



Class Ruling

Income tax: Royal Dutch Shell plc. Combination with BG Group plc – employee share scheme shares and rights

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① This publication provides you with the following level of protection:

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

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

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

What this Ruling is about

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 a provision in force at that time is referred to as a 'former' provision of the ITAA 1936.

Relevant provisions

3. The relevant provisions dealt with in this Ruling are:
- section 83A-10 of the *Income Tax Assessment Act 1997* (ITAA 1997)
 - section 83A-35 of the ITAA 1997
 - section 83A-45 of the ITAA 1997
 - section 83A-120 of the ITAA 1997

- section 83A-130 of the ITAA 1997
- section 130-80 of the ITAA 1997
- Subdivision DA of former Division 13A of the ITAA 1936
- former section 139BA of the ITAA 1936
- former section 139C of the ITAA 1936
- former section 139DQ of the ITAA 1936, and
- subsection 83A-5(2) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

All subsequent legislative references in this Ruling are to provisions of the ITAA 1997 unless otherwise specified.

Class of entities

4. The class of entities to which this Ruling applies is employees of BG Group plc (BG) and its subsidiaries at the time BG was acquired by Royal Dutch Shell plc (Shell) (the Combination) who:

- immediately prior to the Combination, held a beneficial interest in ordinary shares in BG (BG Shares) and/or held rights to ordinary shares in BG (BG Rights) where the BG Shares or BG Rights were obtained:
 - before 1 July 2009 and the shares or rights were qualifying shares or rights within the meaning of former section 139CD of the ITAA 1936 and the employee made no election pursuant to former section 139E of the ITAA 1936 (and no cessation time happened to the interest for the purposes of former subsection 139B(3) of the ITAA 1936 before the Combination), or
 - on or after 1 July 2009, Subdivision 83A-C applies to the shares or rights (and no ESS deferred taxing point happened to the shares or rights before the Combination)
- were, from the time of acquisition of the BG Shares or BG Rights until immediately prior to the Combination:
 - residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936, or
 - temporary residents within the meaning of that expression in subsection 995-1(1) and had no periods of foreign employment from when options were granted

- became employees of a Shell Group company following the Combination
- had their BG Shares or BG Rights replaced or partially replaced with Shell A shares and/or Shell B shares (Shell Shares) or rights to Shell Shares (Shell Rights), and
- are not subject to the Taxation of financial arrangements rules in Division 230.

(**Note:** Division 230 will generally not apply to individuals unless they have made an election for it to apply)

In this Ruling, a person belonging to the class of entities is referred to as a 'Participant'. Where the term 'participant' is used, this refers to a particular plan.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme is actually carried out in accordance with the scheme described in paragraphs 9 to 61 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.

Date of effect

8. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

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

10. BG is a company incorporated in the United Kingdom and has subsidiary entities in Australia.

11. Shell is incorporated in the United Kingdom and a tax-resident of the Netherlands.

12. BG shares were traded on the London Stock Exchange.

13. Shell has ordinary shares consisting of Shell A shares and Shell B shares (Shell Shares). These are traded on the London, New York and Amsterdam stock exchanges.

14. Shell acquired 100% of BG shares by way of a court approved scheme of arrangement. Court approval was granted on 11 February 2016 (the Court Order Date).

15. The Combination came into effect on 15 February 2016 (the Combination Date).

16. Australian BG employees to whom this Ruling applies were subject to one or more of the following share-based incentive plans:

- BG Group Company Share Option Scheme (CSOS)
- BG Group plc Global Partnership Plan (GPP)
- BG Group plc Long Term Incentive Plan (LTIP)
- BG Group plc Sharesave Plan 2008 (Sharesave), and
- BG Group plc Share Incentive Plan 2008 (SIP).

The above plans are collectively referred to as the 'BG share plans'.

17. Some, but not all, interests in the BG share plans vested on the Court Order Date. Participants whose BG Shares vested, or whose BG Rights vested and were automatically exercised on that date became shareholders of BG in relation to those interests and participated in the scheme of arrangement in the same way as all other BG shareholders.

18. Unvested BG Shares and/or BG Rights of participants were replaced with Shell Shares and/or Shell Rights at a ratio that provided an equivalent value of interests in Shell Shares and Shell Rights to the interests held in BG by participants prior to the Combination.

19. Under the terms of the Combination, BG Shareholders received GBP3.83 in cash and 0.4454 Shell B Shares (Default Consideration) for each BG Share they hold, unless they actively elected to:

- receive all or part of the share component in Shell A Shares (as opposed to Shell B Shares) at the same exchange ratio under the 'Shell A Share Alternative', and/or

- vary the proportions in which they receive New Shell Shares and cash, subject to elections made by other BG Shareholders under the 'Mix and Match Facility'.

The Shell A Share Alternative and the Mix and Match Facility discussed in this paragraph, together with the Default Consideration, are collectively referred to in this Ruling as the 'Combination consideration alternatives'.

20. At the time the replacement shares or rights to shares were acquired, no Participant held, nor was treated as holding, a beneficial interest in more than 5% of Shell shares (or 10% where the original BG interests were acquired after 1 July 2015), nor was in a position to cast, or to control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of Shell (or 10% where the original BG interests were acquired after 1 July 2015).

Employee Share Schemes

21. The following five BG employee share plans are relevant for this Ruling:

- BG Group Company Share Option Scheme (CSOS)
- BG Group plc Global Partnership Plan (GPP)
- BG Group plc Long Term Incentive Plan 2008 (LTIP)
- BG Group plc Sharesave Plan 2008 (Sharesave), and
- BG Group plc Share Incentive Plan 2008 (SIP).

The key features of each plan are summarised in turn in the following paragraphs.

CSOS

22. BG made awards of options under this plan prior to 1 July 2009 for no consideration. The exercise price of an option was set at the market value of the share at the time of the award. At the time of the Combination, any outstanding options were exercisable. Under the Plan, shares received upon exercise of the options have no restrictions or conditions. Options not exercised at the time of the Combination are only exercisable within six months of the Court Order Date.

23. Options exercised on or before the Court Order Date were exchanged for BG Shares which were then exchanged for the Combination consideration alternatives.

24. Options exercised in the six months after the Court Order Date were exchanged for BG Shares which in turn are exchanged for the Default Consideration. Any options not exercised by the end of this period will lapse.

GPP

25. The GPP commenced in August 2012.

26. A participant under this plan had the right to receive one BG Share (referred to as the Matching Share) from the company for every three BG Shares (referred to as Partnership Shares) the participant purchased with after-tax income. The Matching Shares would have vested if the Partnership Shares were held for three years and the participant remained employed by BG.

27. If some or all of the Partnership Shares were sold before the third anniversary of their purchase, then the proportionate number of Matching Shares lapsed.

28. Under the terms of the GPP, Matching Shares vested on the Court Order Date as a result of the Combination. After vesting, the BG shares were exchanged for the Combination consideration alternatives.

LTIP

29. Outstanding awards under the LTIP (which were granted in the form of conditional awards or nil cost options) comprise various different types of awards. The awards that are relevant for this Ruling are:

- Group Share Awards (GSAs)
- Performance Share Awards (PSAs), and
- Voluntary Bonus Deferral Plan (VBDP).

Granted in the form of Conditional Share Awards (CSAs)

Group Share Awards (GSAs)

30. Participants were granted rights to shares for no consideration. The rights obtained under this plan would have vested three years after award date. If the employee left the company as a bad leaver within the three year period, the rights were forfeited.

31. Unvested GSAs which were granted less than three years before 8 April 2015 vested in full (without any time pro-rating reduction) on the Court Order Date. As a result of vesting, BG shares were transferred to the participant, which were in turn exchanged for the Combination consideration alternatives.

32. GSA awards granted on or after 8 April 2015, pursuant to the terms of the LTIP, were exchanged for an equivalent GSA over Shell B shares (Shell GSA). The Shell GSA had the same economic value as the BG GSA, and will vest at the same time the BG GSA would otherwise have vested.

Performance Share Awards (PSAs)

33. Participants were granted rights to shares for no consideration. The rights obtained under this plan would have vested three years after award date, subject to performance conditions. If the employee left the company as a bad leaver within the three year period, the rights were forfeited.

34. Unvested PSAs granted before 12 May 2015 vested at the Court Order Date, without any time pro-rating, subject to the achievement of any applicable performance conditions. Where the performance conditions were not achieved, the PSAs lapsed.

35. PSAs granted on 12 May 2015 vested on the Court Order Date adjusted for time pro-rating and subject to the achievement of any applicable Company and individual employee performance conditions. No new PSAs were granted after 12 May 2015.

36. The portion of the PSAs that did not vest following the adjustment for time pro-rating was exchanged for new PSAs over Shell B Shares (New PSAs). The New PSAs had the same economic value as the portion of the BG PSAs they replaced and are subject to the same terms and conditions.

*Granted in the form of Nil-Cost options*Group Share Awards (GSAs)

37. A participant was granted options for no consideration. The options obtained under this plan would have vested three years after award date after which participants had a maximum of seven years to exercise the options in order to receive shares. Participants could choose whether, and when, to exercise the options to acquire BG shares at nil-cost. If the employee left the company as a bad leaver within the three year period, the options were forfeited.

38. Pursuant to the terms of the sub-plan, unvested GSA options granted before 8 April 2015 vested in full on the Court Order Date without any adjustment for time pro-rating. The vested options were exercisable on, and are exercisable for up to six months after, the Court Order Date. Options not exercised by the end of the period will be treated as exercised on the last day of the period. Options exercised for BG Shares are in turn exchanged for the Default Consideration.

39. Unvested GSA options that were granted on or after 8 April 2015 were exchanged for equivalent GSA options over Shell B Shares. These had the same economic value as the original BG options they replaced. These are subject to the same rules as the BG options and will vest at the same time the original BG options would otherwise have vested.

Performance Share Awards (PSAs)

40. A participant was granted options for no consideration. The options obtained under this plan would have vested three years after award date, subject to performance conditions, after which participants had a maximum of seven years to exercise the options in order to receive shares. Participants could choose whether, and when, to exercise the options to acquire BG shares at nil-cost. If the employee left the company as a bad leaver within the three year period, the options were forfeited.

41. Unvested PSA options granted before 12 May 2015 vested on the Court Order Date in accordance with the terms of the sub-plan without adjustment for time pro-rating, subject to the achievement of Company and individual employee performance conditions. Unvested PSA options granted on or after 12 May 2015 vested on the Court Order Date, subject to adjustment for time pro-rating and the achievement of Company and individual employee performance conditions.

42. The vested options were exercisable on, and are exercisable for a period of up to six months after, the Court Order Date. Options not exercised by the end of that period will be treated as exercised (to the extent exercisable) on the last day of that period. Options exercised for BG Shares are in turn exchanged for the Default Consideration.

43. The balance of unvested PSA options that did not vest at the Combination Date due to time pro-rating were exchanged for new PSA options over Shell B Shares (New PSA options). The New PSA options had the same economic value as the portion of the BG PSA options they replaced and are subject to the same terms and conditions. However, any PSA options that did not vest due to performance conditions lapsed.

Voluntary Bonus Deferral Plan (VBDP)

44. Participants obtained a Deferred Share Award (DSA) of nil-cost options over BG group shares instead of Annual Incentive Scheme (AIS) payments. Participants were entitled to a DSA of a total value of 110% of the AIS amount otherwise payable, comprised of a base award of 100% of the AIS amount and an incentive award of 10% of the AIS amount. The DSA was exercisable up to five years from the date of grant. However, where exercised within three years of the date of grant, the additional 10% incentive award component of the DSA is forfeited.

45. The base award was vested and was exercisable at Court Order Date.

46. The portion of the award that forms the incentive award became exercisable on Court Order Date and will remain exercisable for six months after that date.

47. Prior to the Court Order Date, Participants could elect to exercise their VBDP Awards on that date and acquire BG Shares at that time, which were in turn exchanged for one of the Combination consideration alternatives.

48. Where participants exercised the awards any time in the following six months, they were entitled to receive BG Shares or cash.

49. The vested options were exercised automatically on the employee's behalf at the time of vesting and the resulting BG shares were exchanged for the Default Consideration.

Sharesave

50. A participant in this plan was invited to enter into a savings contract with an authorised savings carrier in order to purchase BG shares at a specified price and was granted options which could not be exercised within three years. The participant made regular contributions, from net pay, over three years. After three years participants could exercise the options to purchase BG shares.

51. On the third anniversary of joining the Sharesave plan (the exercise date), a participant was able to use the savings to purchase BG shares at the specified price or alternatively the participant could withdraw all of the savings. The option lapsed if not exercised within six months of the third anniversary.

52. Pursuant to the terms of the Sharesave plan, outstanding options which were not already exercisable became exercisable on the Court Order Date to the extent of the savings made.

53. Prior to the Combination, participants could elect to exchange all of their Sharesave options over BG Shares for options over Shell B Shares, with the replacement options being of the same economic value and subject to the same terms and conditions as the original options.

54. If a participant did not elect to exchange their options, they may exercise their Sharesave options to buy BG Shares at the specified price using the savings in the plan as at the exercise date (exercisable from the Court Order Date for a period of six months afterwards). The BG Shares obtained were ultimately exchanged for the Combination consideration alternatives (or for the Default Consideration if exercised in the six months following the Court Order Date). If a participant does not exercise the options during that time, the options will lapse and the savings will be returned to the participant.

SIP

55. Shares awarded under this plan are held in a special trust. Participants could withdraw shares from the trust in line with the relevant UK tax treatment.

56. Under the SIP, Participants may obtain:

- Free Shares
- Partnership Shares
- Dividend Shares.

These shares are collectively referred to as SIP Shares.

Free Shares (also referred to as Flex Shares)

57. Free Shares to a maximum value of GBP3,000 per annum (increased to GBP 3,600 from 6 April 2016), could be awarded under this plan. A participant was required to hold the Free Shares for a minimum of three years and may hold for up to a maximum of five years. The Free Shares were subject to forfeiture in the event participants left the company as a bad leaver within one year after the beginning of the relevant 'Flex Year' (1 April of the grant year).

Partnership Shares

58. A participant could enter into a Partnership Share Agreement where contributions were made, from gross salary, to a Trust account. Each six months (the Accumulation Period) the Trustee purchased BG Partnership Shares with the contributions made. The shares acquired were held in trust. A participant may, at any time, direct the trustee to transfer legal title to him or her or as they may direct. Partnership Shares were not ESS interests subject to Subdivision 83A-C and therefore are not subject to this Ruling.

Dividend Shares

59. The Dividend Shares were acquired at market value from dividends paid on BG Partnership Shares, Free Shares (also referred to as Flex Shares) and any Dividend Shares previously issued and held in the SIP. The Dividend Shares were not subject to forfeiture, but were required to be held for three years.

Impact on the SIP at the Combination

60. At the Combination Date, the Trustee (at the direction of the participants) exchanged the SIP Shares for the Combination consideration alternatives.

61. Any cash component was paid to participants. Shell shares obtained under the exchange continue to be held in trust for participants in the SIP. Replacement Shell Shares are subject to the same conditions as the original category of SIP BG Shares that they replace.

Ruling

ESS Interests

CSOS

62. Unvested CSOS options acquired before 30 June 2009 under the BG share plans were acquired under an employee share scheme within the meaning of former section 139C of the ITAA 1936.

63. Where the CSOS options were not subject to an election made by participants pursuant to former section 139E of the ITAA 1936 before 1 July 2009 and no cessation time happened to the options for the purposes of former subsection 139B(3) of the ITAA 1936, the options are ESS interests within the meaning of subsection 83A-10(1).

All other plans

64. Unvested BG Rights acquired on or after 1 July 2009 under any of the BG Share Plans are ESS interests as defined under subsection 83A-10(1).

Combination

65. The Combination is a 'takeover' for the purposes of Subdivision DA of former Division 13A of the ITAA 1936 and section 83A-130.

BG Rights acquired before 1 July 2009

66. Where CSOS options are exercised on the Court Order Date or in the period of 6 months after that date, to the extent that the BG Shares are exchanged for:

- Shell Shares as Combination consideration, the Combination does not cause an ESS deferred taxing point to occur, and
- any cash component received will cause an ESS deferred taxing point to occur to the extent of the cash received.

BG Shares or BG Rights acquired on or after 1 July 2009

67. Where BG Shares or BG Rights are replaced with Shell Shares or Shell Rights respectively, the replacement Shell Shares or Shell Rights are treated as a continuation of the ESS interests they replaced.

GPP Matching Shares

68. Neither the vesting of the BG Matching Shares nor the subsequent disposal of the BG Matching Shares will be an ESS deferred taxing point for the BG Shares. However, participants will include an amount in their assessable income under subsection 83A-110(1) in respect of the Shell Shares received due to the application of subsection 83A-115(4) to those matching shares.

Rights to VBDP shares

69. Neither the vesting and exercise of the rights, nor the subsequent disposal of the BG Shares will be an ESS deferred taxing point for the BG Rights. However, participants will include an amount in their assessable income under subsection 83A-110(1) in respect of the Shell Shares received as Combination consideration due to the application of subsection 83A-120(7) to the nature of the rights that those shares replace.

Sharesave BG Rights exchanged for Shell Rights

70. The Shell Rights are treated as a continuation of the BG Rights under section 83A-130 and the Combination does not cause an ESS deferred taxing point.

Sharesave BG Rights not exchanged for Shell Rights

71. Neither the vesting of the rights nor a subsequent exercise and disposal of the BG Shares will be an ESS deferred taxing point for the BG Rights. However, participants will include an amount in their assessable income under subsection 83A-110(1) in respect of the Shell Shares received as Combination consideration due to the application of subsection 83A-120(7) to the nature of the rights that those shares replace.

GSAs and PSAs that vested on the Court Order Date

72. Neither the vesting and satisfaction of these rights with BG Shares nor the subsequent disposal of the BG Shares will be an ESS deferred taxing point. However, participants will include an amount in their assessable income under subsection 83A-110(1) in respect of the Shell Shares received as Combination consideration due to the application of subsection 83A-120(7) to the nature of the rights that those shares replace.

GSAs and PSAs that remain unvested on the Court Order Date

73. To the extent that the these BG Rights are replaced with Shell Rights, these are treated as a continuation of the BG Rights under

section 83A-130 and the Combination does not cause an ESS deferred taxing point.

Free Shares and Dividend shares under the SIP

74. The replacement Shell Shares are treated as a continuation of the BG Shares under section 83A-130 and the Combination does not cause an ESS deferred taxing point.

Continuation of employment

75. For participants who acquired BG Shares or BG Rights under the BG share plans before the Combination, their employment by Shell or a subsidiary of Shell after the Combination is treated as a continuation of the employment in respect of which they acquired their shares or rights for the purposes of:

- (a) former section 139DQ of the ITAA 1936, and/or
- (b) section 83A-130.

Cash component

76. To the extent a Participant received cash for their BG Shares under the BG share plans, an ESS deferred taxing point happened to that portion of the ESS interests.

Capital gains tax consequences

77. Any capital gains or capital losses made as a result of the CGT event that happened upon the exchange of BG Shares or BG Rights held under the BG share plans for Shell Shares or Shell Rights under the Combination are disregarded under subsection 130-80(1).

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.*

ESS Interests

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

79. The shares or awards (rights) acquired by participants under each of the BG Share Plans on or after 1 July 2009 are ESS interests as defined under subsection 83A-10(1).

80. Pursuant to Subdivision 83A-A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), Division 83A also applies to certain shares, rights and stapled securities acquired before 1 July 2009.

81. CSOS options were acquired by participants in respect of their employment for no consideration and thus were acquired under an employee share scheme for the purposes of former section 139C of the ITAA 1936.

82. Subsection 83A-5(2) of the IT(TP)A 1997 provides that Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) will apply to the options granted to a participant under the CSOS Plan where:

- the options were 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 to the options (the Commissioner accepts that the options acquired by the Participant were qualifying rights within the meaning of former section 139CD of the ITAA 1936 as long as the Participant did not make an election covering those options under former section 139E), and
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 and former section 139CB of the ITAA 1936 for those options did not occur before 1 July 2009.

83. As the conditions in subsection 83A-5(2) of the IT(TP)A 1997 were met, the CSOS options are also ESS interests as defined under subsection 83A-10(1).

Combination with the BG Group

84. The employee share scheme rules are designed to ensure that employees are not adversely affected by takeovers and

restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to the takeover or restructure.

85. The Commissioner accepts that as Shell acquired all of the BG shares, the Combination is a '100% takeover' for the purposes of Subdivision DA of former Division 13A of the ITAA 1936 and for the purposes of section 83A-130.

Employee Share Schemes

Rights acquired pre 1 July 2009

86. Pursuant to subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) applies to the CSOS options for the reasons explained in paragraphs 82 and 83.

ESS deferred taxing point

87. Where Subdivision 83A-C applies to an ESS interest, an amount will be included in the assessable income of a participant under subsection 83A-110(1) in the income year when an ESS deferred taxing point happens to the ESS interest.

88. The ESS deferred taxing point for rights is worked out under section 83A-120. However, because Subdivision 83A-C applies to rights acquired before 1 July 2009 in accordance with subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

89. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that the ESS deferred taxing point for a right acquired before 1 July 2009 will be the cessation time determined by former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-120(3).

90. Where an ESS right is disposed of by way of exercising the right, former paragraph 139CB(1)(d) of the ITAA 1936 would ordinarily apply and the cessation time is the time when the right is exercised, unless subsection 139CB(3) applies of the ITAA 1936.

91. Subsection 139CB(3) of the ITAA 1936 provides that:

- where a share is acquired as a result of the exercise of a right (BG Share), and
- because of subsection 139DQ of the ITAA 1936 another share (Shell Share) is treated, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, as a continuation of the previous share (BG Share),

former paragraph 139CB(1)(d) of the ITAA 1936 will not apply.

92. Former subsection 139DQ(1) of the ITAA 1936 provided that where, as a result of a takeover:

- an employee acquires matching shares or rights in a new company to replace shares or rights in an old company that were acquired under an employee share scheme, and
- the conditions specified in former section 139DR of the ITAA 1936 are also met,

the matching shares or rights are treated, for the purposes of former Division 13A of the ITAA 1936, as if they are a continuation of the shares or rights that the employee held in the old company.

93. Where the Participant exercised their CSOS rights and acquired BG Shares at the Court Order Date or in the six months afterwards, the BG Shares acquired were then exchanged for the Combination consideration alternatives.

94. The Commissioner accepts that former subsection 139DQ(1) of the ITAA 1936 applies to the Participant's replacement shares in Shell as:

- the Combination is a '100% takeover' within the meaning of former section 139GCB of the ITAA 1936, and
- the conditions specified in former section 139DR of the ITAA 1936 are met.

95. Thus, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, the replacement shares in Shell are treated as a continuation of the Participant's BG Shares. The conditions in former subsection 139CB(3) are therefore met.

96. As former subsection 139CB(3) of the ITAA 1936 applies, the cessation time provided by former paragraph 139CB(1)(d) will not apply on exercise of the options at the Court Order Date or in the six months afterwards, to the extent that the BG Shares are exchanged for Shell Shares as Combination consideration. Any cash component received will cause an ESS deferred taxing point to occur to the extent of the cash received.

97. Where a Participant exercised their options and obtained BG Shares before the Court Order Date, the BG shares were no longer held in an employee share scheme and the first condition of former subsection 139DR of the ITAA 1936 was not met.

98. Consequently former paragraph 139CB(1)(d) of the ITAA 1936 applied to options exercised before the Court Order Date and a cessation time occurred at the time the rights were exercised, subject to the rule in subsection 83A-120(3) which will substitute that time with the disposal time if the BG Shares are disposed of within 30 days of receipt.

Shares or rights acquired on or after 1 July 2009

99. Under the Combination, when a Participant ceased to hold shares or rights in BG and instead held shares or rights in Shell, the Participant is, for the purposes of Division 83A, taken to have disposed of their shares or rights. Under subsection 83A-115(3) for shares or subsection 83A-120(3) for rights, the disposal may give rise to an ESS deferred taxing point triggered by the Combination.

100. However, the Participant is not taken to have disposed of their BG shares or rights where the replacement shares or rights in Shell are, for the purposes of section 83A-130, treated as a continuation of shares or rights in BG. In such circumstances, the Combination alone would not trigger an ESS deferred taxing point (provided also that the Participant does not cease employment within the meaning of section 83A-330).

Conditions for the continuation of shares or rights

101. Section 83A-130 relevantly provides that where as a result of a takeover of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests
- the replacement ESS interests relate to ordinary shares
- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company at or about the time of the takeover, and
- the employee at the time they acquire the replacement ESS interests:
 - does not hold or is not treated as holding a beneficial interest in more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the shares in the new company, or
 - is not in a position to cast or is not treated as being in a position to cast or control the casting of more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the maximum number of votes that might be cast at a general meeting of the new company,

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

ESS deferred taxing point

102. To the extent that the Combination causes vesting, for each of the following BG plans there would *prima facie* be an ESS deferred taxing point for the purposes of subsection 83A-115(4) in the case of BG Shares and subsection 83A-120(7) in the case of BG Rights as the forfeiture conditions and restrictions were lifted with vesting:

- GPP Matching Shares
- Rights to GSA and PSA shares and options
- Rights to VBDP shares, and
- Rights to Sharesave shares.

103. However, pursuant to subsection 83A-115(3) in the case of the BG Shares and paragraph 83A-120(3)(b) in the case of the BG Rights, as the BG Shares held or obtained were disposed of to acquire Shell Shares within 30 days of the vesting, the ESS deferred taxing point described in paragraph 102 is disregarded and the disposal date is instead taken to be the ESS deferred taxing point.

104. Despite the disposal of the BG Shares, Shell Shares received as consideration are treated as a continuation of the BG Shares under section 83A-130 because all of the conditions mentioned in paragraph 101 were met. Therefore, the disposal of the BG Shares was not an ESS deferred taxing point.

105. However, the Shell Shares obtained as a result of the vesting of the ESS interests described in paragraph 102 were not subject to forfeiture or restrictions. An ESS deferred taxing point happens in relation to these Shell Shares at the time of acquisition under subsection 83A-115(4) in the case of the Shell Shares resulting from GPP Matching Shares and subsection 83A-120(7) in the case of Shell Shares resulting from BG Rights under the GSA, PSA, VBDP and Sharesave plans.

106. To the extent that the Combination did not cause vesting, participants under the following plans Rights were required to exchange BG Rights for Shell Rights:

- the GSA and PSA plans
- the Sharesave plan (if the Participant had elected to do so prior to the Combination becoming effective), and
- the Free Shares and Dividend Shares components of the SIP.

107. Shell Rights received on exchange of BG Rights under the plans set out in paragraph 106 are treated as a continuation of the BG Rights under section 83A-130 because all of the conditions

mentioned in paragraph 101 were met. Therefore, the disposal of the BG Rights was not an ESS deferred taxing point.

Continuation of employment

108. For Participants who continued to be employed by Shell or a subsidiary of Shell after the Combination, their employment is treated as a continuation of the employment in respect of which they acquired their BG shares or rights for the purposes of former Division 13A of the ITAA 1936 and/or section 83A-130. Accordingly, they have not ceased their employment within the meaning of the former sections 139CA and 139CB of the ITAA 1936 and/or section 83A-330.

Capital gains tax consequences

109. Any capital gains or capital losses made as a result of the CGT event that happened upon the exchange of BG Shares or BG Rights held under the BG share plans for Shell Shares or Shell Rights under the Combination are disregarded as each of the relevant requirements in subsection 130-80(1) are satisfied and subsection 130-80(2) does not apply.

Cash component of the consideration

110. To the extent that a Participant receives cash for their BG Shares obtained under the BG share plans, it would constitute a disposal of their ESS interests for the purposes of subsection 83A-130(5). This is because the cash component is not an ESS interest within the meaning of Division 83A and therefore cannot be treated as a continuation of the old interest for the purposes of subsection 83A-130(2). This will result in an ESS taxing point for the ESS interests to the extent a cash component is received.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1997 83A-10(1)
- ITAA 1997 83A-35
- ITAA 1997 83A-45
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-115(3)
- ITAA 1997 83A-115(4)
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(3)(b)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-130
- ITAA 1997 83A-130(2)
- ITAA 1997 83A-130(5)
- ITAA 1997 83A-330
- ITAA 1997 130-80
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(2)
- ITAA 1997 995-1(1)
- IT(TP)A 1997
- IT(TP)A 1997 Div 83A
- IT(TP)A 1997 SubDiv83A-A
- IT(TP)A 1997 83A-5(2)
- IT(TP)A 1997 83A-5(4)
- IT(TP)A 1997 83A-5(4)(b)(i)
- TAA 1953
- Tax Laws Amendment (2009 Budget Measures No.2) Act 2009 Schedule 1
- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 Pt III Div 13A
- ITAA 1936 Subdiv DA
- ITAA 1936 139B
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139C
- ITAA 1936 139CA
- ITAA 1936 139CB
- ITAA 1936 139CB(1)(d)
- ITAA 1936 139CB(3)
- ITAA 1936 139CD
- ITAA 1936 139DA
- ITAA 1936 139DQ
- ITAA 1936 139DQ(1)
- ITAA 1936 139DR
- ITAA 1936 139GCB
- ITAA 1936 139E
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-10

ATO references

NO: 1-7P0DVQ1

ISSN: 2205-5517

BSL: PGI

ATOlaw topic: Income tax ~~ assessable income ~~employee share schemes

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COMMONWEALTH OF AUSTRALIA

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