


CR 2011/23 - Income tax: Shell Group - Performance Share Plan Award

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Class Ruling

Income tax: Shell Group – Performance Share Plan Award

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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.

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 (pre-Division 83A time) is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provisions of the ITAA 1936.

Relevant provision(s)

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

- former Division 13A;
- former section 139B of the ITAA 1936;
- former section 139CB of the ITAA 1936;
- former section 139CC of the ITAA 1936;
- former section 139CD of the ITAA 1936;
- former section 139E of the ITAA 1936;

- former section 139FA of the ITAA 1936;
- former section 139FE of the ITAA 1936;
- former section 139FF of the ITAA 1936;
- Subdivision 83A-C of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83A-110 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-125 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- section 104-75 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-15 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-60 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- former section 130-80 of the ITAA 1997;
- former section 130-83 of the ITAA 1997;
- section 130-90 of the ITAA 1997;
- section 768-915 of the ITAA 1997;
- section 855-10 of the ITAA 1997;
- section 974-75 of the ITAA 1997;
- section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997);
- section 83A-15 of the IT(TP)A 1997; and
- Regulations 83A-315.02 to 83A-315.09 of the *Income Tax Assessment Regulations 1997* (ITAR 1997)...

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

Class of entities

4. The class of entities to which this Ruling applies is persons who were granted a performance share award in the income year ended 30 June 2009 under the Royal Dutch Shell plc (RDS) Performance Share Plan (the Plan) while employed in Australia by a subsidiary of RDS.

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

Qualifications

5. This Class Ruling does not consider the taxation implications of a period of foreign service for participants who are required to include an amount in their assessable income under former Division 13A in the income year ended 30 June 2009 in relation to the award.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 25 of this Ruling.

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

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

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Date of effect

9. This Ruling applies for the income year ended 30 June 2009. 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. 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).

Previous Rulings

10. The Commissioner has previously issued Class Ruling CR 2009/57 Income Tax: Shell Group – 2009 Performance Share Plan Award in respect of the scheme described in paragraphs 11 to 25 of this Ruling. That previous ruling should now be read in light of this Ruling.

Scheme

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

- the request for Class Ruling dated 16 March 2010 and addendum to the application dated 27 May 2010;
- Rules of the Long Term Incentive Plan (Performance Share Plan), Restricted Share Plan and Deferred Bonus Plan;
- the Australian supplement and a sample award certificate for awards made in the year ended 30 June 2009;
- Royal Dutch Shell plc Securities Dealing Policy;
- relief instrument in relation to the operation of the Plan, which was issued by the Australian Securities Investment Commission in December 2008;
- extract of online explanatory materials titled 'Performance Share Plan – Understanding the basics' and 'Performance Share Plan – Questions and Answers'; and
- letter from the applicant dated 25 June 2010.

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

12. In March 2009, eligible persons employed in Australia by subsidiaries of RDS were offered, via email, performance share awards over Class 'A' ordinary shares in RDS. Employees were taken to have accepted each award on the award date specified on the award certificate unless the award was disclaimed by 26 February 2010.

13. Participants have not been required to pay for the grant (or the conversion) of the awards and are not permitted to transfer, assign or otherwise dispose of them.

14. Immediately after the award was granted, no participant held a legal or beneficial interest in more than 5% of the shares in RDS or was in a position to cast or control the casting of more than 5% of the maximum votes that might be cast at a general meeting of RDS.

15. The vesting of awards depends on the satisfaction of performance conditions and this is determined after a 3 year performance period commencing on 1 January 2009. If the conditions are satisfied, an award will vest on the later of either the qualifying date (1 January 2012) or the date on which the satisfaction of the conditions has been determined.

16. An award will lapse to the extent that performance conditions have not been satisfied. An award will also lapse if a participant ceases employment before the qualifying date unless the employment ceased because of certain events, such as injury or retirement, in which case the satisfaction of performance conditions will still be considered.

17. No consideration is payable in relation to the lapse or forfeiture of an award.

18. When a participant's award vests, the participant must activate an electronic delivery process to receive shares or a cash equivalent within 60 days of the vesting being communicated or the award lapses. The choice between shares or the cash equivalent remains until delivery of shares to the employee's vested share account (VSA) or payment, at the absolute discretion of the grantor of the award.

19. Awards entitle the participant to a dividend equivalent, which is an amount per share that is equal to all dividends payable thereon, for which the record date for payment of the dividend falls between the award date and the date of vesting on the assumption of full dividend reinvestment (dividend equivalent entitlement). This additional amount will also be paid in cash or delivered as shares, at the absolute discretion of the grantor of each award, on the same date as the cash payment or share delivery that underlies the award.

20. If the grantor of the award chooses to deliver a share to a participant, the grantor will arrange for the share to be transferred to the participant's VSA, which is a trust, and the share is registered in the name of the Plan administrator as trustee. Participants may then request that the Plan administrator transfer the shares to them or sell the shares on their behalf.

21. An award is forfeitable, but once a share is transferred to a participant's VSA, the beneficial interest in the share is not subject to forfeiture in any circumstances, and the participant can demand that the trustee transfer the share to or at the direction of the participant.

22. In addition to the general discretion referred to in paragraph 18 of this Ruling, an award will be paid in cash if:

- dealing restrictions apply pursuant to relevant legislation, government directives, company listing rules or internal dealing policies, including the Royal Dutch Shell PLC Securities Dealing Code (the Code); and
- the dealing restriction(s) cause a delay of the delivery of shares into a VSA beyond 15 March in the calendar year following the calendar year in which the award vested.

23. Under the Code, employees with access to inside information about RDS on a regular or occasional basis must not deal in shares (that is, take delivery of shares in VSA or sell) during a restricted period without receiving clearance. Clearance to sell will not be given during a restricted period if the employee possesses inside information or is involved in the preparation of group financial results. Outside a restricted period, clearance to sell is required and will not be given if the employee possesses inside information.

24. Participants may be subject to dealing restrictions under the Code in respect of shares held in the participant's VSA. However, the dealing restrictions would not be infringed by the transfer of a share by the trustee to a participant. Further, the dealing restrictions do not allow the trustee to legitimately resist the participant's demand for the shares as against the trustee. Rather, the dealing restrictions are enforceable by RDS under the participant's employment contract.

25. Neither the awards, the beneficial interests in the shares, nor the shares, are taxable Australian property, as defined by subsection 995-1(1).

Ruling

26. If the award is satisfied by the transfer of shares to the participant's VSA after 1 July 2009, the award becomes rights to acquire the number of shares that are transferred to the participant's VSA (including any shares that are transferred in satisfaction of the dividend equivalent entitlement), for the purposes of section 83A-15 of the IT(TP)A 1997.

27. Former Division 13A is taken to have applied as if the award had always been rights to acquire the number of shares that are transferred to the participant's VSA. The number of rights corresponds to the number of shares transferred to the participant's VSA and are referred to in this Ruling as award rights.

28. The award rights were acquired on the award date (in the year ended 30 June 2009) for the purposes of former Division 13A and meet the qualifying conditions in former section 139CD of the ITAA 1936.

29. Subdivision 83A-C of the ITAA 1997 will apply to the award rights where:

- a participant does not make an election under former section 139E of the ITAA 1936 for the income year ended 30 June 2009; and
- the participant has not ceased the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009 (has not had a cessation time occur before 1 July 2009).

30. Former Division 13A continues to apply to award rights where:

- a participant makes an election under former section 139E of the ITAA 1936 for the income year ended 30 June 2009; or
- a participant ceases the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009 (a cessation time has occurred before 1 July 2009).

31. Where a participant made an election under former section 139E of the ITAA 1936 in their income tax return for the year ended 30 June 2009 covering other qualifying shares or rights they acquired in that income year, that election will cover the award rights. That election can not be revoked.

32. Where a participant was treated as if they had made an election for the year ended 30 June 2009 under former subsection 139E(2B) of the ITAA 1936, that section will no longer apply to a participant because the exemption conditions are not satisfied in relation to the award rights.

33. If a participant did not make an election under former section 139E of the ITAA 1936 in their income tax return for the year ended 30 June 2009, former Division 13A will continue to apply to allow the Commissioner, after receiving a request made by a participant in the approved form, to allow an election at a later time under former subsection 139E(2A).

34. The Commissioner will exercise his discretion under former subsection 139E(2A) of the ITAA 1936, to allow an election for the 2008-2009 income year to be made at a later time if:

- the participant did not acquire any other qualifying shares or rights in the 2008-2009 income year; or

- the only qualifying shares or rights acquired in the 2008-2009 income year would have been covered by former subsection 139E(2B) of the ITAA 1936, but for the operation of section 83A-15 of the IT(TP)A 1997;
- and:
- the request for a late election and the election are made in the approved form on or before 15 May in the income year following the year in which the shares are transferred to the participant's VSA; and
 - the Commissioner is within time to amend the participant's assessable income for the income year ended 30 June 2009 to include the discount in that year.

Award rights under Subdivision 83A-C

Deferred taxing point

35. The ESS deferred taxing point for award rights to which Subdivision 83A-C of the ITAA 1997 applies will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 (subject to subsection 83A-120(3) of the ITAA 1997) and will be the earliest of:

- the time when the participant ceases the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936;
- if dealing restrictions apply to the participant at the time the shares are transferred to the participant's VSA – the time when the restrictions cease to have effect; or
- if dealing restrictions do not apply at the time the shares are transferred to the participant's VSA – the time when the shares are transferred.

36. However, if the participant disposes of the shares acquired on exercise of the award rights within 30 days of the cessation time, the ESS deferred taxing point will instead be the time of the disposal under subsection 83A-120(3).

37. Dealing restrictions apply at the time the share is transferred to a participant's VSA, if:

- the participant has inside information as defined in the Code at that time; or
- the shares are transferred to the participant's VSA in a restricted period and the participant is unable to dispose of shares in a restricted period.

38. Dealing restrictions cease to have effect at the first time that the participant is no longer in possession of inside information and is no longer in a restricted period (if applicable).

Amount included in assessable income

39. If a participant ceases employment before the time that the shares are transferred to the participant's VSA, the participant's assessable income for the income year in which the deferred taxing point occurs will include the market value of the award rights at the deferred taxing point reduced by the cost base of the award rights: subsection 83A-110(1).

40. If the participant chooses to use the amount determined by the application of Income Tax Assessment Regulations 1997 (ITAA 1997) regulations 83A-315.02 to 83A-315.09, as the market value of the award rights, the value of each award right at the ESS deferred taxing point is equal to the market value of a share on that day. Therefore, the total market value of the award rights is the market value of a share at the ESS deferred taxing point multiplied by that number of shares that are transferred to a participant's VSA.

41. If the ESS deferred taxing point for the award rights is at the time or after the time when the shares are transferred to the participant's VSA, the participant's assessable income for the income year in which the deferred taxing point occurs will include the market value of the shares at the ESS deferred taxing point reduced by the cost base of the shares: subsection 83A-110(1).

42. A participant does not include an amount in their assessable income in relation to award rights to the extent that the amount relates to employment outside of Australia: paragraph 83A-5(4)(a) of the IT(TP)A 1997.

43. The total amount otherwise included in assessable income relates to the employment of the participant from the later of the start of the performance period and when the participant commences employment to the earlier of the qualifying date and the date the participant ceases employment.

44. The proportion of the total amount that relates to employment outside of Australia is the same proportion that the period of employment during which the employment was exercised outside of Australia bears to the total period of employment to which the assessable amount relates.

Award rights under former Division 13A***Where an election made***

45. If a participant makes an election under former section 139E of the ITAA 1936 for the income year ended 30 June 2009, the discount is included in the participant's assessable income in the income year in which the award rights were acquired (the income year ended 30 June 2009): former subsection 139B(2) of the ITAA 1936.

46. The discount included in the participant's assessable income is the market value of the award rights at the award date: former subsection 139CC(2) of the ITAA 1936.

47. The market value of each award right is the same as the market value of a share on the award date under former subsection 139FE(1) of the ITAA 1936. The market value of the share is determined under former section 139FA of the ITAA 1936.

Where no election made and participant ceased employment before 1 July 2009

48. If a participant:

- did not make an election under former section 139E of the ITAA 1936 for the year ended 30 June 2009; and
- ceased employment within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009;

the cessation time for the participant occurred at the time that they ceased employment and the discount will be included in the participant's assessable income in the income year ended 30 June 2009.

49. The discount included in the participant's assessable income is the market value of the award rights at the time the participant ceased employment: former subsection 139CC(4) of the ITAA 1936.

50. The market value of each award right is the same as the market value of a share on the day the participant ceased employment under former subsection 139FE(1) of the ITAA 1936. The market value of the share is determined under former section 139FA of the ITAA 1936.

Shortfall interest charge

51. The Commissioner will remit all of the shortfall interest charge that a participant is liable to pay if the discount is included in an amended income tax assessment for an earlier year because:

- the participant made an election in their income tax return for the year ended 30 June 2009, because they acquired other qualifying shares or rights in that year;
- the participant had a cessation time or an ESS deferred taxing point in the earlier income year; or
- the participant makes a late election.

52. The Commissioner will remit the shortfall interest charge to the earlier of:

- the time when the amended assessment is made;
- the date of lodgement of the income tax return for the year in which the shares are transferred to the participant's VSA; or
- the due date for lodgement (including extensions) of the income tax return for the year in which the shares are transferred to the participant's VSA.

Capital gains tax (CGT) consequences

Award rights under Subdivision 83A-C

Grant of award

53. The granting of an award to a participant does not result in a CGT event for the participant.

54. An award right is a convertible interest of the kind mentioned in subsection 974-75(1). The satisfaction of an award right by a transfer of shares to a participant's VSA is a conversion of the convertible interest.

Award rights satisfied by transfer of shares to participant's VSA before ESS deferred taxing point – where dealing restrictions apply to participant at time of transfer

55. Where an award right is satisfied by a transfer of shares to a participant's VSA and dealing restrictions apply to the participant at the time the shares are transferred (delaying the ESS deferred taxing point until the restrictions cease to have effect), any capital gain or capital loss arising from the transfer of shares is disregarded in accordance with subsection 130-80(1).

56. Where an award right is satisfied by a transfer of shares to a participant's VSA and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

57. Where a participant has acquired a beneficial interest in a share held by the trustee on the transfer of shares to a participant's VSA before the ESS deferred taxing point and later acquires that share from the trustee or instructs the trustee to dispose of the shares:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and

- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

58. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

Award rights satisfied by transfer of shares to participant's VSA on ESS deferred taxing point – where dealing restrictions do not apply to participant at time of transfer

59. Where an award right is satisfied by a transfer of shares to a participant's VSA and dealing restrictions do not apply to the participant at the time the shares are transferred (giving rise to the ESS deferred taxing point at the time of transfer), any capital gain or capital loss arising from the transfer of shares is disregarded in accordance with subsection 130-80(1).

60. Where an award right is satisfied by a transfer of shares to a participant's VSA and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

61. Where a participant has acquired a beneficial interest in a share held by the trustee on the transfer of shares to a participant's VSA on the ESS deferred taxing point and later acquires that share from the trustee or instructs the trustee to dispose of the shares:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

62. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

Award rights satisfied by transfer of shares to participant's VSA after ESS deferred taxing point

63. Where an award right is satisfied by a transfer of shares to a participant's VSA after the ESS deferred taxing point:

- the time of acquisition of the award right is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and
- the first element of cost base and reduced cost base of the award right is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

64. Where an award right is satisfied (converted) by a transfer of shares to a participant's VSA after the ESS deferred taxing point, CGT event C2 in section 104-25 happens. Subsection 130-60(3) disregards any capital gain or capital loss that the participant makes from converting the award right. Where an award right is converted, the participant acquires a beneficial interest in a share held by the trustee.

65. Where a participant who has acquired a beneficial interest in a share held by the trustee on the conversion of an award right becomes absolutely entitled as against the trustee to that share, CGT event E5 happens, in accordance with subsection 104-75(1).

66. Any capital gain or capital loss made by a participant from CGT event E5 happening after the ESS deferred taxing point is disregarded in accordance with subsection 130-90(1).

67. A participant who has acquired a beneficial interest in a share held by the trustee on the conversion of an award right after the ESS deferred taxing point acquires the share for CGT purposes at the time the share is transferred to their VSA and they become absolutely entitled to the share. The first element of cost base and reduced cost base of the share is worked out in accordance with subsection 130-60(1) item 2.

Where ESS deferred taxing point of award right happens at time of disposal of share acquired pursuant to award right

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

Award rights under Division 13A

Where an election made

69. A participant acquires an award right at the time the right is granted. The granting of an award right to a participant does not result in a CGT event for the participant.

70. The first element of the cost base of an award right is the market value of the right worked out under former sections 139FA to 139FF of the ITAA 1936 at the time the participant acquired the right, in accordance with former subsection 130-80(2) of the ITAA 1997.

71. An award right is a convertible interest of the kind mentioned in subsection 974-75(1). The satisfaction of an award right by a transfer of shares to a participant's VSA is a conversion of the convertible interest. CGT event C2 in section 104-25 happens on the conversion of the convertible interest.

72. Any capital gain or capital loss made by a participant on the conversion of an award right is disregarded in accordance with subsection 130-60(3).

73. A participant becomes absolutely entitled to the shares at the time the shares are transferred to the participant's VSA and CGT event E5 in section 104-75 happens. Any capital gain or capital loss a participant makes in accordance with subsection 104-75(5) is disregarded in accordance with subsection 104-75(6).

74. A participant acquires a share for CGT purposes at the time the share is transferred to their VSA and they become absolutely entitled to the share. Where a participant disposes of a share acquired as a result of conversion of an award right, a capital gain or capital loss may arise in accordance with subsection 104-10(4). A participant makes a capital gain if the capital proceeds from the disposal of the share exceed the cost base of the share. A participant makes a capital loss if those capital proceeds are less than the reduced cost base of the share.

75. The first element of the cost base and reduced cost base of the share is the cost base of the award right at the time of conversion, in accordance with subsection 130-60(1) item 2.

Where no election made and participant ceased employment before 1 July 2009

76. Where a participant ceases employment before 1 July 2009 and the participant's award right is satisfied (converted) by a transfer of shares to the participant's VSA, any capital gain or capital loss made by the participant on the conversion of the award right is disregarded in accordance with subsection 130-60(3).

77. A participant acquires a share at the time the shares are transferred to the participant's VSA. At that time, the participant becomes absolutely entitled to the shares and CGT event E5 happens in accordance with section 104-75. Any capital gain or capital loss a participant makes in accordance with subsection 104-75(5) is disregarded in accordance with subsection 104-75(6).

Disposal of share more than 30 days after cessation time

78. Where a cessation time occurs in relation to an award right before 1 July 2009 (as a result of a participant ceasing employment), and a participant disposes of a share acquired from the conversion of the award right (necessarily more than 30 days after the cessation time), the participant will make a capital gain where the capital proceeds from the disposal are more than the cost base of the share, in accordance with subsection 104-10(4).

79. The first element of the cost base of the share acquired from the conversion of an award right will be the cost base of the right at the time of conversion, in accordance with subsection 130-60(1) of the ITAA 1997. The first element of the cost base of the right will be the market value of the right (worked out under former sections 139FA to 139FF of the ITAA 1936) at the cessation time, in accordance with former subsection 130-83(3) of the ITAA 1997.

Lapse of award

80. Where an award lapses, CGT event C2 happens in accordance with subsection 104-25(1).

81. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

82. Although a participant pays nothing for an award, the market value substitution rule for cost base and reduced cost base does not apply in accordance with subsection 112-20(3) table item 5.

83. Although a participant receives no capital proceeds from the lapse of an award, the market value substitution rule for capital proceeds also does not apply in accordance with subparagraph 116-30(3)(a)(i).

84. Therefore, a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from the lapse of an award.

Foreign / Temporary Residents

85. As an award right, a beneficial interest in a share and a share itself are not taxable Australian property, any capital gain or capital loss a participant makes from a CGT event happening in relation to any of those CGT assets is disregarded if the participant is a foreign resident or a temporary resident just before the CGT event happens (sections 855-10 and 768-915).

Commissioner of Taxation

2 March 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.***

86. Section 83A-15 of the IT(TP)A 1997, provides that if:

- you acquired a beneficial interest in a right before 1 July 2009; and
- on or after 1 July 2009, the right becomes a right to acquire a beneficial interest in a share;

former Division 13A is taken to have applied as if the right had always been a right to acquire the beneficial interest in the share.

87. Section 83A-15 of the IT(TP)A 1997 is to be interpreted by considering the ordinary meaning of the text having regard to its legislative context and purpose.

88. *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1 October 2010 defines 'become' as 'to come or grow to be' and relevantly defines 'come' as 'to turn out to be'.

89. The ordinary meaning of 'becomes' in section 83A-15 of the IT(TP)A 1997 covers a right that turns out to be a right to acquire a share because the right ultimately results in receipt of a share. The right effectively operates as a right to a beneficial interest in a share upon the receipt of an actual share.

90. This interpretation is supported by the Explanatory Memorandum to the *Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009*, which explains the purpose of the provision at paragraphs 1.410 and 1.411:

Sometimes it is unclear at the time of acquisition of a right whether [sic] will be received in the form of an ESS interest, or it may be unclear how many ESS interests will be received as a result of its exercise. If it becomes clear that the right will be received in a definite number of ESS interests, it is taxed under the employee share rules as though it were always clearly as [sic] ESS interest. See paragraphs 1.367 to 1.372 for further discussion of these types of benefits.

This provision would apply, for example, to an employment benefit that is a right to an indeterminate number of shares or to a benefit that may be received in shares, in cash or in some other form. The provision ensures that employment benefits provided in the form of discounted shares or rights to shares are taxed consistently.

91. A participant acquired a beneficial interest in the award before 1 July 2009. The award created an entitlement in the employee to receive shares (including the dividend equivalent entitlement) or a cash equivalent (at the discretion of the grantor), subject to satisfying performance hurdles. The award comprises rights for the purpose of paragraph 83A-15(1)(a) of the IT(TP)A 1997.

92. If the grantor exercises its discretion to transfer shares to the participant's VSA after 1 July 2009, the award becomes rights to acquire a beneficial interest in the number of shares that are transferred to the participant's VSA (including any shares that are transferred in satisfaction of the dividend equivalent entitlement), for the purposes of paragraph 83A-15(1)(b) of the IT(TP)A 1997.

93. Under subsection 83A-15(2) of the IT(TP)A 1997, former Division 13A is taken to have applied as if the award had always been rights to acquire the number of shares that are transferred to the participant's VSA. The number of rights corresponds to the number of shares transferred to the participant's VSA and are referred to in this Ruling as award rights.

94. The award rights were acquired on the award date for the purposes of former Division 13A, as this is the date that the award was acquired. Therefore, the award rights were acquired in the year ended 30 June 2009.

95. As former Division 13A is taken to have applied to the award rights, the assessable income of a participant includes the discount given in relation to the award rights if the award rights were acquired under an employee share scheme (former subsection 139B(1) of the ITAA 1936). Award rights are acquired by a participant in respect of their employment for no consideration (being less than the market value of the award rights), and therefore, under an employee share scheme within the meaning of former section 139C of the ITAA 1936.

96. The award rights meet the qualifying conditions in former section 139CD of the ITAA 1936 because:

- the award rights were acquired under an employee share scheme within the meaning of former section 139C of the ITAA 1936;
- RDS is a holding company of the employer of a participant;
- all the award rights that were available for acquisition under the scheme are rights to acquire ordinary shares; and
- immediately after the acquisition of the award rights, a participant did not hold a legal or beneficial interest in more than 5% of the shares in RDS and was not in a position to cast or control the casting of more than 5% of the maximum votes that might be cast at a general meeting of RDS.

97. Division 83A of the IT(TP)A 1997 sets out when Division 83A of the ITAA 1997 will apply to a share or right.

98. Subsection 83A-5(2) of the IT(TP)A 1997 provides that Subdivision 83A-C of the ITAA 1997 will apply to an ESS interest where:

- at the pre-Division 83A time, former subsection 139B(3) of the ITAA 1936 applied in relation to the interest;
- the interest was acquired (within the meaning of former Division 13A) before 1 July 2009;
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, for the interest did not occur before 1 July 2009.

99. Section 83A-10 of the IT(TP)A 1997 provides that to avoid doubt, former Division 13A continues to apply if:

- at the pre-Division 83A time, former Division 13A applied in relation to a share or right; and
- if there is a beneficial interest in the share or right that is an ESS interest, Division 83A of the ITAA 1997 does not apply in relation to the ESS interest under section 83A-5 of the IT(TP)A 1997.

100. Former subsection 139B(3) of the ITAA 1936 applies in relation to a share or right if it is a qualifying share or right and the taxpayer has not made an election under former section 139E of the ITAA 1936 covering the share or right. Former subsection 139B(3) of the ITAA 1936 practically applies so that the discount given in relation to the interest is included in the assessable income in the year in which the cessation time occurs.

101. Former section 139E of the ITAA 1936 (for the 2008-2009 income year) provided for an election to be made in an employee's income tax return for the acquisition year and provided the Commissioner with a discretion to allow an election to be made at a later time. The election applies for an income year and covers each qualifying share or right acquired in that year.

102. Reading the provisions of subsection 83A-5(2) and section 83A-10 of the IT(TP)A 1997 together, and having regard to the scheme of former Division 13A, Division 13A continues to operate to allow taxpayers to make elections in their income tax returns for the 2008-2009 income year and to request late elections under former section 139E of the ITAA 1936 after the pre-Division 83A of the ITAA 1997 time.

103. Former Division 13A continues to apply to award rights where:

- a participant makes an election under former section 139E of the ITAA 1936 (including a late election that is allowed by the Commissioner) for the income year ended 30 June 2009; or
- a participant ceases the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009 (a cessation time has occurred before 1 July 2009).

104. Subdivision 83A-C of the ITAA 1997 will apply to the award rights where:

- a participant does not make an election under former section 139E of the ITAA 1936 for the income year ended 30 June 2009; and
- the participant has not ceased the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009 (not had a cessation time occur before 1 July 2009).

105. If a participant made an election under former section 139E of the ITAA 1936 in their income tax return for the year ended 30 June 2009, covering other qualifying shares or rights acquired in that income year, that election will cover the award rights. That election cannot be revoked.

106. Under former subsection 139E(2B) of the ITAA 1936, a taxpayer is treated as if they had made a section 139E election where:

- the total discount for the taxpayer for the year of income is \$1,000 or less; and
- the exemption conditions in former section 139CE of the ITAA 1936 are satisfied in relation to the relevant shares or rights.

107. When former Division 13A is taken to have applied to the award rights, former subsection 139E(2B) of the ITAA 1936 will not apply to a participant for the 2008-2009 income year because the exemption conditions are not satisfied in relation to the award rights. The total discount for the participant for the 2008-2009 income year may also be greater than \$1,000.

108. The Commissioner will exercise his discretion under former subsection 139E(2A) of the ITAA 1936 to allow participants to make a late election for the 2008-2009 income year if:

- the participant did not acquire any other qualifying shares or rights in the 2008-2009 income year; or
- the only qualifying shares or rights acquired in the 2008-2009 income year would have been covered by former subsection 139E(2B) of the ITAA 1936, but for the operation of section 83A-15 of the IT(TP)A 1997;

and:

- the request for a late election and the election are made in the approved form on or before 15 May in the income year following the year in which the shares are transferred to the participant's VSA; and
- the Commissioner is within time to amend the participant's assessable income for the income year ended 30 June 2009 to include the discount in that year.

109. If the amendment period has passed and the participant is also out of time to lodge an objection against their assessment, a participant may lodge an objection and request an extension of time to object to their assessment for the income year ended 30 June 2009.

110. In deciding to exercise his discretion in the above circumstances, the Commissioner has considered what is fair and reasonable having regard to the retrospective change in the law effected by section 83A-15 of the IT(TP)A 1997. A participant may not have been aware of the law change at the time they lodged their 2008-2009 income tax return. In any event, a participant could not have made an election for the 2008-2009 income year covering the award (when the award was acquired) as they did not know if the award would ultimately be treated as if it were always rights to acquire shares for the purposes of former Division 13A. Until the award is satisfied with shares, a participant can not be certain that section 83A-15 of the IT(TP)A 1997 would apply to the award.

111. If participants request that the Commissioner make a late election in circumstances other than those described in paragraph 108 of this Ruling, the Commissioner will consider each request for a late election on a case by case basis having regard to the circumstances which led to the participant not making an election prior to lodging their income tax return for the 2008-2009 income year, the explanation for the delay in making the request and any other relevant facts and circumstances.

Award rights under Subdivision 83A-C

Deferred taxing point

112. Pursuant to subsection 83A-5(4) of the IT(TP)A 1997, the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 will be the ESS deferred taxing point for award rights to which Subdivision 83A-C of the ITAA 1997 applies (subject to subsection 83A-120(3) of the ITAA 1997).

113. The cessation time for rights is determined under former section 139CB of the ITAA 1936, and for the award rights, will be the earliest of:

- the time when the participant ceases the employment in respect of which the award rights were acquired within the meaning of former subsection 139CB(2) of the ITAA 1936;
- if dealing restrictions apply to the participant at the time the shares are transferred to the participant's VSA – the time when those restrictions cease to have effect; or
- if dealing restrictions do not apply at that time the shares are transferred to a participant's VSA – the time when the shares are transferred to the participant's VSA (being the time when the award rights are exercised).

114. Dealing restrictions are considered to apply at the time the share is transferred to a participant's VSA, if:

- the participant has inside information as defined in the Code at that time; or
- the shares are transferred in a restricted period and the participant is unable to dispose of shares in a restricted period.

115. Dealing restrictions cease to have effect at the first time that the participant is no longer in possession of inside information and is no longer in a restricted period (if applicable).

116. However, if the participant disposes of the beneficial interest in the shares acquired on exercise of the rights within 30 days of the cessation time, the ESS deferred taxing point will instead be the time of the disposal under subsection 83A-120(3).

Amount included in assessable income

117. If the ESS deferred taxing point occurs before the time the shares are transferred to the participant's VSA, the participant's assessable income for the income year in which the deferred taxing point occurs will include the market value of the award rights at the deferred taxing point reduced by the cost base of the award rights: subsection 83A-110(1).

118. Section 83A-315 provides that if the regulations specify an amount to be used for market value in relation to an ESS interest for the purposes of Division 83A, use that amount.

119. Regulation 83A-315.01 of the ITAR 1997 provides that an individual can choose to value unlisted rights that must be exercised within 10 years of acquisition, as either:

- the market value of the right; or
- the amount determined by application of regulations 83A-315.02 to 83A-315.09.

120. Regulation 83A-315.03 of the ITAR 1997 provides that if the lowest amount that must be paid to exercise a right to acquire a beneficial interest in a share is nil, the value of the right on a particular day is the same as the market value of the share on that day.

121. A participant is not required to pay anything for delivery of the shares on vesting of the award. Therefore, under regulation 83A-315.03 of the ITAR 1997, the value of the award right at the ESS deferred taxing point is the same as the market value of a share on that day.

122. If the ESS deferred taxing point is at the time or after the time when the shares have been transferred to the participant's VSA, the participant's assessable income will include the market value of the shares at the ESS deferred taxing point reduced by the cost base of the shares under subsection 83A-110(1).

123. Subsection 83A-110(1) applies in relation to the ESS interest to which Subdivision 83A-C applies (that is the award rights, at the ESS deferred taxing point of the award rights). On a literal reading, the ESS interests to be valued at the ESS deferred taxing point and whose cost base must be determined for the purpose of determining the amount to be included in assessable income, is the award rights. However, where a right is exercised and the ESS deferred taxing point occurs at a time that the employee holds the underlying share, the right has ceased to exist at the time subsection 83A-110(1) applies in relation to it.

124. The context indicates that subsection 83A-110(1) of the ITAA 1997 was intended to apply in the same way as the corresponding provision in former Division 13A applied (former subsection 139CC(4) of the ITAA 1936). In particular, a clear contextual indicator is paragraphs 83A-120(7)(c) and (d) of the ITAA 1997, which clearly contemplate a taxing point arising when an individual no longer holds their original right but rather holds the underlying share. Therefore, subsection 83A-110(1) of the ITAA 1997 must be interpreted as if the reference to the market value of the interest and the cost base of the interest at the ESS deferred taxing point, is not a reference to the right (which no longer exists), but is instead a reference to the market value and cost base of the share.

125. A participant does not include an amount in relation to an ESS interest in their assessable income to the extent that it relates to employment outside of Australia: paragraph 83A-5(4)(a) of the IT(TP)A 1997.

126. The amount otherwise included in assessable income in relation to award rights is considered to relate to a participant's *employment period*, being the period from:

- the later of the start of the performance period and when the participant commences employment; to
- the earlier of the qualifying date or the date that the participant ceases employment.

127. Where a participant is employed outside Australia during the *employment period* the amount excluded from assessable income is considered to be that proportion of the total amount otherwise included in assessable income that relates to employment outside Australia in the same proportion that the period of employment outside Australia during the *employment period* bears to the *employment period*.

Award rights under former Division 13A

Where an election made

128. If a participant makes an election under former section 139E of the ITAA 1936 (including a late election that is allowed by the Commissioner) for the income year ended 30 June 2009, former subsection 139B(2) of the ITAA 1936 is taken to have applied to the award rights and the discount is included in the participant's assessable income in the income year in which the award rights were acquired (the income year ended 30 June 2009).

129. The discount included in the participant's assessable income is the market value of the award rights at the time when they were acquired (the award date), under former subsection 139CC(2) of the ITAA 1936, as no consideration was paid or given for acquisition of the rights.

130. The market value of each award right is determined under former Subdivision F of former Division 13A of the ITAA 1936. As the lowest amount that must be paid to exercise an award right is nil, the market value of the right is the same as the market value of the share on the day the right is acquired under former subsection 139FE(1) of the ITAA 1936. The market value of the share is determined under former section 139FA of the ITAA 1936.

Where no election made and participant ceased employment before 1 July 2009

131. If a participant:

- did not make an election under former section 139E of the ITAA 1936 for the year ended 30 June 2009; and
- ceased employment within the meaning of former subsection 139CB(2) of the ITAA 1936 before 1 July 2009;

the cessation time for the participant is taken to have occurred at the time the participant ceased employment, under former section 139CB of the ITAA 1936.

132. The discount will be included in the participant's assessable income in the income year ended 30 June 2009 under former subsection 139B(3) of the ITAA 1936.

133. As the participant cannot dispose of the award rights, the discount is calculated under former subsection 139CC(4) of the ITAA 1936. The discount is the market value of the award rights at the time the participant ceased employment, as no amount of consideration was paid or given by the taxpayer to acquire the award rights.

134. The market value of each award right is determined under former Subdivision F of former Division 13A of the ITAA 1936. As the lowest amount that must be paid to exercise the award right is nil, the market value of the right is the same as the market value of the share on the day the participant ceased employment, under former subsection 139FE(1) of the ITAA 1936. The market value of the share is determined under former section 139FA of the ITAA 1936.

Shortfall interest charge

135. Section 280-100 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) provides that a taxpayer is liable to pay shortfall interest charge on an additional amount of income tax that they are liable to pay because the Commissioner amends their assessment for an income year.

136. If, after the award is satisfied by the transfer of shares to a participant's VSA, the operation of section 83A-15 of the IT(TP)A 1997 results in an amount in relation to the award rights being included in a participant's assessable income in an earlier income year and the Commissioner amends the participant's assessment for that earlier income year, the participant will be liable to pay shortfall interest charge on any additional amount of tax payable.

137. Under section 280-160 of Schedule 1 to the TAA, the Commissioner may remit the whole or part of the charge if it is fair and reasonable to do so. The Commissioner must have regard to the principle that remission should occur where the circumstances justify the Commonwealth bearing part or all of the cost of delayed payments.

138. Where a participant incurs shortfall interest charge in relation to their award rights because:

- the participant made an election in their income tax return for the year ended 30 June 2009 because they acquired other qualifying shares or rights in that year;
- the participant had a cessation time or an ESS deferred taxing point occur in an income year prior to the year ending 30 June 2012; or
- the participant makes a late election in relation to their award rights;

the Commissioner considers it reasonable to remit the shortfall interest charge to the earlier of:

- the time when the amended assessment is made;
- the date of lodgement of the income tax return for the year in which the shares are transferred to the participant's VSA; or
- the due date for lodgement (including extensions) of the income tax return for the year in which the shares are transferred to the participant's VSA.

CGT consequences

Award rights under Subdivision 83A-C

Grant of award

139. The granting of an award to a participant does not result in a CGT event for the participant.

140. An award right is a convertible interest of the kind mentioned in subsection 974-75(1). The satisfaction of an award right by a transfer of shares to a participant's VSA is a conversion of the convertible interest.

Award rights satisfied by transfer of shares to participant's VSA before ESS deferred taxing point – where dealing restrictions apply to participant at time of transfer

141. Where an award right is satisfied by a transfer of shares to a participant's VSA and dealing restrictions apply to the participant at the time the shares are transferred (delaying the ESS deferred taxing point until the restrictions cease to have effect), any capital gain or capital loss arising from the transfer of shares is disregarded in accordance with subsection 130-80(1).

142. Where an award right is satisfied by a transfer of shares to a participant's VSA and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

143. Where a participant has acquired a beneficial interest in a share held by the trustee on the transfer of shares to a participant's VSA before the ESS deferred taxing point and later acquires that share from the trustee or instructs the trustee to dispose of the shares:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

144. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

Award rights satisfied by transfer of shares to participant's VSA on ESS deferred taxing point – where dealing restrictions do not apply to participant at time of transfer

145. Where an award right is satisfied by a transfer of shares to a participant's VSA and dealing restrictions do not apply to the participant at the time the shares are transferred (giving rise to the ESS deferred taxing point at the time of transfer), any capital gain or capital loss arising from the transfer of shares is disregarded in accordance with subsection 130-80(1).

146. Where an award right is satisfied by a transfer of shares to a participant's VSA and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

147. Where a participant has acquired a beneficial interest in a share held by the trustee on the transfer of shares to a participant's VSA on the ESS deferred taxing point and later acquires that share from the trustee or instructs the trustee to dispose of the shares:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

148. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

Award rights satisfied by transfer of shares to participant's VSA after ESS deferred taxing point

149. Where an award right is satisfied by a transfer of shares to a participant's VSA after the ESS deferred taxing point:

- the time of acquisition of the award right is immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125; and
- the first element of cost base and reduced cost base of the award right is its market value immediately after the ESS deferred taxing point of the award right, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

150. Where an award right is satisfied (converted) by a transfer of shares to a participant's VSA after the ESS deferred taxing point, CGT event C2 in section 104-25 happens. Subsection 130-60(3) disregards any capital gain or capital loss that the participant makes from converting the award right. Where an award right is converted, the participant acquires a beneficial interest in a share held by the trustee.

151. Where a participant who has acquired a beneficial interest in a share held by the trustee on the conversion of an award right becomes absolutely entitled as against the trustee to that share, CGT event E5 happens, in accordance with subsection 104-75(1).

152. Any capital gain or capital loss made by a participant from CGT event E5 happening after the ESS deferred taxing point is disregarded in accordance with subsection 130-90(1).

153. A participant who has acquired a beneficial interest in a share held by the trustee on the conversion of an award right after the ESS deferred taxing point acquires the share for CGT purposes at the time the share is transferred to their VSA and they become absolutely entitled to the share. The first element of cost base and reduced cost base of the share is worked out in accordance with subsection 130-60(1) item 2.

Where ESS deferred taxing point of award right happens at time of disposal of share acquired pursuant to award right

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

Award rights under Division 13A

Where an election made

155. A participant acquires an award right at the time the right is granted. The granting of an award right to a participant does not result in a CGT event for the participant.

156. The first element of the cost base of an award right is the market value of the right worked out under former sections 139FA to 139FF of the ITAA 1936 at the time the participant acquired the right, in accordance with former subsection 130-80(2).

157. An award right is a convertible interest of the kind mentioned in subsection 974-75(1). The satisfaction of an award right by a transfer of shares to a participant's VSA is a conversion of the convertible interest. CGT event C2 in section 104-25 happens on the conversion of the convertible interest.

158. Any capital gain or capital loss made by a participant on the conversion of an award right is disregarded in accordance with subsection 130-60(3).

159. A participant becomes absolutely entitled to the shares at the time the shares are transferred to the participant's VSA and CGT event E5 in section 104-75 happens. Any capital gain or capital loss a participant makes in accordance with subsection 104-75(5) is disregarded, in accordance with subsection 104-75(6).

160. A participant acquires a share for CGT purposes at the time the share is transferred to their VSA and they become absolutely entitled to the share. Where a participant disposes of a share acquired as a result of conversion of an award right, a capital gain or capital loss may arise in accordance with subsection 104-10(4). A participant makes a capital gain if the capital proceeds from the disposal of the share exceed the cost base of the share. A participant makes a capital loss if those capital proceeds are less than the reduced cost base of the share.

161. The first element of the cost base and reduced cost base of the share is the cost base of the award right at the time of conversion, in accordance with subsection 130-60(1) item 2.

Where no election made and participant ceased employment before 1 July 2009

162. Where a participant ceases employment before 1 July 2009 and the participant's award right is satisfied (converted) by a transfer of shares to the participant's VSA, any capital gain or capital loss made by the participant on the conversion of the award right is disregarded in accordance with subsection 130-60(3).

163. A participant acquires a share at the time the shares are transferred to the participant's VSA. At that time, the participant becomes absolutely entitled to the shares and CGT event E5 happens in accordance with section 104-75. Any capital gain or capital loss a participant makes in accordance with subsection 104-75(5) is disregarded in accordance with subsection 104-75(6).

Disposal of share more than 30 days after cessation time

164. Where a cessation time occurs in relation to an award right before 1 July 2009 (as a result of a participant ceasing employment), and a participant disposes of a share acquired from the conversion of the award right (necessarily more than 30 days after the cessation time), the participant will make a capital gain where the capital proceeds from the disposal are more than the cost base of the share, in accordance with subsection 104-10(4).

165. The first element of the cost base of the share acquired from the conversion of an award right will be the cost base of the right at the time of conversion, in accordance with subsection 130-60(1) of the ITAA 1997. The first element of the cost base of the right will be the market value of the right (worked out under former sections 139FA to 139FF of the ITAA 1936) at the cessation time, in accordance with former subsection 130-83(3) of the ITAA 1997.

Lapse of award

166. Where an award lapses, CGT event C2 happens in accordance with subsection 104-25(1).

167. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

168. Although a participant pays nothing for an award, the market value substitution rule for cost base and reduced cost base does not apply in accordance with subsection 112-20(3) table item 5.

169. Although a participant receives no capital proceeds from the lapse of an award, the market value substitution rule for capital proceeds also does not apply in accordance with subparagraph 116-30(3)(a)(i).

170. Therefore, a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from the lapse of an award.

Foreign / Temporary Residents

171. As an award right, a beneficial interest in a share and a share itself are not taxable Australian property, any capital gain or capital loss a participant makes from a CGT event happening in relation to any of those CGT assets is disregarded, if the participant is a foreign resident or a temporary resident just before the CGT event happens (sections 855-10 and 768-915).

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2009/57

Subject references:

- employee share schemes

Legislative references:

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- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
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