because Wilfred's associate was not an employee of Bird Mania Ltd when the rights were acquired.

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