

CR 2001/28 - Income tax: capital gains: employee share scheme: Telstra Corporation Limited

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Class Ruling

Income tax: capital gains: employee share scheme: Telstra Corporation Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Part 3-1 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
 - Part 3-3 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to whom this Ruling applies are all Australian residents who participated in either or both of the Telstra Employee Share Ownership Plan No. I (TESOP I), and the Telstra Employee Share Ownership Plan No. II (TESOP II).

4. This Ruling only applies to those employees who made an election under section 139E of ITAA 1936 to be assessed on the discount given in relation to shares in the year in which they were acquired by the employee for the purposes of Division 13A of ITAA 1936.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
6. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 23 is carried out in accordance with the details of the arrangement provided in this Ruling.
7. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

9. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- the Telstra Employee Share Ownership Plan 1997 offer document;
- the Telstra Employee Share Ownership Plan Loan Scheme rules;
- the Telstra Employee Share Ownership Plan Trust Deed;
- the Telstra Employee Share Ownership Plan 1999 offer document;
- the Telstra Employee Share Ownership Plan II Loan Scheme rules;
- the Telstra Employee Share Ownership Plan II Trust Deed; and
- the application for the Class Ruling dated 1 June 2001.

The schemes

11. The Commonwealth of Australia made share offers to Telstra (and related company) employees in November 1997 and October 1999 under two employee share schemes (as defined in Division 13A of the ITAA 1936). These schemes are the:

- Telstra Employee Share Ownership Plan No. I (“TESOP I”); and
- Telstra Employee Share Ownership Plan No. II (“TESOP II”).

12. Shares (other than Loyalty Shares) were allocated to employees under TESOP I and TESOP II on the following dates:

- 15 November 1997 for TESOP I; and
- 16 October 1999 for TESOP II.

Key aspects of TESOP I AND TESOP II

Provision of shares without cost to Telstra employees

13. Both TESOP I and TESOP II provided extra shares to employees (without cost to the employee) where the employees acquired shares in Telstra in accordance with the relevant terms of TESOP I and TESOP II.

14. In the case of TESOP I, these extra shares were referred to as “Extra Loan Shares” or “Extra Non-Loan Shares” depending upon whether the employee acquired shares in Telstra using a loan provided by Telstra or their own funds.

15. In the case of TESOP II, these extra shares were referred to as “Extra Shares” and were based on the number of shares the employee acquired in Telstra under the allocation of shares in Telstra which was guaranteed by the Commonwealth of Australia (“Guaranteed Allocation”).

16. Extra Loan Shares, Extra Non-Loan Shares and Extra Shares are/were all held in trust by Telstra ESOP Trustee Pty Ltd (the “Trustee”) (see explanation below for details).

Provision of interest free loan to Telstra employees

17. Both TESOP I and TESOP II provided for loans to employees by Telstra to assist those employees to acquire shares in Telstra. These shares were referred to as “Loan Shares”. The maximum number of shares employees could acquire using the loan provided by Telstra was:

- (i) under TESOP I – 2000 shares; and
- (ii) under TESOP II – 400 shares.

Loan Shares are/were held in trust by the Trustee.

18. The Loan Shares were provided to the employees at a nominal discount to their market value (as determined under Division 13A of the ITAA 1936).

19. TESOP I also permitted an employee to acquire shares using their own funds if they did not wish to borrow an amount which Telstra offered to provide to the employee. These are/were referred to as “Non-Loan Shares”. Non-Loan Shares are not held in trust - they are owned by the employee.

Provision of Loyalty Shares

20. Both TESOP I and TESOP II provided additional shares (“Loyalty Shares”) to eligible employees of the Telstra group who:

- (iii) acquired shares in Telstra in accordance with the relevant terms of TESOP I and TESOP II; and
- (iv) retained the shares for 12 months after the date of acquiring those shares.

21. The Loyalty Shares when provided under TESOP II are/were held in trust by the Trustee. These shares are referred to as “TESOP II Loyalty Shares”. The Loyalty Shares acquired under TESOP I were not held in trust.

Restriction periods under TESOP I and TESOP II

22. Under both TESOP I and TESOP II an employee is prevented from dealing with or disposing of the shares before a particular time ('the restriction period'). The table below sets out when the restriction period in relation to the relevant TESOP I and TESOP II shares expires.

TESOP Restriction Periods	
Share Type	Restriction Period Expiry Date
TESOP I – Loan Shares / Extra Loan Shares ¹	Latter of : • 15 November 2000, or • the date the loan is repaid ²
TESOP I – Extra (1:4) Non-loan Shares ³	Earlier of: • 15 November 2000; or • when you cease employment with the Telstra Group ⁴
TESOP II – Extra (1:4) Shares ⁵ and TESOP II Loyalty (1:10) Shares	Earlier of: • 16 October 2002; or • when you cease employment with the Telstra Group ⁴
TESOP II – Loan Shares	For continuing employees the date is the latter of : • 16 October 2002; or • the date the loan is repaid ⁶
1. "Extra Loan Shares" are extra shares employees received as a result of the acquisition of shares under TESOP I using amounts loaned to them by Telstra. 2. This is irrespective of whether employment with the Telstra Group has ceased. If the employee had ceased employment prior to 15 November 2000, the relevant date was when the loan was repaid. Where the shares were sold for the employee by the Trustee, the relevant time was immediately prior to when the shares were sold. 3. "Extra Non-Loan Shares" are extra shares acquired as a result of the acquisition of shares by the employee under TESOP I using his/her own money. 4. This also includes situations where the employee ceased employment with a company that was part of the Telstra Group at the time of the relevant Telstra float (and the employee was employed by that company at the time of the float). 5. "Extra Shares" are extra shares the employee acquired as a result of a Guaranteed Allocation of shares which the employee acquired using her/his own money. 6. This is irrespective of whether the relevant employment with the Telstra Group has ceased. However, if the employee ceases employment prior to 16 October 2002, the relevant date is when the loan is repaid. Where the shares are sold for the employee by the Trustee, the relevant time is immediately prior to when the shares are sold	

23. There is no restriction period for the Non-Loan Shares or the Loyalty Shares acquired under TESOP I. There is also no restriction period for the shares the employee acquired under the Guaranteed Allocation in connection with TESOP II .

Ruling

24. Where an employee of Telstra (or a related group company) made an election under section 139E of the ITAA 1936 for the year in which Loan Shares, Extra Loan Shares, Extra Non-Loan Shares or Extra Shares were acquired by the Trustee on the employee's behalf (and in the case of TESOP II Loyalty Shares, when the right to acquire the TESOP II Loyalty Shares was acquired by the employee), the employee is taken to have acquired the relevant shares for capital gains tax purposes at the time the employee becomes absolutely entitled to the shares as against the Trustee (as set out in the table following paragraph 30).

25. Where an employee of Telstra (or a related group company) made an election under section 139E of the ITAA 1936, the date of acquisition as determined in paragraph 24 above is also the relevant date to determine the employee's cost base of the relevant shares under section 130-80(2) of the ITAA 1997.

26. Where an employee made an election under section 139E of the ITAA 1936, the date of acquisition as referred to in paragraph 24 above is also the relevant date for the commencement of the 12 month holding period required under section 115-25 of the ITAA 1997 for the employee to be eligible for a discount capital gain on disposal of the relevant shares.

Explanations

27. The implications for the employee in relation to the relevant shares acquired by the employee under TESOP I and TESOP II as detailed below are only relevant to those employees who made an election under section 139E of the ITAA 1936 for the year in which the relevant shares were acquired by the Trustee (or the rights acquired by the employee in the case of TESOP II Loyalty Shares). Further, the analysis below applies only to shares which were allocated under TESOP I and TESOP II prior to 28 February 2001.

28. This Class Ruling and the following analysis do not apply to an employee who acquired shares under TESOP I or TESOP II and did not make an election under section 139E of the ITAA 1936 in respect of those shares.

Time of Acquisition by the Employee

29. Under subsection 109-5(2) of the ITAA 1997, the employee is taken to 'acquire' the shares for capital gains tax purposes at the time the employee becomes absolutely entitled to the shares as against the

Trustee in accordance with CGT event E5 and subsection 104-75(2) of the ITAA 1997.

30. CGT event E5 happens when a person becomes absolutely entitled to a capital gains tax asset of a trust as against the trustee. The table below sets out precisely when, under TESOP I and TESOP II, the employees become absolutely entitled to the Loan Shares, Extra Loan Shares, Extra Non-Loan Shares, Extra Shares or TESOP II Loyalty Shares as against the Trustee and therefore when CGT event E5 happens in relation to the relevant shares.

Absolute Entitlement under TESOP I and TESOP II

Share Type	Absolute Entitlement Date		
	When loan repaid in full by 15 November 2000	When employee ceased to be an employee of the Telstra group	When loan was not repaid in full by 15 November 2000
TESOP I - Loan Shares/Extra Loan Shares	15 November 2000	If the loan is repaid in full; • when the employee ceased to be an employee of the Telstra group. If the loan is not repaid in full, at the earlier time when: • the employee repays the loan in full, or • immediately prior to when the Trustee disposes of the shares on the employee's behalf.	At the earlier time when: • the employee repays the loan in full, or • immediately prior to when the Trustee disposes of the shares on the employee's behalf.

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Share Type	Absolute Entitlement Date		
	When the loan is repaid in full by 16 October 2002	When the employee ceased to be an employee of the Telstra group	When the loan is not repaid in full by 16 October 2002
TESOP II – Loan Shares	16 October 2002	If the loan is repaid in full; • when the employee ceased to be an employee of the Telstra group. If the loan is not repaid in full, at the earlier time when: • the employee repays the loan in full; or • immediately prior to when the Trustee disposes of the shares on the employee's behalf.	At the earlier time when: • the employee repays the loan in full, or • immediately prior to when the Trustee disposes of the shares on the employee's behalf.

Share type	Absolute Entitlement Date
TESOP I - Extra Non-loan shares	At the earlier of: • 15 November 2000; or • the time when the employee ceased relevant employment with the Telstra group
TESOP II - Extra Shares and TESOP II Loyalty Shares	At the earlier of: • 16 October 2002; or • the time when the employee ceases relevant employment with the Telstra group.

31. The time at which employees become absolutely entitled to the Loan Shares, Extra Loan Shares, Extra Non-Loan Shares, Extra Shares and TESOP II Loyalty Shares is described in more detail below.

TESOP I - Loan Shares and Extra Loan Shares

For employees who remain with the Telstra group

32. While:

- (i) the relevant employment continues with the Telstra Group; and
- (ii) either an amount is outstanding against the Share Loan or 3 years have not expired from the date of acquisition of the relevant shares;

the Loan Shares and Extra Loan Shares are held by the Trustee on the employee's behalf.

When both:

- (i) 3 years have expired from the date of acquisition of the relevant shares and
- (ii) the Share Loan has been repaid in full;

the Trustee must transfer the Loan Shares and Extra Loan Shares to the employee.

33. When:

- (i) 3 years have expired from the date of acquisition of the relevant shares; but
- (ii) the Share Loan has not been repaid in full;

the employee may either pay back the loan with cash (and have the Loan Shares and Extra Loan Shares transferred to them) or arrange through the Trustee to sell the Loan Shares and/ or Extra Loan Shares on the employee's behalf.

For employees whose relevant employment with the Telstra group ceases

34. If:

- (i) the relevant employment with the Telstra Group ceases; but
- (ii) the Share Loan has not been repaid in full;

the employee can either pay back the loan with cash (and have the Loan Shares and Extra Loan Shares transferred to them) or arrange with the Trustee to sell the Loan Shares and Extra Loan Shares on the employee's behalf.

35. If the employee does not arrange with the Trustee to sell the Loan Shares and Extra Loan Shares on the employee's behalf within

the specified times under TESOP I, the Trustee is obligated to sell the Loan Shares and Extra Loan Shares on the employee's behalf in accordance with the terms of TESOP I.

36. If:

- (i) the relevant employment with the Telstra Group ceases;
and
- (ii) the Share Loan has been repaid in full after the due date for payment of the final instalment on the shares;

the Trustee is obligated to transfer the Loan Shares to the employee.

Absolute entitlement to TESOP I Loan Shares and Extra Loan Shares

37. The employee becomes absolutely entitled as against the Trustee to the Loan Shares and Extra Loan Shares acquired under TESOP I:

- when both the relevant employee's Share Loan is repaid in full and 3 years have expired from the date of acquisition of the relevant shares. At this time the Trustee must transfer the Loan Shares and Extra Loan Shares to the employee;
- where 3 years have expired from the date of acquisition of the relevant shares but the Share Loan has not been repaid in full, at the earlier of the following points in time:
 - (i) when the employee repays the Share Loan in full; or
 - (ii) immediately prior to when the Trustee disposes of the shares on the employee's behalf;
- where the relevant employment with the Telstra Group ceases and the Share Loan has been repaid in full after the due date for payment of the final instalment on the shares, at the point in time when the relevant employment with the Telstra group ceases. At this time the Trustee must transfer the Loan Shares and Extra Loan Shares to the employee; or
- where the relevant employment with the Telstra Group ceases and the Share Loan has not been repaid in full, at the earlier of the following points in time:
 - (i) when the employee repays the Share Loan in full; or

- (ii) immediately prior to when the Trustee disposes of the shares on the employee's behalf.

TESOP I - Extra Non-Loan Shares

38. The Trustee is obligated to transfer the Extra Non-Loan Shares to the employee at the earlier of:

- (i) the time when the relevant employment with the Telstra Group ceases; or
- (ii) the time when 3 years have expired from the date when the Extra Non-Loan Shares were acquired.

Absolute entitlement to TESOP I Extra Non-Loan Shares

39. The employee becomes absolutely entitled as against the Trustee to the Extra Non-Loan Shares at the earlier of:

- (i) the time when the relevant employment with the Telstra Group ceases; or
- (ii) the time when 3 years have expired from the date when the Extra Non-Loan Shares were acquired.

TESOP II - Extra Shares and Loyalty Shares

40. The employee may instruct the Trustee to sell the Extra Shares and/ or Loyalty Shares on behalf of the employee at the earlier of:

- (i) the time when the relevant employment with the Telstra Group ceases; or
- (ii) the time when 3 years have expired from the date when the relevant Extra shares were acquired.

41. The Trustee must (unless the employee has previously instructed it to deal with the shares) transfer the Extra Shares and/ or Loyalty Shares to the employee in accordance with TESOP II.

Absolute entitlement to TESOP II Extra Shares and Loyalty Shares

42. The employee becomes absolutely entitled as against the Trustee to the Extra Shares and/ or Loyalty Shares at the earlier of:

- (i) the time when the relevant employment with the Telstra Group ceases; or
- (ii) the time when 3 years have expired from the date when the relevant shares were acquired.

TESOP II - Loan Shares

For employees who remain with the Telstra group

43. While:

- (i) the relevant employment with the Telstra Group continues; and
- (ii) either an amount is outstanding against the Share Loan or 3 years have not expired from the date of the acquisition of the relevant shares;

the Loan Shares are held by the Trustee on the employee's behalf.

44. When both:

- (i) 3 years have expired from the date of acquisition of the Loan Shares; and
- (ii) the Share Loan has been repaid in full;

the Trustee is obligated to transfer the Loan Shares to the employee at the later of the time when the 3 year period expired or the Share Loan was repaid in full.

If 3 years expire or for employees whose relevant employment with the Telstra group ceases

45. Where:

- (i) 3 years have expired from the date of acquisition of the Loan Shares;
- or
- (ii) the relevant employment with the Telstra group ceases;
- and
- (iii) the Share Loan has not been repaid in full;

the employee may repay the amount on the Share Loan (and have the Loan Shares transferred to him) or arrange with the Trustee to sell the Loan Shares where the proceeds of the sale will be used to repay the amount outstanding on the Share Loan. If the employee does not repay the Share Loan or arrange with the Trustee to sell the Loan Shares within the specified time limits the Trustee may dispose of the Loan Shares.

Absolute entitlement to TESOP II Loan Shares

46. The employee becomes absolutely entitled as against the Trustee to the Loan Shares under TESOP II:

- when both:

- (i) the relevant employee's Share Loan is repaid in full; and
- (ii) either 3 years have expired from the date of acquisition of the loan shares or when the relevant employment with the Telstra group ceases.

At this time the Trustee is obligated to transfer the Loan Shares to the employee;

- Where 3 years have expired from the date of acquisition of the Loan Shares or the relevant employment with the Telstra group ceases and the Share Loan has not been repaid in full, at the earlier of the point in time at which:
 - (i) the employee repays the Share Loan; or
 - (ii) immediately prior to when the Trustee disposes of the shares on the employee's behalf.

Cost base of the shares for the employee

47. Under section 130-80 of the ITAA 1997 where an employee made an election under section 139E of the ITAA 1936 to be assessed on any discount in the year the relevant shares were acquired by the Trustee on the employee's behalf, the first element of the cost base of the relevant shares acquired by the employee will be the market value (as determined under section 139FA of the ITAA 1936) on the day the employee acquired the relevant shares for capital gains tax purposes. As discussed above, the day the employee acquired the relevant shares for capital gains tax purposes is the day the employee becomes absolutely entitled to the relevant shares.

Commencement of the 12 month holding period

48. Where the shares are disposed of after 11.45 am (by legal time in the Australian Capital Territory) on 21 September 1999, the employee will be entitled to the 50% capital gains tax discount where the requirements of Subdivision 115-A of the ITAA 1997 are satisfied. Section 115-25 of the ITAA 1997 states that, to be eligible for the discount capital gain, the employee must hold the shares for at least 12 months from the date the employee acquires the shares. As indicated above, the date of acquisition for capital gains tax purposes is when the employee becomes absolutely entitled to the shares. Therefore, to be eligible for the discount capital gain, the employee must hold the relevant shares for at least 12 months from the date they become absolutely entitled to the shares.

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Commissioner of Taxation

18 July 2001

Previous draft:

Not previously issued in draft form

- resignation of employees
- share discounts on employee share schemes

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 97/16;

- shareholders
- shares
- trust assets
- trust deeds
- trust distributions
- trust income
- trusts
- trustees

Subject references:

- acquisition of shares
- assignment of rights and entitlements
- capital assets
- capital gains
- capital gains tax
- CGT cost base
- CGT indexed cost base
- cost base
- dismissal of employees
- disposal of shares
- employee related issues
- employee share ownership
- employee share schemes & options
- employees
- employer/employee relationship issues
- interposed trusts
- multiple sub trusts

Legislative references:

- ITAA 1936 Div 13A
- ITAA 1936 Div 13 of Part III
- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1997 3-1
- ITAA 1997 3-3
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- ITAA 1997 104-75(2)
- ITAA 1997 109-5(2)
- ITAA 1997 115-25
- ITAA 1997 115-A

ATO References

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