



Class Ruling

Income tax: BT Investment Management Limited – Employee Equity Plan

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

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

Relevant provision(s)

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

- Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139E of the ITAA 1936;
- Subdivision F of Division 13A (Subdivision F) of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;

- section 139G of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are all persons who:

- are Australian resident (within the meaning of subsection 6(1)) employees of BT Investment Management Limited (BTIM) or BT Investment Management (RE) Limited (the group); and
- acquired a BTIM share (share) under the BTIM Employee Equity Plan (the plan) in their own name, or in the name of a nominee.

In this Ruling a person belonging to this class of entities is referred to as a participating employee.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 34 of this Ruling.

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

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

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Date of effect

8. This Ruling applies from the year ending 30 June 2008. The Ruling will cease to have effect when there are no longer any participating employees who hold shares acquired under the plan.

9. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

13. The following description of the scheme is based on information provided by the applicant. The description is based on the following documents:

- the application for Class Ruling from Allens Arthur Robinson (the applicant) dated 14 December 2007;
- the rules of the BT Investment Management Limited Employee Equity Plan;
- BT Investment Management Limited Employee Equity Plan Trust, Trust Deed Poll (the trust deed); and
- e-mails from Allens Arthur Robinson dated 15 February and 2 May 2008.

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

Note: Certain information received has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

14. BTIM is an Australian resident company and a subsidiary of the Westpac Banking Corporation (WBC).

15. On 26 October 2007 the board of BTIM (the board) approved the establishment of the plan.

16. The plan has been established as an initiative for creating a stronger link between employee reward and increasing shareholder value.

17. Under the plan, eligible employees of the group are invited to apply to acquire ordinary shares in BTIM.

18. The first invitations to participate in the plan were made to eligible employees under an Initial Public Offer (IPO) prospectus on or around 14 November 2007. Those employees who accepted the invitation were allotted or issued shares under the IPO on 7 December 2007.

19. The applicant has advised that under the IPO, shareholders (other than participating employees or their nominees) were allotted or issued shares at \$4.80 a share (the offer price).

20. BTIM was listed and the ordinary shares in the company were quoted on the Australian Securities Exchange (ASX) on 10 December 2007.

21. The plan provides for eligible employees to:

- acquire shares in their own name; or
- acquire shares in the name of a nominee(s) where the employee is absolutely entitled to the shares as against the nominee.

22. Under the plan, upon acceptance of the invitation, eligible employees and nominees become participants in the plan.

23. A share acquired by a participating employee (or their nominee) under the plan may be:

- issued or allotted (issued) to them by BTIM (including under the IPO); or
- acquired on-market or otherwise acquired by the trustee of the BT Investment Management Limited Employee Equity Plan Trust (the trustee) and transferred to the participating employee (or their nominee) in accordance with paragraph 25 of this Ruling.

24. The trustee funds on-market acquisitions with funds contributed by the group. Participating employees or their nominees do not provide consideration for shares acquired under the plan.

25. The applicant has advised that the only shares that will be held in trust by the trustee are those that are:

- forfeited in accordance with paragraph 28 of this Ruling;
- mistakenly allocated in accordance with paragraph 30 of this Ruling (and consequently acquired by the trustee); or
- purchased by the trustee out of any excess income generated by forfeited or mistakenly allocated shares held, or out of funds contributed by the group for the purposes of the plan;

and a participating employee (or their nominee) will not be beneficially entitled to the shares until they are allocated, at which time the shares will be immediately transferred to the participating employee (or their nominee).

26. Shares acquired under the plan are subject to restrictions which are enforced by a holding lock.

27. A participating employee (or their nominee) is not permitted to dispose of shares acquired under the plan until the earliest of:

- ten years from the date the shares are acquired under the plan or such other time as may be determined by the board;
- the date the participating employee ceases employment within the meaning of subsection 139CA(3); or
- the time of receipt by the plan company (an independent entity nominated by BTIM) of a written consent from the board of a release request made by the participating employee (or their nominee).

Forfeiture of shares

28. The plan provides that shares acquired by a participating employee (or their nominee) may be forfeited:

- at any time prior to the receipt by the plan company of the board's written consent, where the participating employee has acted fraudulently or dishonestly; or
- where the shares are unvested shares at the date the participating employee ceases employment with the group (exceptions apply as specified in the plan).

29. Upon forfeiture the participating employee's (or their nominee's) shares are transferred to the trustee and the trustee deals with the shares in accordance with the plan and the trust deed. Subject to the board's discretion, the trustee may pay a total of \$1 to the participating employee (or their nominee) for the shares forfeited.

Shares allocated in error

30. Where shares are mistakenly allocated to a participating employee or their nominee (the mistaken recipient), the plan provides that a mistaken recipient will:

- have no right or interest in the shares;
- hold the shares absolutely for the benefit of the trustee; and
- irrevocably appoint each officer of the trustee to act as their attorney to transfer the shares to the trustee within a reasonable period of time.

31. The applicant has advised that at no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of BTIM. Also at no time will a participating employee be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of BTIM.

32. In relation to vested and unvested shares, and notwithstanding the holding lock, participating employees will be entitled (or where a participating employee's shares are held by a nominee, the participating employee will be absolutely entitled as against the nominee) to receive dividends or other distributions paid or made on shares at all times from the date they are acquired by the participating employee (or their nominee).

33. At the time shares were first acquired under the plan, none of the companies within the group had any employees with at least 3 years service with their employer company.

34. The applicant has advised that it is expected that once there are employees with at least 3 years service, at least 75% of permanent employees (as defined in section 139GB) of each company within the group with at least 3 years service with the employer company, will have the opportunity, in a particular year, to participate in the plan, or another employee share scheme operated by BTIM (or by WBC, for as long as it remains the holding company of BTIM).

Ruling

35. A participating employee will acquire a share under an employee share scheme for the purposes of Division 13A where, under the plan:

- BTIM issues a share to the participating employee or the nominee of the participating employee; or
- the trustee allocates and transfers a share to the participating employee or the nominee of the participating employee.

36. The share will be acquired by the participating employee, within the meaning of section 139G, at the time it is issued or allocated and transferred to the participating employee or their nominee, and the share will be a qualifying share, within the meaning of section 139CD.

Where an employee makes an election

37. Where a participating employee makes an election under section 139E in relation to a share acquired under the plan, the discount given in relation to the share will be included in their assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).

38. The discount to be included is the market value of the share (calculated under Subdivision F) at the time it is acquired.

39. Where at the time of acquisition a share is listed on the ASX, or any other recognised stock exchange, its market value will be the amount determined in accordance with section 139FA.

40. Where a share was acquired under the IPO (prior to being quoted on the ASX) the Commissioner will accept the amount of \$4.80, being the offer price, as the market value of the share at that time, for the purposes of subsection 139FB(1).

Capital gains tax

41. Where a share is issued or allocated and transferred to a participating employee or their nominee under the plan, the participating employee will acquire the share for the purposes of the capital gains tax (CGT) provisions in Part 3-1 and Part 3-3 of the ITAA 1997.
42. The first element of the cost base and reduced cost base of a share will be the market value of the share, calculated under Subdivision F, when the share was acquired (subsection 130-80(2) of the ITAA 1997).
43. However, where a share was held by the trustee before it was allocated and transferred to a participating employee or their nominee by the trustee, the first element of the cost base and reduced cost base of the share will be the market value of the share, calculated under Subdivision F, when the participating employee or their nominee first acquired a beneficial interest in the share in accordance with subsection 130-80(3) of the ITAA 1997.
44. Where a share is disposed of, a participating employee will make a capital gain if the capital proceeds from the disposal are more than the cost base of the share. Conversely the participating employee will make a capital loss if the capital proceeds are less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).
45. Where the disposal of a share occurs 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain (Subdivision 115-A of the ITAA 1997).

Forfeiture of shares

46. Where a share is forfeited under the plan, it will be disposed of for CGT purposes when a participating employee or their nominee transfers the share to the trustee (section 104-10 of the ITAA 1997).
47. Where the trustee pays a total of \$1 to the participating employee or their nominee for all the shares, that amount will be the capital proceeds under section 116-20 of the ITAA 1997. However, where the trustee pays nothing for the forfeited shares, the capital proceeds will be the market value of the shares at the time of disposal in accordance with subsection 116-30(1) of the ITAA 1997.

Where an employee does not make an election

48. Where a participating employee does not make an election under section 139E, the discount given in relation to a share will be included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

49. Pursuant to section 139CA, the cessation time will be the earliest of:

- the time when the share is disposed of in accordance with the plan forfeiture provisions;
- the time when the holding lock is lifted;
- the time when a participating employee ceases to be employed by their employer or a group company, or Westpac (for as long as Westpac is the holding company of BTIM); or
- the end of the 10 year period starting when the participating employee acquired the share.

Disposal within 30 days

50. Where a participating employee or their nominee subsequently disposes of a share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount of consideration received on the disposal of the share, in accordance with subsection 139CC(3).

Forfeiture of shares

51. Where shares are disposed of as a result of forfeiture, the discount for all the forfeited shares will be the amount of \$1 (if that is the case) the participating employee or their nominee receives from the trustee (subsection 139CC(3)).

52. Where no amount is received from the trustee there is no discount included in the assessable income of the participating employee.

Capital gains tax

53. Any capital gain or capital loss made as a consequence of the disposal will be disregarded (subsection 130-83(2) of the ITAA 1997).

Disposal after 30 days

54. Where a share is not disposed of by a participating employee or their nominee in an arm's length transaction at the cessation time or within 30 days after the cessation time the discount will be the market value of the share (calculated under Subdivision F) at the cessation time in accordance with subsection 139CC(4).

Capital gains tax

55. Where a participating employee or their nominee disposes of a share acquired under the plan other than in an arm's length transaction within 30 days after the cessation time, a capital gain or a capital loss may arise (refer to paragraphs 42 to 47 of this Ruling).

56. In determining the gain or loss the first element of the cost base of the share is the market value of the share (calculated under Subdivision F) at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

Shares allocated in error

57. Where under the plan a share is mistakenly allocated to a participating employee or their nominee and is subsequently transferred to the trustee:

- the mistaken recipient does not acquire the share under an employee share scheme for the purposes of Division 13A;
- the mistaken recipient does not acquire the share for CGT purposes; and
- no capital gain or capital loss will arise on the transfer of the share to the trustee.

Qualified person with respect to dividends

58. In the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the plan will not prevent a participating employee from being a qualified person for the purposes of section 207-145 of the ITAA 1997 with respect to dividends received by them on shares acquired under the plan, provided the shares are held for the requisite period of time during the relevant qualification period.

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

59. An employee will acquire a share under an employee share scheme, for the purposes of Division 13A, if the share is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of the employee, pursuant to subsection 139C(1); and
- acquired for less than market value, pursuant to subsection 139C(3).

60. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a legal or a beneficial interest in the share, or having it allotted or transferred to them by another person.

61. Where under the plan:

- a share is issued to a participating employee by BTIM; or
- the trustee allocates and transfers a share to a participating employee;

the participating employee will acquire a legal interest in the share.

62. Where a share is acquired by a nominee of a participating employee (the nominee will not acquire the share under an employee share scheme, pursuant to subsection 139C(5)), the participating employee will acquire a beneficial interest in the share as they are absolutely entitled to the share as against the nominee. Therefore, whether a participating employee acquires a legal or beneficial interest in a share, they will acquire the share within the meaning of section 139G.

63. The plan has been established as an initiative for creating a stronger link between employee reward and increasing shareholder value. As such, any share acquired under the plan is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

64. As no consideration is paid or given by a participating employee for the acquisition of a share, the participating employee will acquire the share for less than market value, pursuant to subsection 139C(3).

65. Thus, a participating employee will acquire a share under an employee share scheme for the purposes of Division 13A.

Qualifying shares

66. For a share to be a qualifying share, the conditions set out in section 139CD must be satisfied. These conditions are as follows:

- (1) the share is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));
- (2) the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3));
- (3) all the shares available for acquisition under the scheme are ordinary shares (subsection 139CD(4));
- (4) at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
 - shares or rights under the scheme; or
 - shares or rights in the employer, or a holding company of the employer, under another employee share scheme (subsection 139CD(5));and
- (5) immediately after the acquisition of the share, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

67. In accordance with paragraph 65 of this Ruling, where it was concluded that a share will be acquired under an employee share scheme, the first condition is satisfied.

68. To satisfy the second condition, a share acquired by a participating employee must be a share in their employer or the holding company of their employer. As the class of entities to which this ruling applies defines participating employees to be employees of the group, this condition will be satisfied.

69. The shares available for acquisition under the plan are ordinary shares, therefore the third condition will be satisfied.

70. The fourth condition requires that at the time shares are acquired at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire shares under the employee share scheme.

71. A permanent employee of an employer is defined as a full-time employee or permanent part-time employee of the employer with at least 36 months of service (subsection 139GB(1)).

72. The applicant has advised that:

- at the time shares were first acquired under the plan, none of the companies within the group had any employees with at least 3 years service with their employer company; and
- it is expected that once there are employees with 3 years service with their employer, at least 75% of permanent employees (as defined in section 139GB) of each company within the group with at least 3 years service with their employer company, will have the opportunity, in a particular year, to participate in the plan, or another employee share scheme operated by BTIM (or by WBC, for as long as it remains the holding company of BTIM).

73. Where, at the time a share is acquired under an employee share scheme, an employer has no permanent or part-time employees with at least 3 years service, the Commissioner accepts that the fourth condition will be satisfied.

74. Therefore, the shares acquired by participating employees or their nominees under the plan will satisfy the fourth condition as at the time shares are acquired, the group will either have no permanent employees or where they do have permanent employees, at least 75% will have the opportunity, in a particular year, to participate in the plan, or another employee share scheme operated by BTIM (or by WBC, for as long as it remains the holding company of BTIM).

75. As the plan will be operated so that no participating employee will:

- hold a legal or beneficial interest in more than 5% of the shares of BTIM; or
- be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of BTIM,

the Commissioner accepts that the last of the conditions will be satisfied.

76. As all the conditions in section 139CD are satisfied, a share acquired by a participating employee under the plan will be a qualifying share within the meaning of section 139CD.

77. Where an employee acquires a qualifying share under an employee share scheme:

- the discount given in relation to the share is included in their assessable income in accordance with Subdivision B of Division 13A; and

- the amount of the discount, and the year of income in which the discount is included is dependent on whether the employee makes a section 139E election covering the share.

Where an employee makes an election

78. An employee can elect under section 139E that subsection 139B(2) applies in respect of all shares or rights acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the employee's assessable income in the year of income in which the share is acquired.

79. The amount of the discount to be included is calculated in accordance with subsection 139CC(2), the discount being the market value of the share at the time it was acquired by the employee.

80. Subdivision F contains special provisions to determine the market value of a share on a particular day.

81. Section 139FA provides that where a share is quoted on a stock market of an approved stock exchange on a particular day, its market value on that day is determined in accordance with the provision. Therefore, where on the day a share is acquired under the plan, it is listed on the ASX or any other recognised stock exchange, its market value is determined under section 139FA.

82. Subsection 139FB(1) provides that where a share is not quoted on an approved stock exchange on a particular day, its market value is the arm's length value of the share:

- as specified in a written report, in a form approved by the Commissioner, given to the person from whom the taxpayer acquires the share by a person who is a qualified person in relation to valuing the share (refer to section 139FG); or
- as calculated in accordance with any other method approved in writing by the Commissioner as a reasonable method of calculating the arm's length value of unlisted shares.

83. It follows that where a participating employee acquired a share under the IPO, prior to the shares being listed on the ASX or any other recognised stock exchange, its market value is the amount determined under subsection 139FB(1).

84. The Commissioner considers that where a participating employee acquired shares under the IPO on 7 December 2007, the method for determining the offer price under the IPO (at \$4.80 a share) is a reasonable method of calculating the arm's length value of shares on 7 December 2007, for the purposes of paragraph 139FB(1)(b).

Capital gains tax

85. Where a share is issued to a participating employee, or a share is allocated and transferred to a participating employee by the trustee, the participating employee will acquire the share for CGT purposes, pursuant to sections 109-5 and 109-10 of the ITAA 1997.

86. Where a share is issued to the nominee of a participating employee, or a share is allocated and transferred to the nominee, and the participating employee is absolutely entitled to the share as against the nominee, the participating employee will acquire the share for CGT purposes, pursuant to sections 109-5 and 109-10 of the ITAA 1997.

87. Section 106-50 of the ITAA 1997 provides that if an entity is absolutely entitled to a CGT asset as against the trustee of a trust (disregarding any legal disability), Part 3-1 and Part 3-3 of the ITAA 1997 apply to an act done by the trustee in relation to the asset as if the entity had done it. Accordingly, where shares are held by a nominee, against whom a participating employee is absolutely entitled, the CGT provisions in Part 3-1 and Part 3-3 apply to an act done by the nominee in relation to the shares as if the participating employee had done it.

88. Therefore, where a participating employee or their nominee subsequently disposes of a share, the participating employee will make a capital gain if the capital proceeds from the disposal exceed the cost base of the share. Conversely, the participating employee will make a capital loss if the reduced cost base exceeds the capital proceeds, pursuant to subsection 104-10(4) of the ITAA 1997.

89. Where an employee acquires a qualifying share under an employee share scheme and makes an election under section 139E covering the share, the first element of the cost base or reduced cost base of the share is:

- where the share is acquired from an employee share trust, the market value of the share (calculated under Subdivision F) at the time the employee first acquired a beneficial interest in the share, pursuant to subsection 130-80(3) of the ITAA 1997; and
- where the share is not acquired from an employee share trust, the market value of the share (calculated under Subdivision F) at the time the employee first acquired the share for CGT purposes, pursuant to subsection 130-80(2) of the ITAA 1997.

90. Therefore, where a share is allocated and transferred to a participating employee or their nominee by the trustee (the share having been held by the trustee for the benefit of participating employees and their nominees), the participating employee will acquire a beneficial interest in the share at or immediately prior to transfer.

91. Where a share is acquired (including where the share is beneficially acquired, provided the share is a qualifying share acquired from an employee share trust and the holder has made an election under section 139E covering the share) at least 12 months before disposal, any capital gain that results from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

92. Consequently, where the disposal of a share occurs 12 months or more after the share is issued, or allocated and transferred to a participating employee or their nominee any capital gain made by the participating employee on disposal of the share will be a discount capital gain.

Forfeiture of shares

93. On forfeiture of a share under the plan, CGT event A1 will happen when ownership of the share is transferred to the trustee. The participating employee will make a capital gain if the capital proceeds from the disposal are more than the share's cost base, or a capital loss, if those capital proceeds are less than the share's reduced cost base (section 104-10 of the ITAA 1997).

94. Where the trustee pays a total of \$1 to a participating employee or their nominee for all their forfeited shares, they will have received capital proceeds in respect of the disposal.

95. As the plan applies equally to all participating employees (and their nominees), the Commissioner accepts that a participating employee (or their nominee) and the trustee will deal with each other at arm's length in connection with the disposal. Therefore the market value substitution rule in subsection 116-30(2) of the ITAA 1997 will not apply, and the capital proceeds from the disposal will be \$1, pursuant to subsection 116-20(1) of the ITAA 1997.

96. Where the trustee pays nothing for forfeited shares, a participating employee (or their nominee) will receive no capital proceeds from the disposal. Therefore the participating employee will be taken to have received capital proceeds equal to the market value of the share at the disposal time, pursuant to subsection 116-30(1) of the ITAA 1997.

Where an employee does not make an election

97. Where an employee acquires a qualifying share and does not make an election under section 139E:

- the discount given in relation to the share is included in the employee's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3); and

- the amount of the discount to be included in assessable income is dependent on whether the share is disposed of in an arm's length transaction within 30 days of the cessation time, pursuant to section 139CC(3) or 139CC(4).

98. Where an employee share scheme contains forfeiture provisions, the cessation time will be determined in accordance with subsection 139CA(2).

99. As the plan provides for a share to be forfeited up until the time the holding lock is released, the cessation time will be the earlier of:

- the time when the share is disposed of in accordance with the plan forfeiture provisions;
- the time when the holding lock is lifted;
- the time when the participating employee ceases to be employed by their employer or a group company, pursuant to subsection 139CA(3); or
- the end of the 10 year period starting when the participating employee acquired the share.

Disposal within 30 days

100. Where a participating employee or their nominee disposes of a share in an arm's length transaction within 30 days of the cessation time, the discount to be included in assessable income is the amount or value of any consideration received by them for the disposal less the amount or value of any consideration paid or given by them for the acquisition of the share, pursuant to subsection 139CC(3).

Forfeiture of shares

101. Where a participating employee or their nominee forfeits shares under the plan the Commissioner accepts the disposal will be at arm's length (refer to paragraph 95 of this Ruling). Consequently the discount to be included in the participating employee's assessable income will be the amount received from the trustee. Where no amount is received there is no discount included in assessable income.

Capital gains tax

102. Any capital gain or loss made is disregarded if it is made as a consequence of an arm's length disposal at the cessation time or within 30 days after the cessation time (subsection 130-83(2) of the ITAA 1997).

Disposal after 30 days

103. Where a participating employee or their nominee does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time less the amount or value of any consideration paid or given by them for the acquisition of the share, pursuant to subsection 139CC(4).

Capital gains tax

104. Where a share is a qualifying share and no election is made under section 139E of the ITAA 1936, a capital gain or loss may arise upon disposal (refer to paragraphs 42 to 47 of this Ruling) and the first element of the cost base of the share will be its market value at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

105. For the purposes of subsection 139CC(4) and subsection 130-83(3) of the ITAA 1997, the market value of a share acquired under the plan is determined under Subdivision F.

Shares allocated in error

106. An employee will acquire a share for the purposes of Division 13A if another person transfers or allots the share to the employee or the employee otherwise acquires a legal or beneficial interest in the share from another person.

107. Where a share is mistakenly allocated to a participating employee or their nominee, the plan provides that the mistaken recipient will hold the share absolutely for the account of the trustee. The Commissioner accepts that as this is only to effect the rectification of a mistake, the mistaken recipient never acquires a right or interest in the share. Therefore a participating employee or their nominee who is mistakenly allocated a share will not acquire the share for the purposes of Division 13A.

Capital gains tax

108. For CGT purposes a person will acquire a share if they become its owner (section 109-5 of the ITAA 1997). Where a share is allocated to a mistaken recipient under the plan, the mistaken recipient does not acquire a right or interest in a share and therefore will never own the share. In these circumstances the mistaken recipient is taken never to acquire the share for CGT purposes.

109. A person will make a capital gain or loss if and only if a CGT event happens (section 102-20 of the ITAA 1997).

110. Where a mistaken recipient transfers the share to the trustee, CGT event A1 will only happen if there is a change in the ownership of a share from the mistaken recipient to the trustee, pursuant to subsection 104-10(2) of the ITAA 1997. As the mistaken recipient never owns the share, CGT event A1 does not happen and as no other CGT event is considered to happen, no capital gain or loss will arise on the transfer of the share to the trustee.

Qualified persons with respect to dividends

111. Where a franked dividend is paid to a person, subsection 207-145(1) of the ITAA 1997 denies a gross-up and tax offset where the person is not a qualified person for the purposes of Division 1A of the former Part IIIA.

112. Broadly, a participating employee will be a qualified person in relation to all dividends paid on shares acquired under the plan during a year of income if they satisfy both the holding period rule and the related payments rule in respect of the dividend. Where shares are held by a nominee, the participating employee will be the person that has to satisfy the qualified person rules as the nominee will be ignored for imputation purposes (former subsection 160APHH(6)).

113. A participating employee will be taken to be a qualified person in respect of a dividend paid on shares acquired under the plan if the relevant shares are held at risk for a period of 45 days during the primary qualification period where no related payments are made, or the secondary qualification period where related payments are made (former section 160APHO).

114. Under former subsection 160APHM(2), a person is taken to have materially diminished the risks of loss or opportunities for gain with respect to shares if the net position of the person results in the person having less than 30% of the risks of loss or opportunities for gain relating to the shares.

115. The net position of a person with respect to shares is determined in accordance with the former subsection 160APHJ(5). However, former subsection 160APHJ(2), in defining the meaning of position provides:

....if a share, or an interest in a share, is an employee share scheme security, a condition attached to the share or interest, or a term of the document that created the interest, that prevents the holder of the share or interest from disposing of it or could result in the share or interest being forfeited is not a position in relation to the share or interest

116. Shares acquired by a participating employee or their nominee will be employee share scheme securities, as defined in former section 160APHD, as they will be qualifying shares for the purposes of Division 13A.

117. The conditions attaching to those shares which prevent their disposal (that is, the holding lock), or which could result in the shares being forfeited (such as where the shares do not become vested shares or where the employee's actions as noted in the plan otherwise result in forfeiture) will by virtue of the definition referred to above, not constitute a position in relation to those shares for the purposes of Division 1A of former Part IIIAA.

118. As the terms of the plan do not give rise to a position that may affect the calculation of the net position with respect to the shares, the operation of the plan itself will not consequently result in a material diminution of risks or opportunities for gain with respect to the shares.

119. Therefore, in the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the plan will not prevent a participating employee or their nominee from being a qualified person for the purposes of section 207-145 of the ITAA 1997 with respect to dividends received by them on shares acquired under the plan, provided the shares are held for the requisite period of time during the relevant qualification period.

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- deferral
- discount
- election
- employee share scheme
- forfeiture
- qualifying share

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