

CR 2008/36 - Income tax: INVESCO PLC - corporate reorganisation - Employee Share Schemes



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Class Ruling

Income tax: INVESCO PLC – corporate reorganisation – Employee Share Schemes

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

What this Ruling is about

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

Relevant provision(s)

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

- Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936;
- section 139CB of the ITAA 1936; and
- section 130-83 of the *Income Tax Assessment Act 1997* (ITAA 1997).

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

Class of entities

3. The class of entities to which this Ruling applies is all persons who were employees of INVESCO Asset Management Australia (Holdings) Limited who were granted options or awards to acquire INVESCO PLC shares under one of the employee share plans referred to in paragraph 14 of this Ruling. They are persons who, immediately prior to the corporate reorganisation described in paragraph 16 of this Ruling:

- held those options or awards;
- have not made an election under section 139E in relation to the options or awards;
- have not had a cessation time (within the meaning of section 139CB) happen in relation to the options or awards;
- were residents of Australia (within the meaning of subsection 6(1)) from the time of grant of the options or awards, to the time of the corporate reorganisation; and
- continued to be employed by INVESCO Asset Management Australia (Holdings) Limited after the corporate reorganisation.

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

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 23 of this Ruling.

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

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

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Date of effect

8. This Ruling applies to the income year ended 30 June 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

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

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

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

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

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

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

Scheme

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

- Application for Class Ruling from Minter Ellison Lawyers (the applicant) dated 23 October 2007;
- the draft Scheme of Arrangement;
- the draft Prospectus relating to the admission to the official list of the UK Listing Authority and to trading on the London Stock Exchange of INVESCO Limited;

- the Plan Rules for the INVESCO AMVESCAP No. 3 Executive Share Option Scheme, the INVESCO AMVESCAP 2000 Share Option Plan and the INVESCO AMVESCAP Global Stock Plan;
- a draft and undated employee communication to be sent to the employees by INVESCO PLC prior to implementation of the scheme of arrangement;
- a press release dated 18 July 2007 from INVESCO PLC announcing the loss of its status as a 'foreign private issuer' under the rules and regulations of the United States Securities and Exchange Commission;
- a press release dated 25 September 2007 from INVESCO PLC announcing the proposed corporate reorganisation of the INVESCO Group;
- a 'Frequently Asked Questions' document issued by INVESCO PLC concerning the proposed corporate reorganisation of the INVESCO Group;
- the Annual Report for INVESCO PLC for the financial year ended 30 June 2006; and
- letters dated 13 December 2007, 20 December 2007 and 24 December 2007 from the applicant.

14. INVESCO PLC operates a number of employee share plans including:

- INVESCO AMVESCAP No. 3 Executive Share Option Scheme (option scheme);
- INVESCO AMVESCAP 2000 Share Option Plan (option plan); and
- INVESCO AMVESCAP Global Stock Plan (award plan).

These plans are collectively referred to as the 'rights plans'.

15. Under the rights plans, participating employees were granted options or awards, which conferred on them rights to acquire ordinary shares in INVESCO PLC, which the applicant has advised are qualifying rights for the purposes of Division 13A.

Corporate reorganisation of INVESCO group

16. On 25 September 2007 the board of INVESCO PLC announced a corporate reorganisation to be implemented through a series of inter-related proposals. These proposals included:

- a corporate restructure (the Restructure) by way of a court approved scheme of arrangement under which INVESCO PLC would become a subsidiary of a newly incorporated holding company (INVESCO Limited); and
- a share capital consolidation, also known as a reverse stock split (the consolidation) which would be implemented immediately after the Restructure.

17. On 4 December 2007 the Restructure occurred and immediately after, INVESCO Limited implemented the consolidation.

18. The Restructure and consolidation resulted in INVESCO PLC shares being replaced by INVESCO Limited shares on the basis of one INVESCO Limited share for every two INVESCO PLC shares held immediately prior to the Restructure. The consolidation was intended to ensure that, initially, an INVESCO Limited share traded at a value comparable to the trading value of an INVESCO American Depositary Share (which, immediately prior to the Restructure, had an economic value equivalent to the value of two INVESCO PLC shares).

19. With respect to rights to INVESCO PLC shares held by participating employees, the rules governing the option scheme and the option plan provide that:

- if another company (the successor company) obtains control of INVESCO PLC as a result of a court sanctioned arrangement in connection with a reconstruction of INVESCO PLC; and
- the shareholders of the successor company, immediately after it has obtained control, are substantially the same as the shareholders of INVESCO PLC before then,

then all rights acquired under these plans will be deemed to have been replaced with rights in the successor company.

20. The option scheme and option plan rules further provide that in the event of a variation in the share capital of INVESCO PLC or the successor company (including by way of a consolidation) the terms of any rights acquired under these plans will be deemed to be appropriately adjusted.

21. With respect to the award plan, the rules provide that:

- in the event of a court sanctioned arrangement in connection with a reconstruction of INVESCO PLC, the successor company may continue to operate the plan; and

- shares acquired on exercise of rights acquired under the scheme can be shares in the successor company and on the happening of a reverse split (consolidation) rights to these shares can be modified or amended.

22. Immediately after the consolidation, for every two rights to INVESCO PLC shares held immediately prior to the Restructure, a participating employee holds one right to an INVESCO Limited share, with the same terms applying to the replacement right, following appropriate adjustments to the exercise price of the replacement right. No amount was received by the participating employee in respect of the consolidation.

23. The applicant has also advised that:

- shares in INVESCO Limited are ordinary shares; and
- at the time replacement rights in INVESCO Limited were acquired under the Restructure, no participating employee:
 - held a legal or beneficial interest in more than 5% of the shares in INVESCO Limited; or
 - was in a position to cast, or control the casting of, more than 5% of the maximum number of votes that may be cast at a general meeting of INVESCO Limited.

Ruling

The Restructure

24. Where, under the Restructure, a participating employee's right to an INVESCO PLC share was replaced with a right to an INVESCO Limited share the replacement right will be treated as a continuing right for the purposes of Division 13A.

Capital gains tax

25. Any capital gain or capital loss that arises under the Restructure, as a result of the replacement of the right to an INVESCO PLC share with a right to an INVESCO Limited share, will be disregarded, pursuant to subsection 130-83(1A) of the ITAA 1997.

The consolidation

26. Where, as a result of the consolidation, participating employees' rights to INVESCO Limited shares are adjusted or otherwise modified or amended, so that for every two rights to INVESCO Limited shares held immediately prior to the consolidation a participating employee holds one right to an INVESCO Limited share, a cessation time will happen in relation to one in every two rights to INVESCO Limited shares, pursuant to subsection 139CB(1).

27. However, no amount will be included in the participating employee's assessable income under section 139B as a consequence of a cessation time happening to one in every two rights to INVESCO Limited shares following the consolidation.

Commissioner of Taxation14 May 2008

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.*

Acquisition of a right

28. Section 139G provides that a person will acquire a right to acquire a share in several circumstances, including when another person creates the right in the person or they acquire a legal interest in the right from another person.

29. For the purposes of this Ruling, the Commissioner accepts the advice by the applicant that rights conferred under the rights plans are qualifying rights within the meaning of section 139CD. Therefore, a participating employee will have acquired a qualifying right when a right to an INVESCO PLC share was conferred under one of the rights plans.

30. Where an employee acquires a right under an employee share scheme, the discount given in relation to the right is included in the assessable income of the employee, pursuant to subsection 139B(1).

The Restructure

31. The object of Subdivision DA of Division 13A (Subdivision DA) is to allow Division 13A to continue to apply in appropriate circumstances, to shares or rights acquired under an employee share scheme where a 100% takeover or restructure is involved.

32. In that regard, section 139GCC defines the meaning of restructure for the purposes of this provision. A restructure of a company is a change in the ownership, or the structure of the ownership, of the company as a result of which some or all shares or rights held in the company under an employee share scheme immediately before the change are replaced, or could reasonably be regarded as having been replaced, wholly or partly by shares or rights in one or more other companies.

33. It is accepted that that part of the corporate reorganisation described in paragraph 16 of this Ruling, constitutes a 'restructure' within the meaning of section 139GCC.

34. Section 139DQ sets out in the first instance the circumstances that the provisions of Subdivision DA will apply to. In this case the relevant requirements are that:

- (a) an employee acquires a right in a new company;
- (b) the right can reasonably be regarded as matching a right in another company (the old company);

- (c) the right in the old company was acquired under an employee share scheme;
- (d) the acquisition of the right in the new company occurs in connection with a restructure of the old company; and
- (e) as a result of the restructure the employee ceased to hold rights in the old company.

35. For the purposes of subparagraph 34(a) of this Ruling, a participating employee who held rights in INVESCO PLC prior to the Restructure acquired rights in a new company (INVESCO Limited) as a result of the Restructure.

36. For the purposes of subparagraph 34(b) of this Ruling, in determining whether a right can reasonably be regarded as matching a right in another company, the note to subsection 139DQ(1) provides that one of the factors to consider is the respective market values of the old shares and the new shares. The Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No. 7) Bill 2004 (the EM) that introduced the provisions provides further guidance on this issue when it states at paragraph 3.14:

Matching shares or rights should be no more than that which is required to place the employee in the same position financially as if the restructure had not occurred.

37. Further, in paragraph 3.19 of the EM it states that:

The attributes of the shares or rights immediately before the restructure need to be the same, or substantially the same, immediately after the restructure.

38. The applicant has advised that there was no additional benefit over and above the replacement rights that was conferred on any participating employee as a result of the Restructure. The terms under which the replacement rights were issued to the participating employees placed the participating employees in a comparable financial position as they were in immediately prior to the Restructure.

39. The applicant has also advised that all characteristics of the original rights and the replacement rights are identical, except that the replacement rights are in respect of shares in INVESCO Limited rather than shares in INVESCO PLC.

40. Based on this advice, the Commissioner accepts that the replacement rights in INVESCO Limited (the new company) will be regarded as matching the original rights in INVESCO PLC (the old company).

41. For the purposes of subparagraph 34(c) of this Ruling, as the applicant has advised that the original rights in INVESCO PLC (the old company) are qualifying rights for the purposes of Division 13A they must have (by definition) acquired those rights under an employee share scheme. Therefore it is accepted that this requirement is satisfied.

42. For the purposes of the requirements in subparagraphs 34(d) and (e) of this Ruling, it is accepted that the acquisition by a participating employee of a replacement right in INVESCO Limited (the new company) will have occurred in connection with the Restructure of INVESCO PLC (the old company) and as a result of the Restructure the participating employee will have ceased to hold rights in the old company.

43. Having met the above requirements, section 139DQ also provides that the treatment of matching rights as a continuation of existing rights is also subject to the conditions in section 139DR.

Conditions for the continuation of rights

44. Section 139DR sets out the following conditions that must be met before matching rights will be treated as being a continuation of rights in the old company:

- (1) the employee must have held rights in the old company under an employee share scheme immediately before the restructure;
- (2) where the employee has not made an election under section 139E in relation to rights in the old company, the employee, at or about the time they acquired the matching rights, must be employed by the new company, a holding company of the new company, or a subsidiary of either the new company or a holding company of the new company;
- (3) the matching rights must be rights to acquire ordinary shares; and
- (4) at the time of acquiring the matching rights the employee:
 - must not hold a legal or beneficial interest in more than 5% of the shares of the new company; and
 - must not be in a position to cast or control more than 5% of the votes at a general meeting of the new company.

45. An employee is considered to hold rights under an employee share scheme for the purposes of subsection 139DR(1), where:

- the rights were acquired under an employee share scheme;
- at the time of a takeover or restructure the rights are unexercised; and
- the rights are potentially subject to relief by the operation of section 139DD (no benefit where rights lost) if the rights lapse or are lost before being exercised.

46. In accordance with the class of entities (as described in paragraph 3 of this Ruling), participating employees are persons who acquired their original rights under employee share schemes and held those (unexercised) rights immediately prior to the Restructure. Further, but for the Restructure, if these rights were to lapse or be lost before being exercised, section 139DD can apply. Therefore, it is accepted that the first condition is met.

47. Similarly, because participating employees are described in paragraph 3 of this Ruling as persons who:

- have not made an election under section 139E in relation to their original rights; and
- continued to be employed by INVESCO Asset Management Australia (Holdings) Limited (a subsidiary of the new company) after the Restructure,

it is accepted that the second condition is met.

48. The applicant has advised that shares in INVESCO Limited are ordinary shares, therefore the replacement rights are rights to acquire ordinary shares. Accordingly, the third condition is met.

49. In relation to the fourth condition, the applicant has advised that at the time replacement rights in INVESCO Limited were acquired under the Restructure, no participating employee held a legal or beneficial interest in more than 5% of the shares of INVESCO Limited or was in a position to cast, or control the casting of, more than 5% of the votes at a general meeting of INVESCO Limited. Therefore, it is accepted that this condition is met.

50. In summary, it is accepted that the circumstances described in section 139DQ were present and the conditions set out in section 139DR were met. Therefore, when, under the Restructure, a participating employee's rights to INVESCO PLC shares were replaced with rights to INVESCO Limited shares, the replacement rights will be treated as continuing rights for the purposes of Division 13A.

Capital gains tax

51. Subsection 130-83(1A) of the ITAA 1997 provides that if a CGT event happens in relation to a right and it happens in connection with an acquisition of another right, that under section 139DQ of the ITAA 1936 is treated for the purposes of Division 13A as if it was a continuation of the original right, then any capital gain or capital loss from the CGT event is disregarded.

52. Where a participating employee held a right to an INVESCO PLC share immediately before the Restructure and, as a result of the Restructure, acquired a right to an INVESCO Limited share, then in accordance with paragraph 50 of this Ruling, the right to an INVESCO Limited share is treated as if it is a continuation of the right to an INVESCO PLC share for the purposes of Division 13A.

53. Therefore, where a CGT event happens, in relation to the right to an INVESCO PLC share, in connection with the acquisition of the right to the INVESCO Limited share any capital gain or capital loss made from the CGT event is disregarded.

The consolidation

54. Where an employee acquires a qualifying right, and they have not made an election under section 139E covering the right, the discount in relation to the right is included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

55. Subsection 139CB(1) provides that the cessation time for a right will be the earliest of:

- the time when the employee disposes of the right (other than by exercising it);
- the time when the employee ceases employment within the meaning of subsection 139CB(2);
- the time when the right is exercised (where there are no disposal restrictions or forfeiture conditions that apply to the share that is acquired on exercise);
- where disposal restrictions or forfeiture conditions apply to a share that is acquired on exercise of the right, the time when any such restrictions or conditions cease to have effect; or
- the end of the 10 year period starting when the employee acquired the right.

56. Immediately after the consolidation, a participating employee (who has not made an election under section 139E covering the rights) holds half as many rights as they held immediately before the consolidation. Therefore, for the purposes of Division 13A they are considered to have disposed of one in every two rights as a result of the consolidation and therefore a cessation time will have happened in relation to one in every two such rights.

57. Subsection 139CC(3) provides that where an employee disposes of a right in an arm's length transaction at or within 30 days after the cessation time, the discount is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the right.

58. As no amount is received by a participating employee in respect of the consolidation, and the disposal of a right under the consolidation is accepted as being at arm's length, the discount in respect of the disposal of one in every two rights to INVESCO Limited shares is nil. Whether or not a participating employee paid anything to acquire a right is of no consequence in calculating the discount where no amount is received on disposal of the right.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- employee share schemes & options
- qualifying rights
- taxpayer elections

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(3)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)
- ITAA 1936 139CB(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CD

- ITAA 1936 139DD
- ITAA 1936 Pt III Div 13A Subdiv DA
- ITAA 1936 139DQ
- ITAA 1936 139DQ(1)
- ITAA 1936 139DR
- ITAA 1936 139DR(1)
- ITAA 1936 139E
- ITAA 1936 139G
- ITAA 1936 139GC
- ITAA 1936 139GCC
- ITAA 1997 130-83
- ITAA 1997 130-83(1A)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No. 7) Bill 2004

ATO references

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