



Class Ruling

Income tax: Breville Group – Performance Rights Plan

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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.

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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.

2. In this Ruling, Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), as in force at the time occurring just before Schedule 1 to the *Tax Laws Amendment (2009 Budget Measures No. 2) Act 2009* commenced is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provisions of the ITAA 1936.

Relevant provision(s)

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

- Division 83A of Part 2-40 (Division 83A) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-C of Division 83A (Subdivision 83A-C) of the ITAA 1997;
- section 83A-110 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-125 of the ITAA 1997;

- section 83A-310 of the ITAA 1997;
- section 83A-330 of the ITAA 1997
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-15 of the ITAA 1997;
- Division 115 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997); and
- former section 139CB of the ITAA 1936.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

4. The class of entities to which this Ruling applies is all persons who acquire performance rights (rights) under the Breville Group Limited Performance Rights Plan (the plan) while they are employees of the Breville Group Limited (Breville) or any of its wholly owned subsidiaries (Breville group). They are persons who:

- are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936 and not temporary residents within the meaning of that expression in subsection 995-1(1) of the ITAA 1997;
- are employed by the Breville group from the time of acquisition of their rights until at least the time the rights are exercised; and

where the rights are acquired prior to 1 July 2009 they are persons whose rights:

- are not covered by an election made under former section 139E of the ITAA 1936; or
- have not had a cessation time, as mentioned in former subsection 139B(3) of the ITAA 1936, happen in relation to them prior to 1 July 2009.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 25 of this Ruling.

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

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

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Date of effect

9. This Ruling applies from 1 July 2008. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- the request for Class Ruling dated 28 June 2010;
- Breville Group Limited – Performance Rights Plan Rules;
- Breville Group Limited – Breville Group Performance Share Plan Trust Deed;
- amended Breville Group Limited – Performance Rights Plan Rules;
- Pro-Forma version of the 2009 Invitations;

- letter from the applicant dated 24 August 2010;
- letter from the applicant dated 14 September 2010;
and
- emails received from the applicant in relation to the Class ruling.

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

The plan

11. Breville established the plan in 2009 as part of its reward and retention policy for its senior executives.

12. Under the plan, Breville invites eligible employees to apply for performance rights (rights) to acquire fully paid ordinary shares (shares) in Breville.

13. Where rights are granted to employees they are granted for no consideration and the date of grant is specified in the invitation.

14. Rights were first granted to participants in the year ending 30 June 2009 (2009 rights) and the applicant has advised that rights will be offered in the year ending 30 June 2011 and subsequent income years (post 2009 rights).

15. The exercise of rights is subject to the satisfaction of a performance condition and the meeting of certain other conditions, including that a participant remain an employee of the Breville group during the vesting period.

16. The rights vest on a date which is more than 12 months after they are granted, if the performance condition is satisfied.

17. The participants are notified by Breville once the rights have vested and participants have 30 days to exercise their rights. The amount payable upon exercise is nil.

18. Once exercised, a right becomes an entitlement to a share which can be satisfied under the plan rules by:

- (i) Breville issuing the relevant number of shares to the participant;
- (ii) Breville procuring the transfer to the participant of the relevant number of shares; or
- (iii) the trustee of a trust allocating shares to the relevant participant.

19. Where a participant exercises their rights, shares will be either issued or transferred to the participant or allocated to the participant by the trustee of the trust established by Breville and held for the benefit of the participant.

20. Shares issued, transferred or allocated to a participant are not subject to forfeiture. Where shares are issued or transferred to a participant the participant acquires legal title, and where the trustee allocates shares to a participant, the participant becomes absolutely entitled to the shares.

21. The applicant has advised that at the time of grant no participant will hold a beneficial interest in more than five per cent of the shares in Breville or be in a position to cast, or to control the casting of, more than five per cent of the maximum number of votes that might be cast at a general meeting of Breville.

Disposal restriction – lock period

22. Where shares are issued, transferred or allocated, a participant is not entitled to dispose of their shares until the earlier of:

- 3 years after the date from which the shares are issued, transferred or allocated;
- 12 months after the date the participant ceases to be employed by a Breville group company; or
- such other date as the board of Breville (Board) determines (see paragraph 23 of this Ruling).

23. The Board has a discretion to permit a participant to dispose of their shares at an earlier date. However, the applicant has advised that the Board will only consider exercising its discretion to permit a participant to trade in their shares prior to the end of the lock period in exceptional circumstances, such as when a participant is having severe and unforeseen medical or financial related issues.

Lapsing of the rights

24. Each unvested right will lapse on the earlier of:

- the expiry of the exercise period (unless otherwise determined by the Board);
- the date the participant ceases employment with a Breville group company (unless otherwise determined by the Board);
- the date specified by the Board that they will lapse;
- the date a participant purports to transfer the right without the written consent of the board;
- failure to meet the performance condition in the prescribed period;
- the 10th year anniversary of the date of grant of the right; and

- the Board determining that a participant acted fraudulently or dishonestly or in breach of their obligations to any Breville group company.

25. The applicant has advised that where the Board has a discretion in relation to the lapsing of unvested rights, the Board will only exercise that discretion in exceptional circumstances, and not on a routine basis.

Ruling

Assessability of rights under Subdivision 83A-C

26. Where a participant acquires a right under the plan, Subdivision 83A-C applies in relation to the right.

27. No amount will be included in the participant's assessable income in relation to the right until the ESS deferred taxing point occurs.

ESS deferred taxing point

Rights acquired pre 1 July 2009

28. The ESS deferred taxing point for 2009 rights acquired by a participant under the plan will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, pursuant to subsection 83A-5(4) of the IT(TP)A 1997, which will be the earlier of:

- the time when the participant disposes of the right (other than by exercising the right);
- the time when the participant ceases the employment in respect of which the right was acquired, within the meaning of former subsection 139CB(2) of the ITAA 1936;
- if trading restrictions apply to the participant at the time the right is exercised and a share is issued, transferred or allocated – the time when the restrictions cease to have effect;
- if trading restrictions do not apply at the time the right is exercised and a share is issued, transferred or allocated – the time when the right is exercised; or
- the end of the ten year period starting when the participant acquired the right,

however, if the participant disposes of the share acquired on exercise of the right within 30 days of the cessation time, the ESS deferred taxing point will instead be the time of the disposal, under paragraph 83A-5(4)(c) of the IT(TP)A 1997.

Rights acquired post 1 July 2009

29. The ESS deferred taxing point for post 2009 rights acquired by a participant under the plan will, pursuant to section 83A-120, be the earlier of the following times:

- the time when a participant's right can no longer be forfeited and the participant is first able to dispose of the right, or the share acquired on exercise of the right;
- the time when a participant ceases the employment in respect of which they acquired the right, within the meaning of section 83A-330; or
- seven years after the participant was granted the right,

however, if the participant disposes of the right, or the share acquired on exercise of the right within 30 days after the first to occur of the above times, the ESS deferred taxing point will instead be the time of the disposal.

Amount to be included in assessable income

30. The market value of the right is included in the participant's assessable income under section 83A-110 in the income year in which the ESS deferred taxing point occurs.

Forfeiture or loss of rights

31. Division 83A will be taken never to have applied and no amount will be included in the assessable income of a participant if:

- a 2009 right lapses without having been exercised, pursuant to sub-paragraph 83A-5(4)(d)(i) of the IT(TP)A 1997; or
- a post 2009 right is forfeited or lost, pursuant to section 83A-310 of the ITAA 1997, other than as a result of a choice not to exercise the right.

Capital gains tax***Certain capital gains and losses disregarded***

32. The granting of a right to a participant does not result in a CGT event for the participant.

33. Any capital gain or loss made by a participant from the exercise of a right by the participant and the issue or transfer of a share to the participant or the allocation of a share by the trustee to the participant is disregarded, in accordance with subsection 130-80(1).

34. Where the ESS deferred taxing point of a right happens at the time of disposal of the share acquired pursuant to the right, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

First element of cost base of shares

35. The first element of the cost base and reduced cost base of a share acquired by a participant pursuant to a right to which this ruling applies is the market value of the share immediately after the ESS deferred taxing point of the right, in accordance with section 83A-125, section 112-15, subsection 110-25(2) and subsection 110-55(2).

Time of acquisition of shares

36. For the purposes of Division 115, the time of acquisition of a share acquired pursuant to a 2009 right to which this ruling applies is:

- where the share is not allocated by the trustee, the time the participant acquires legal title in the share; or
- where the share is allocated by the trustee, the time the participant becomes absolutely entitled to the share, that is, the time the share is allocated to the participant by the trustee;

in accordance with sub-paragraph 83A-5(4)(f)(i) of the IT(TP)A 1997.

37. The time of acquisition of a share acquired pursuant to a post 2009 right to which this ruling applies is immediately after the ESS deferred taxing point of the right, in accordance with section 83A-125.

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.*

Assessability of rights under Subdivision 83A-C

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

39. Division 83A of the ITAA 1997 also applies to certain shares, rights and stapled securities acquired before 1 July 2009 under Division 83A of the IT(TP)A 1997.

Rights acquired pre 1 July 2009

40. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A to the extent that it relates to that Subdivision) applies in relation to a 2009 right granted to a participant under the plan because:

- it is an ESS interest within the meaning of subsection 83A-10(1) of the ITAA 1997 (being a right to acquire a beneficial interest in a share in a company);
- the 2009 right was acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009;
- former subsection 139B(3) of the ITAA 1936 applied in relation to the 2009 right (the Commissioner accepts that the 2009 right acquired by the participant was a qualifying right within the meaning of former section 139CD of the ITAA 1936 and the participant did not make an election covering the 2009 right under former section 139E of the ITAA 1936); and
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 and former section 139CB of the ITAA 1936 did not occur before 1 July 2009.

41. Subdivision 83A-C (and the rest of Division 83A of the ITAA 1997) applies to the 2009 right subject to the modifications contained in subsection 83A-5(4) of the IT(TP)A 1997.

Rights acquired post 1 July 2009

42. Subdivision 83A-B will apply to a post 2009 right granted to a participant under the plan, unless Subdivision 83A-C applies.

43. Subdivision 83A-C allows for the deferral of tax on the amount assessable in respect of an ESS interest if certain conditions are satisfied. Subdivision 83A-C applies, and Subdivision 83A-B does not apply, to an ESS interest which is a right if the following conditions are satisfied:

- (a) subdivision 83A-B would, apart from subsection 83A-105(1), apply to the interest; and
- (b) subsection 83A-35(3), subsection 83A-35(4), subsection 83A-35(5) and subsection 83A-35(9) apply to the interest; and
- (c) there is a real risk that a participant will forfeit or lose the interest (other than disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

44. In relation to the first condition, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to a post 2009 right because the right:

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

45. In relation to the second condition, subsection 83A-35(3), subsection 83A-35(4), subsection 83A-35(5) and subsection 83A-35(9) apply to a post 2009 right granted to a participant because:

- when the right is acquired, the participant is employed by a Breville group company (subsection 83A-35(3));
- all of the ESS interests available for acquisition under the plan relate to ordinary shares in the capital of Breville (subsection 83A-35(4));
- the predominant business of Breville is not the acquisition, sale or holding of shares, securities or other investments, directly or indirectly (subsection 83A-35(5)); and
- after the acquisition of the post 2009 right, the participant will not hold a beneficial interest in more than five per cent of the shares in Breville nor be in a position to cast, or control the casting of, more than five per cent of the maximum number of votes that might be cast at a general meeting of Breville (subsection 83A-35(9)).

46. In relation to the third condition, Subdivision 83A-C applies to a post 2009 right if, under the conditions of the plan when the right is granted, there is a real risk that a participant will forfeit or lose the right (other than disposing of it, exercising the right or letting it lapse).

Real risk of forfeiture

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

The 'real risk of forfeiture' test does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, 'real' is regarded as something more than a mere possibility. Something is not a real risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

48. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore, the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

49. Where ESS interests are subject to both performance conditions and service conditions (such as a minimum term of employment) and the service conditions are sufficient to satisfy the real risk of forfeiture test at the time of acquisition, it is not necessary to consider whether the performance conditions also satisfy the test.

50. As rights acquired by participants are subject to a vesting period which is greater than 12 months (that is, they will lapse if the employee ceases employment prior to vesting) and the applicant has advised that the Board's discretion in relation to the lapsing of unvested rights will only be exercised in exceptional circumstances, and not on a routine basis, the Commissioner accepts that the post 2009 rights granted under the plan will be subject to a real risk of forfeiture and subsection 83A-105(3) applies. Accordingly, it is not necessary to consider whether the performance conditions alone satisfy the real risk of forfeiture test.

51. As a result, Subdivision 83A-C applies to post 2009 rights granted under the plan, and Subdivision 83A-B does not apply. The taxation of discounts received under the plan will be deferred until a deferred taxing point.

ESS deferred taxing point***Rights acquired pre 1 July 2009***

52. Under subsection 83A-110(1), an amount will be included in the assessable income of a participant in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs.

53. The ESS deferred taxing point for a right is worked out under section 83A-120 of the ITAA 1997. However, because Subdivision 83A-C of the ITAA 1997 applies to a 2009 right held by a participant in the plan by virtue of subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 also applies.

54. The ESS deferred taxing point for a 2009 right will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-120(3) of the ITAA 1997. The cessation time will be the earlier of:

- the time when the participant disposes of the right (other than by exercising the right);
- the time when the participant ceases the employment in respect of which the right was acquired, within the meaning of former subsection 139CB(2) of the ITAA 1936;
- if trading restrictions apply to the participant at the time the right is exercised and a share is issued, transferred or allocated – the time when the restrictions cease to have effect;
- if trading restrictions do not apply at the time the right is exercised and a share is issued, transferred or allocated – the time when the right is exercised; or
- the end of the ten year period starting when the participant acquired the right.

55. However, if the participant disposes of the share acquired on exercise of the right within 30 days after the cessation time, the ESS deferred taxing point will instead be the time of the disposal, under paragraph 83A-5(4)(c) of the IT(TP)A 1997.

Rights acquired post 1 July 2009

56. The ESS deferred taxing point for a post 2009 right is worked out under section 83A-120. It will be at the earlier of the following times:

- the time when there is no real risk of forfeiting or losing the right and the plan no longer genuinely restricts exercise or disposal of the right or disposal of the resulting share;
- the time when a participant ceases the employment in respect of which they acquired the right, within the meaning of section 83A-330; or
- seven years after the participant was granted the right.

57. The Commissioner accepts that the disposal restrictions described at paragraph 22 of this Ruling are genuine restrictions.

58. If the participant disposes of the right, or the share acquired on exercise of the right within 30 days after the first to occur of the above times, the ESS deferred taxing point will instead be the time of the disposal.

Amount to be included in assessable income

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

60. As the 2009 rights and post 2009 rights are granted for nil consideration and no exercise price is payable on exercise of the rights, the cost base of the interest will be nil.

Determining the market value

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

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

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

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

64. However, a participant must use the market value of the right, according to its ordinary meaning, if the deferred taxing point occurs on the day the participant disposes of the right.

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

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

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

Forfeiture or loss of rights

68. Where under Division 83A an amount is included in assessable income in respect of ESS interests granted under an employee share scheme, and the interests are subsequently forfeited or lost, section 83A-310 may apply to ensure Division 83A is taken never to have applied.

69. Section 83A-310 will apply if:

- either:
 - (i) the individual forfeits the interest; or
 - (ii) in the case of an ESS interest that is a beneficial interest in a right – the individual forfeits or loses the interest (without having disposed of the interest or exercised the right); and
- the forfeiture or loss is not the result of:
 - (i) a choice made by the individual (other than a choice by that individual to cease particular employment); or
 - (ii) a condition of a scheme that has the direct effect of protecting (wholly or partly) the individual against a fall in the market value of the interest.

Rights acquired pre 1 July 2009

70. Subparagraph 83A-5(4)(d)(i) of the IT(TP)A 1997 applies in relation to the 2009 rights acquired by participants under the plan because paragraph 83A-5(2)(a) of the IT(TP)A 1997 applies. Subparagraph 83A-5(4)(d)(i) of the IT(TP)A 1997 relevantly provides that the requirements in section 83A-310 of the ITAA 1997 must be treated as being satisfied in relation to an interest if the two requirements mentioned in former section 139DD of the ITAA 1936 are satisfied in relation to that interest.

71. The two requirements in former section 139DD of the ITAA 1936, in relation to the 2009 right, are that:

- the participant loses the right without having exercised it; and
- at the time the right was acquired, the participant was employed by a Breville group company.

72. If a participant loses their 2009 rights without having exercised them, the two requirements in section 139DD of the ITAA 1936 are satisfied and therefore the requirements of section 83A-310 of the ITAA 1997 are also satisfied.

73. Accordingly, Division 83A will be taken never to have applied in relation to the 2009 right and no amount will be included in the assessable income of the participant in relation to the right under Division 83A.

74. Where an amount has been included in a participant's assessable income of an earlier year, the participant can request an amendment to exclude that amount. There is no time limit for amending an assessment in these circumstances, pursuant to section 170(10AA) of the ITAA 1936.

Rights acquired post 1 July 2009

75. Where under the plan:

- a participant forfeits or loses a post 2009 right;
- Breville did not exercise their discretion to enable the participant to retain the right; and
- the participant had not at any time been in a position where they could have chosen to exercise the right,

then section 83A-310 will apply and Division 83A will be taken to have never applied to the right.

76. No amount will be included in a participant's assessable income in respect of a post 2009 right that was forfeited or lost in these circumstances. Where an amount has been included in an earlier year a participant can request an amendment to exclude that amount. As explained above, there is no time limit for amending an assessment in these circumstances.

Capital gains tax

Certain capital gains and losses disregarded

77. The granting of a right to a participant does not result in a CGT event for the participant.

78. Any capital gain or loss made by a participant from the exercise of a right by the participant and the issue or transfer of a share to the participant or the allocation of a share by the trustee to the participant is disregarded, in accordance with subsection 130-80(1).

79. Where the ESS deferred taxing point of a right happens at the time of disposal of the share acquired pursuant to the right, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

First element of cost base of shares

80. The first element of the cost base and reduced cost base of a share acquired by a participant pursuant to a right to which this ruling applies is the market value of the share immediately after the ESS deferred taxing point of the right, in accordance with section 83A-125, section 112-15, subsection 110-25(2) and subsection 110-55(2).

Time of acquisition of shares

81. For the purposes of Division 115, the time of acquisition of a share acquired pursuant to a 2009 right to which this ruling applies is:

- where the share is not allocated by the trustee, the time the participant acquires legal title in the share; or
- where the share is allocated by the trustee, the time the participant becomes absolutely entitled to the share, that is, the time the share is allocated to the participant by the trustee;

in accordance with sub-paragraph 83A-5(4)(f)(i) of the IT(TP)A 1997.

82. The time of acquisition of a share acquired pursuant to a post 2009 right to which this ruling applies is immediately after the ESS deferred taxing point of the right, in accordance with section 83A-125.

Appendix 2 – Detailed contents list

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

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References

Related Rulings/Determinations:

TR 2006/10

Subject references:

- acquisition of shares
- capital gains tax
- cessation
- disposal of shares
- employee share ownership
- employee share schemes & options
- securities rights & options

Legislative references:

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