

CR 2011/19 - Income tax: Barclays PLC Share Award Schemes



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Class Ruling

Income tax: Barclays PLC Share Award Schemes

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

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

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

If you rely on this ruling, 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.

Relevant provision(s)

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

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 83A-10 of the ITAA 1997;
- Section 83A-25 of the ITAA 1997;
- Section 83A-340 of the ITAA 1997;
- Section 960-50 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is employees of Barclays PLC (Barclays) and its subsidiaries (the Barclays Group) who:

- are granted a Provisional Allocation of shares in Barclays under any of the share plans listed in paragraph 11 of this Ruling;
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- are not 'temporary residents' within the meaning of that expression in section 995-1(1) of the ITAA 1997.

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

Qualifications

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

5. Members of 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 9 to 40 of this Ruling.

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

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- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2009 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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. The following documents, or relevant parts of them, form part of and are to be read with the description:

- the application for a Class Ruling received 13 October 2010;
- information previously provided by the applicant in the original applications for Class Rulings received on 8 June 2010 and 7 July 2010; and
- responses to subsequent requests for information.

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. Barclays is a corporation incorporated in the United Kingdom and is a non-resident of Australia for the purposes of the ITAA 1936 and the ITAA 1997. Shares in Barclays are listed on the London and New York Stock Exchanges.

11. The Barclays Group operates a number of share schemes including:

- the Mandatory ESAS Award Plan (ESAS);
- the Incentive Share Plan (ISP); and
- the Share Value Plan (SVP).

collectively referred to hereafter as the Plans.

12. The Plans are funded by the Barclays Group and each is operated through a trust administered by an independent trustee.

- ESAS Plan – operated through the Barclays Group (ESAS) Employees' Benefit Trust and administered by The Appleby Trust (Jersey) Limited

- ISP Plan – operated through the Barclays Group (PSP) Employees' Benefit Trust and administrated by the Appleby Trust (Jersey) Limited
- SVP Plan – operated through the Barclays Group (PSP) Employees' Benefit Trust and administrated by the Appleby Trust (Jersey) Limited

13. The Plans are designed to ensure that employees of the Barclays Group share in the success of the group and that employee interests are aligned with Barclays' interests.

14. Under the Plans, the Plan trustees grant participants a provisional share award allocation (Provisional Allocation).

15. The Provisional Allocations relate to listed ordinary shares in Barclays.

16. Prior to 1 July 2009, Provisional Allocations were granted to participants under the ESAS and ISP. Since 1 July 2009 Provisional Allocations have also been granted to participants under the SVP, which was established after 1 July 2009.

17. The Provisional Allocations are granted by, and entirely at the discretion of, the relevant Plan trustee.

18. The trust deeds for the Plans provide that the trustee may apply the capital and income of the trust fund for the benefit of any one or more of the beneficiaries at such times and in such amounts and such manner as the trustee may decide from time to time during the trust period. The Plan trustee may declare any part of the income or capital to be held on trust for the benefit of one or more of the beneficiaries exclusively.

19. Each Plan operates independently from a participant's employment contract, such that Barclays cannot bind the relevant trustees to unilaterally make a Provisional Allocation.

20. Under each Plan a Provisional Allocation is evidenced by a letter sent by the Plan trustee to the participant informing the participant of various matters. This normally includes the date of the Provisional Allocation, the number of shares comprising the Provisional Allocation, or the formula by which that number may be determined, and the conditions that must be satisfied before the trustee will consider releasing some or all of the Provisional Allocation to the participant, including the date from which any such release may be considered.

21. The trustee may at any time after a Provisional Allocation date impose such further conditions on the release of some or all of the Provisional Allocation to a participant as it may deem appropriate, having first consulted with the Board of Barclays.

22. The trustee acquires the shares with funds provided by the Barclays Group. The shares may be acquired either before or after a Provisional Allocation is made to a participant.

23. The rules governing each Plan provide that the Provisional Allocation does not constitute the acquisition by a participant of an interest in the shares allocated to the participant, or the acquisition of a right to the shares, or entitle the participant to claim any interest in the trust fund, or to compel the trustee to pay or apply any capital or income of the trust fund to or for the benefit of the participant.

24. Until their release a participant shall have no interest in provisionally allocated shares, no entitlement to dividends or distributions and no right to vote in respect of provisionally allocated shares.

Release of Provisional Allocations

25. Where a participant is granted a Provisional Allocation under the ESAS it comprises a basic allocation of shares and a further allocation (bonus shares) equal to 30% of the participant's basic allocation.

26. Where dividends are paid in relation to shares held by the trustee of the ESAS, ISP or SVP, the trustee may, in its absolute discretion, apply any such dividends (net of tax) which it receives to purchase further shares and may release such further shares to a participant at the same time as it releases the provisionally allocated shares. These shares are referred to as dividend shares.

27. In relation to the ISP the release date is the third anniversary of the Provisional Allocation date. In relation to the ESAS the release dates are on the third and fifth anniversaries of the Provisional Allocation dates. In relation to the SVP the release dates are on the first, second and third anniversaries of the Provisional Allocation date.

28. In relation to the ISP and SVP, on or after a release date, the trustee may in its absolute discretion determine to release to a participant the number of shares specified in the Provisional Allocation (including any bonus shares or dividend shares) or a lesser amount, having determined (and having consulted with the board) that any performance conditions or minimum period of service has been satisfied.

29. In relation to the ESAS, on the third anniversary of the Provisional Allocation, the trustee, in its absolute discretion, may determine to release a portion of the Provisional Allocation to a participant. The portion which the trustee will consider releasing comprises the basic allocation, plus two-thirds of the bonus shares and all associated dividend shares. Following the trustee's determination, the released shares are held in a nominee account which is administered by the trustee and the shares are dealt with at the direction of the participant. If on the fifth anniversary of the Provisional Allocation the shares that were released into the nominee account on the third anniversary are still held in the nominee account, the trustee, in its absolute discretion, may determine to release the remaining one-third of the bonus shares, together with associated dividend shares, to the participant.

30. The Plan trustees have an absolute discretion to release shares (including bonus and dividend shares) irrespective of whether performance hurdles or relevant conditions have been satisfied.

31. The Plan rules set out when provisionally allocated shares may, in the absolute discretion of the trustee, be released where participants cease employment for good leaver reasons (for example. injury, disability, redundancy, retirement, transfer of company out of Barclays group) without the minimum period of employment.

32. The Plan trustees may decide to release no shares despite an employee being a good leaver. In some cases, shares may be released earlier than the release date (for example. after cessation of employment).

33. If a participant ceases employment for bad leaver reasons, unreleased shares shall cease to be available for release, unless a Plan trustee decides, in its absolute discretion, to release all or some of the shares.

34. If takeovers, restructures, or voluntary winding up events occur the provisionally allocated shares may be released.

35. The Plan rules provide that if a Plan trustee determines to release shares to a participant, the trustee shall inform the participant of the number of shares released.

36. The participants pay no consideration for any released shares. Once shares are released they are not subject to any conditions which would result in the participant forfeiting the shares.

37. Following a Plan trustee determining to release shares, ESAS shares may be held in a nominee account administered by the trustee and the shares dealt with at the direction of the participant. In respect of the ISP and SVP, released shares will be transferred to the participant within a specified time period.

38. Where a participant's released shares are held in a nominee account the participant shall from the date of determination become beneficially entitled to such shares and shall have the right to receive dividends paid to the trustee on such shares and the right to vote on such shares.

39. Where a participant's released shares are held in a nominee account by the trustee, the trustee is empowered to sell the participant's shares to cover certain liabilities, including income tax in respect of the released shares.

40. Any decisions taken in relation to a Provisional Allocation is at the trustee's absolute discretion, in consultation with the Barclays Group Share Schemes Committee.

41. As shares acquired under the Plan are not listed on an Australian stock exchange they will have their value expressed in a foreign currency.

Ruling

42. Where a participant is granted a Provisional Allocation by a Plan trustee, the participant will not acquire an ESS interest (subsection 83A-10(1); section 83A-340).

43. Where in relation to the Provisional Allocation, the trustee determines to release to the participant (or to a nominee account of the participant) shares which were previously provisionally allocated (including any bonus shares or dividend shares) the participant will, at that time acquire ESS interests (subsection 83A-10(1)).

44. For the income year in which the trustee determines to release provisionally allocated shares to the participant, the assessable income of the participant will include the discount given in relation to the shares (subsection 83A-25(1)).

45. The discount given in relation to the shares is the market value of the shares at the time of the release, expressed in Australian currency (section 960-50).

Commissioner of Taxation

9 February 2011

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

46. Under subsection 83A-10(1), an ESS interest in a company is either a beneficial interest in a share in the company, or a right to acquire a beneficial interest in a share in the company.

47. Under the terms of the relevant trust deeds a participant to whom a Provisional Allocation has been made is not entitled to any interest in the trust fund, nor is the participant able to compel the trustee to pay or apply any of the capital or income of the trust fund for the participant's benefit.

48. The release of shares following a Provisional Allocation takes place at the absolute discretion of the trustee. Unless and until the trustee determines in its absolute discretion to release shares, the participant does not have a beneficial interest in a share nor does the participant have a beneficial interest in a right to acquire a share. Thus at the time of Provisional Allocation the participant will not acquire an ESS interest.

Indeterminate rights

49. Section 83A-340 provides that where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

50. At the time of the Provisional Allocation a participant does not have a right to acquire a beneficial interest in a share. However, the participant does have a right to require the proper exercise of the trustee's absolute discretion (to release the shares) and due administration of the trust.

51. In order for section 83A-340 to apply, the right must be capable of becoming a right to acquire a beneficial interest in a share, and in fact become such a right.

52. Section 83A-340 provides examples of rights which later become rights to acquire a beneficial interest in a share:

Example 1: You acquire a right to acquire, at a future time:

- (a) shares with a specified total value, rather than a specified number of shares; or
- (b) an indeterminate number of shares.

Example 2: You acquire a right under which the provider must provide you with either ESS interests or cash, whichever the provider chooses.

53. In both examples the right is a right to receive property but the precise extent or nature of that property has not yet been determined at the time of acquisition of the right. Such rights are capable of becoming a right to acquire a beneficial interest in a share because the capacity to acquire property is inherent in the nature of the right originally acquired. It merely remains to be determined whether the original right ultimately becomes a right to acquire a specific number of shares or some other form of property, such as cash.

54. A participant's right to require the proper exercise of a Plan trustee's absolute discretion and due administration of the trust is not considered to be a right of the kind provided for by section 83A-340. The participant's right is discrete and fully determined at the time it is created or acquired. It is not capable of becoming a right to acquire property.

55. In *Gartside v. Inland Revenue Commissioners* [1968] AC 553, Lord Reid described such an entitlement of a beneficiary in a discretionary trust in the following way:

.....a right to require the trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered; you get it only because the trustees have decided to give it to you.

56. Where a Plan trustee in its absolute discretion determines to release provisionally allocated shares, it is not the case that the right to require the proper exercise of the trustee's discretion has become a right to acquire a beneficial interest in a share. Nor has the participant acquired the shares by reason of having a right to require the trustee to properly exercise his discretion to release the provisionally allocated shares.

57. Therefore, where a participant acquires a right as a result of a Provisional Allocation, the participant has not acquired a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share. Consequently, section 83A-340 does not apply.

Provisional Allocation

58. At the time of the Provisional Allocation, the participant does not acquire an ESS interest within the meaning of section 83A-10; and as any rights which are acquired at the time are not capable of becoming rights to acquire a beneficial interest in a share as provided for by section 83A-340, the participant is not treated for the purposes of Division 83A as having acquired an ESS interest at the time of Provisional Allocation.

Release of Provisional Allocation

59. When the trustee determines to release provisionally allocated shares to a participant or to a nominee account on the participant's behalf, the participant acquires a beneficial interest in a share in a company, that is. an ESS interest within the meaning of paragraph 83A-10(1)(a).

60. The ESS interest is acquired under an employee share scheme (subsection 83A-10(2)) as the shares are provided to employees in relation to their employment.

61. The shares are acquired at a discount as no consideration is payable for their acquisition.

62. As the shares are acquired under an employee share scheme at a discount, Subdivision 83A-B will apply to the ESS interests unless Subdivision 83A-C applies (subsection 83A-20(1)).

63. In this case Subdivision 83A-C does not apply as the released shares are not acquired under a salary sacrifice arrangement nor are the shares subject to a real risk of forfeiture at the time of their release (subparagraph 83A-105(1)(c)(ii)).

64. Where in an income year an employee acquires an ESS interest at a discount, the employee's assessable income for the income year of the acquisition will include the discount given in relation to the ESS interest (subsection 83A-25(1)).

65. The discount received is the market value of the ESS interest at the time it was acquired by the employee **less** any consideration paid or given by the participant for the acquisition.

66. As a participant is not required to pay or give any consideration for the acquisition of a share under the Plan, the discount will be equal to the market value of the share at the acquisition time.

67. Where the conditions in section 83A-35 are met an employee is able to reduce the total amount included in their assessable income under subsection 83A-25(1) by up to \$1000.

68. As a participant's released shares are not subject to a minimum holding period the condition in subsection 83A-35(8) is not met and therefore section 83A-35 cannot apply.

Conversion to Australian dollars

69. Subsection 960-50(1) requires that an amount in a foreign currency is to be translated into Australian currency.

70. Subsection 960-50(4) requires that in applying this section:

- (a) first, translate any amounts that are elements in the calculation of other amounts; and

(b) then, calculate the other amounts.

This indicates that the amounts that are elements in calculating the discount are to be translated into Australian currency prior to calculating the discount.

71. The market value of the share is an amount for purposes of section 960-50 (paragraph 960-50(2)(h)) and is an element in the calculation of the discount determined under subsection 83A-25(1). Therefore, the market value of the share should be translated first, before calculating the discount.

72. In this circumstance the market value is equal to the discount as the shares are acquired for no consideration.

73. As the participant is required to include in assessable income the market value of the shares (that is, the discount) acquired at the time shares are released, it is reasonable that the market value be converted to Australian currency at the exchange rate applicable at that time.

74. The Australian Taxation Office (ATO) website <http://www.ato.gov.au> provides daily exchange rates. The ATO obtains the daily average telegraphic transfer exchange rates from the Commonwealth Bank. However, participants may use the daily rates provided by other banks.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes & options

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(a)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-20(1)

- ITAA 1997 83A-25
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-35
- ITAA 1997 83A-35(8)
- ITAA 1997 83A-105(1)(c)(ii)
- ITAA 1997 83A-340
- ITAA 1997 83A-B
- ITAA 1997 83A-C
- ITAA 1997 960-50
- ITAA 1997 960-50(1)
- ITAA 1997 960-50(4)
- ITAA 1997 960-50(2)(h)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

Case references:

- Gartside v. Inland Revenue Commissioners [1968] AC 553

ATO references

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