

# ***CR 2012/97 - Income tax: Google Inc. 2004 Stock Plan: Australian Resident Employees***

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## Class Ruling

### Income tax: Google Inc. 2004 Stock Plan: Australian Resident Employees

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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

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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 83-A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-C of Division 83A (Subdivision 83A-C) of the ITAA 1997;
- section 83A-10 of the ITAA 1997;
- section 83A-105 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-330 of the ITAA 1997; and
- section 136(1)(h) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)

## Class of entities

3. The class of entities to which this Ruling applies is employees of Google Inc (Google) and its subsidiaries Google Australia Pty Limited (Google Australia) and DoubleClick Australia Pty Ltd (DoubleClick) who:

- are granted Google Stock Units (GSUs) under the Google Inc. 2004 Stock Plan (the Plan);
- are residents of Australia (within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)); and
- are not temporary residents (within the meaning of subsection 995-1(1) of the ITAA 1997).

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

## Qualifications

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

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 10 to 22 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

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9. This Ruling applies from 1 July 2012 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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).

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## Scheme

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10. 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:

- Class Ruling Application dated 7 May 2012;
- Google Inc. 2004 Stock Plan;
- Google Inc. 2004 Stock Plan Google Stock Unit Agreement;
- Exhibit A-Appendix of Special Terms and Conditions for Participants outside the US;
- Google Inc. 2004 Stock Plan Australian Addendum;
- Google Inc. 2004 Stock Plan Offer Document: Offer of Google Stock Units to Australian Resident Employees; and
- Communications with the applicant.

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

11. Google is a foreign resident company listed on the NASDAQ.

12. Under the Plan eligible Australian resident employees of the company or a subsidiary may be offered GSUs at the discretion of the company.

13. The Plan is designed to ensure employees share in the success of the company and the employees interests are aligned with Google's interests. The Plan is operated to attract and retain the best available personnel and promote the success of the Company. Upon grant employees become participants in the Plan, GSUs acquired by participants are governed by the Plan Rules and are subject to the Google Stock Unit Agreement (the Award agreement).

14. The GSUs are granted to participants for no consideration and are acquired by the participant at a discount to their market value.

15. Immediately after the acquisition of the GSUs, no participant will hold a beneficial interest in more than 5% of the shares in Google and no participant will be in a position to cast or control the casting of more than 5% of the votes that may be cast at a general meeting of Google.

16. Participants must hold each GSU for a compulsory period (the vesting period). Different vesting periods may apply to the GSUs depending on the vesting schedule in the Award agreement. The defined period may be monthly, quarterly or semi-annually over a four year period.

17. Upon vesting of the GSUs, no exercise price is payable and the participant will be issued Google shares automatically.

18. It is a requirement of the Plan that the participant remains an employee for the duration of the vesting period.

19. If a participant ceases employment (for any reason except his or her death) during the vesting period, the participant's right to have the GSUs vest and receive the related shares will terminate and the GSUs will be cancelled.

20. GSUs are non-transferrable except upon the death of a participant.

21. Google's general discretion to waive forfeiture, the vesting period or any other conditions that may have been imposed, will not be exercised on a routine basis to allow participants ceasing employment (for any reason except his or her death) to have their GSUs vest.

22. There are no restrictions on disposal of shares issued upon vesting of a GSU, except for company-wide trading restrictions imposed by Google's insider trading policy, which allows current employees to sell their shares only during quarterly open trading windows.

## Ruling

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23. A participant who is granted GSUs under the Plan acquires an Employee Share Scheme (ESS), interest in terms of subsection 83A-10(1).

24. The Commissioner accepts that GSUs granted to participants under the Plan are acquired at real risk of forfeiture and that Subdivision 83A-C applies in relation to the GSUs.

25. No amount will be included in the participant's assessable income in relation to the GSUs until the ESS deferred taxing point occurs.

26. The ESS deferred taxing point determined in accordance with section 83A-120 will be the earliest of the following times:

- when the employee ceases employment (within the meaning of 83A-330) with Google or its subsidiaries [subsection 83A-120(5)]; or
- immediately after the end of the period where disposal restrictions apply to the shares acquired [subsection 83A-120(7)]. This will be the first open trading window subsequent to the vesting time of the GSUs.

However, where the participant disposes of the share within 30 days of the time which would otherwise be the deferred taxing point, the ESS deferred taxing point will instead be the time of disposal [subsection 83A-120(3)].

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**Commissioner of Taxation**

24 October 2012

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## Appendix 1 – Explanation

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**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 acquired under an employee share scheme**

27. Where an ESS interest is acquired under an employee share scheme at a discount on or after 1 July 2009, the discount in relation to the ESS interest is included in the assessable income of a participant, in accordance with Division 83A.

28. An ESS interest in a company is defined in subsection 83A-10(1) as a beneficial interest in:

- (a) a share in the company; or
- (b) a right to acquire a beneficial interest in a share in the company.

29. An employee share scheme is defined in subsection 83A-10(2) as a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment.

30. Thus, where under the Plan a participant is issued GSUs, they will acquire an ESS interest under an employee share scheme.

31. As participants do not pay for their GSUs they will be acquired at a discount and, pursuant to subsection 83A-20(1), Subdivision 83A-B will apply to the GSUs acquired by participants under the Plan, unless Subdivision 83A-C applies.

### **GSUs acquired under the Plan**

#### ***Subdivision 83A-C***

32. Subdivision 83A-C allows for the deferral of tax on the amount assessable in respect of an ESS interest if certain conditions are satisfied. Subdivision 83A-C applies, and Subdivision 83A-B does not apply to an ESS interest which is a right if the following conditions are satisfied:

- (a) Subdivision 83A-B would, apart from section 83A-105, apply to the interest;
- (b) subsection 83A-35(3), (4), (5) and (9) apply to the interest; and
- (c) there is a real risk that a participant will forfeit or lose the interest (other than by disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

33. In relation to the first condition Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the right because the right:

- is a beneficial interest in a right to acquire a beneficial interest in an ordinary share of Google; and
- is provided to employees of Google and its subsidiaries, in relation to their employment, and will be provided for nil consideration (that is, at a discount).

34. In relation to the second condition, subsections 83A-35(3), (4), (5) and (9) apply to each GSU granted to a participant because:

- when the GSU is acquired, the participant is employed by Google or its subsidiaries (83A-35(3));
- all of the GSUs available for acquisition under the Plan relate to ordinary shares in Google (83A-35(4));
- the predominant business of Google and its subsidiaries is not the acquisition, sale or holding of shares, securities or other investments, directly or indirectly (83A-35(5)); and
- after the acquisition of the GSU, the participant will not hold a beneficial interest in more than five per cent of the shares in Google nor be in a position to cast, or control the casting of, more than five percent of the maximum number of votes that might be cast at a general meeting of Google (83A-35(9)).

35. In relation to the third condition Subdivision 83A-C will apply to a GSU if, under the conditions of the Plan when the GSU is granted, there is a real risk that a participant will forfeit or lose the GSU (other than by disposing of it, exercising the right or letting it lapse).

### ***Real risk of forfeiture***

36. The Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the Explanatory Memorandum), which inserted Division 83A into the ITAA 1997, explains the 'real risk of forfeiture' test at paragraph 1.156 as follows:

The 'real risk of forfeiture' test does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, real is regarded as something more than a mere possibility. Something is not a real risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

37. It is further explained at paragraph 1.158 of the Explanatory Memorandum that the 'real risk of forfeiture' test is intended to provide for deferral of tax when there is a real alignment of interests between the employee and employer, through the employee's benefits being at risk.

38. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

39. 'Real' is defined in *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne as 'actually existing as a thing or occurring in fact' and 'genuine; rightly so called; not artificial or merely apparent'.

40. When considering whether a condition in a scheme imposes a real risk of forfeiture, the Commissioner will have regard to whether a reasonable person would consider that there is a genuine connection between the forfeiture condition and aligning the interests of the employee and employer.

41. The scheme has been designed to motivate, reward and retain employees. Each GSU granted is part of a package of GSUs that vest over a four year period. Participants have an interest in remaining employed with Google or its subsidiaries as they will be provided with shares in the company when the GSUs vest if they are still employed at that time.

42. A condition imposing a minimum employment period from the grant date, will only meet 'the real risk of forfeiture test' if the risk is genuine, having regard to the circumstances and the deferral period under the scheme.

43. GSUs granted to participants under the Plan will either vest monthly, quarterly or semi-annually over the four year period, in accordance with the vesting schedule in the award agreement. The right to GSU's that have not vested will terminate if the participant ceases to be an employee of Google or its subsidiaries (for any reason except his or her death) during the vesting period.

44. Although Google has a general discretion to waive conditions such as forfeiture and vesting conditions, the applicant has advised that this discretion will not be exercised on a routine basis. As Google's discretion will not be routinely exercised, at the time of acquiring GSUs participants cannot expect the discretion to be exercised. Therefore the Commissioner accepts that the existence of the discretion would not prevent the GSUs from being held at real risk of forfeiture.

45. Although GSUs will vest upon a participant meeting a relatively short term of employment condition, the Plan operates such that a deferred taxing point will occur on the occasion of the first trading window subsequent to the vesting time. Consequently the Plan operates such that the deferral period is not considered to be excessive when compared to the term of employment. As the GSUs vest on a regular and frequent basis the participant needs to remain an employee for the entire four-year vesting period, to obtain the benefit of the total package of GSUs.

46. Therefore the Commissioner accepts that the risk of forfeiture is genuine having regard to the circumstances and the deferral period under the scheme. The scheme provides more than a 'mere' or 'rare' possibility of forfeiture and as such does not prevent the scheme from having a purpose of retaining employees and aligning their interests with the interests of the company.

47. Participants will have a real risk, of forfeiting or losing the rights acquired under the scheme and the rights will satisfy the condition in subsection 83A-105(3).

### ***ESS deferred taxing point***

48. When Subdivision 83A-C applies to an ESS interest, an amount will be included in the assessable income of an employee in accordance with section 83A-110 at the ESS deferred taxing point.

49. The ESS deferred taxing point for a right is worked out under section 83A-120. As a consequence of the ongoing restrictions on disposing of the GSUs and the relatively short vesting periods only one of two possible ESS deferred taxing points can arise. It will be at the earlier of the following times:

- the time when there is no longer a real risk of forfeiting or losing the right (other than by disposing of it, exercising it or letting it lapse); and there is also no genuine restriction on exercising the right; and there is no real risk that if you exercise the right you will forfeit or lose the share (other than by disposing of it) and there is also no genuine restriction on disposal of the share; or
- the time when the participant ceases the employment in respect of which they acquired the right, within the meaning of section 83A-330;

50. If the participant disposes of the share acquired on exercise of the right within 30 days after the first occurrence of one of the above times, the ESS deferred taxing point will instead be the time of the disposal.

51. At the conclusion of the vesting period, there is no longer a real risk of forfeiture. There are no restrictions on disposal of the shares issued except for company-wide trading restrictions imposed by Google's insider trading policy, which allows current employees to sell their shares only during quarterly open trading windows.

52. Therefore, unless the employee ceases employment earlier, the ESS deferred taxing point for the GSUs will be at the commencement of the first trading window after the vesting period. This is the time when a participant is no longer restricted from disposing of their shares.

## ***Fringe Benefits Tax***

53. The provision of the GSUs under the Plan is not a fringe benefit due to the exclusion in paragraph (h) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA. That paragraph excludes a benefit constituted by the acquisition at a discount of an ESS interest under an employee share scheme.

54. The subsequent receipt of a share on exercise of the right is also not a fringe benefit because it directly arises from, and is merely a conversion of, the initial right.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

acquisition of shares

capital gains tax

CGT events

CGT cost base

disposal of shares

employee share ownership

employee share schemes

ESS deferred taxing point

ESS interest

real risk of forfeiture

*Legislative references:*

- TAA 1953

- Copyright Act 1968

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ATO references

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