


CR 2015/107 - Income tax: EQT Group restructure - employee share schemes - treatment of shares or rights

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Class Ruling

Income tax: EQT Group restructure – employee share schemes – treatment of shares or rights

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① This publication provides you with the following level of protection:

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

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

If you rely on this ruling, 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 is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provision of the ITAA 1936.

Relevant provision(s)

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

- section 83A-10 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 83A-35 of the ITAA 1997
- section 83A-45 of the ITAA 1997
- section 83A-130 of the ITAA 1997

- section 130-80 of the ITAA 1997
- Subdivision DA of former Division 13A of the ITAA 1936
- former section 139BA of the ITAA 1936, and
- former section 139DQ of the ITAA 1936.

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

Class of entities

4. The class of entities to which this Ruling applies is all persons who are employees of EQT Holdings Limited (EQTHL) or any of its wholly owned subsidiaries (EQT Group) and immediately prior to the Restructure described in paragraphs 11 to 22 of this Ruling:

- held a beneficial interest in Equity Trustees Limited (EQT) shares or rights to acquire a beneficial interest in EQT shares under the EQT Executive Performance Share Plan (EPSP), the EQT Employee Share Acquisition Plan (ESAP) or the EQT Salary Sacrifice Share Plan (SSSP) in respect of their employment by a member of the EQT Group
- from the time of acquisition of the shares or rights, were residents of Australia within the meaning of subsection 6(1) of the ITAA 1936
- if they acquired the shares or rights before 1 July 2009 under either the EPSP or SSSP, those shares or rights were not covered by an election made under former section 139E of the ITAA 1936 and those shares or rights did not have a cessation time as mentioned in former section 139B(3) of the ITAA 1936 happen to them before the Restructure, and/or
- if they acquired the shares or rights on or after 1 July 2009 under either the EPSP or SSSP, Subdivision 83A-C applies to the shares or rights and those shares or rights did not have an ESS deferred taxing point happen to them before the Restructure, and/or
- if they acquired the shares on or after 1 July 2009 under the ESAP, those shares are still subject to the disposal restriction under subsection 83A-35(8) or still subject to the disposal restriction under subsection 83A-45(4) if they acquired the shares on or after 1 July 2015.

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 9 to 38 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.

Date of effect

8. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 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.

EQTHL

10. EQTHL is part of the EQT Group of companies and recently became the head company of the EQT Group following the Restructure described below. The EQT Group is a broad based financial services organisation providing trustee and related services.

The Restructure of the EQT Group

11. The Restructure was voted on and approved by EQT shareholders at a scheme meeting on 27 November 2015, and was then approved by way of a court order under subsection 411(6) of the *Corporations Act 2001*.

12. The Restructure had two stages. The first stage involved the insertion of EQTHL into the EQT Group. EQTHL was incorporated on 21 August 2015, and is the new holding company for the EQT Group.

13. EQTHL had one share on issue at the beginning of the Restructure which was held by EQT. At that time EQTHL did not carry on any operations or undertake any activities other than those associated with the Restructure and did not issue, or agree to issue, any securities other than those proposed in accordance with the terms of the Restructure.

14. Under the second stage of the Restructure one share in EQT was issued to EQTHL and the original share held by EQT in EQTHL was bought back for nominal consideration and cancelled.

15. EQT shareholders (other than ineligible foreign resident shareholders) who held EQT shares on the Record Date (7 December 2015) exchanged each of their EQT shares for an EQTHL share (that is, on a one-for-one basis).

16. Certain overseas resident shareholders (ineligible foreign resident shareholders) were ineligible to receive EQTHL shares under the Restructure. EQTHL shares that would otherwise have been issued to those shareholders in exchange for their ordinary shares were instead issued to a Nominee.

17. EQTHL shares issued to the Nominee were sold by the Nominee for a price and on terms determined in good faith.

18. The sale proceeds (net of expenses) were remitted to the relevant ineligible foreign resident shareholder and this was considered to be full satisfaction of EQTHL's obligations.

19. As at the Record Date all statements of holding in respect of EQT shares ceased to have effect as documents of title in respect of those EQT shares and each entry on the EQT share register at that date ceased to have any effect other than as evidence of entitlement to the Restructure consideration.

20. EQTHL shares were then listed on the ASX and EQT shares ceased to be listed on the ASX (with EQT becoming a wholly owned subsidiary of EQTHL). EQTHL may change its name, subject to regulatory approval.

21. The implementation date for the Restructure was 14 December 2015. Following the implementation of the Restructure, EQT shareholders as at the Record Date continued to have the same economic interest in the EQT Group as they held immediately before the implementation of the Restructure, through their holding of one EQTHL share for each EQT share they formerly held.

22. The holders of entitlements to acquire unissued EQT shares (being various executives of EQT) exchanged their entitlements for equivalent entitlements to acquire the same number of EQTHL shares on substantially the same terms and conditions.

Employee share schemes

23. In the period leading up to the Restructure the EQT Group had three employee and director share plans (EQT Share Plans) in place that are relevant for the purposes of this Class Ruling:

- EQT Executive Performance Share Plan 1999 (EPSP)
- EQT Employee Share Acquisition Plan (ESAP), and
- EQT Salary Sacrifice Share Plan (SSSP).

EPSP

24. Under this plan key executives were offered share entitlements to acquire EQT shares on a one-for-one basis on exercise (Awards), subject to the satisfaction of certain performance criteria prescribed by the Board and tested over a three year period, with additional performance assessment, if applicable, in the fourth year in respect of the TSR performance criteria. Shares allocated on exercise of Awards may be held in trust and subject to disposal restrictions for a further period.

ESAP

25. Under this plan employees (other than key executives) received an annual allocation at no cost of no more than \$1,000 worth of EQT shares with a disposal restriction of the lesser of three years from allocation or ceasing employment with the EQT Group, subject to the Board activating the ESAP after considering the financial performance of EQT for the preceding financial year.

SSSP

26. Under this plan employees (including directors but excluding key employees) could sacrifice \$5,000 or less per annum of their pre-tax salary and/or their bonus for EQT shares, subject to an elected disposal restriction period.

Employee Share Trust

27. Equity Nominees Limited, the trustee of the Equity Trustees Limited Employee Equity Plan Trust, oversees the acquisition and allocation of the shares for the participants under the EPSP and the SSSP.

28. Equity Nominees Limited participated in the Restructure in the same way as other EQT shareholders in relation to shares registered in its name.

29. The Equity Trustees Limited Employee Equity Plan Trust is an employee share trust as described in subsection 130-85(4).

Changes to the EQT Share Plans as part of the Restructure

30. Under the Restructure, EQTHL assumed EQT's responsibilities for operation and management of the EQT Share Plans.

31. The rules for each of the EQT Share Plans were amended to reflect the new structure, including permitting the participants to acquire EQTHL shares instead of EQT shares.

32. Participants in the EPSP have entered into an entitlements cancellation deed. Under the Restructure, Awards held under the EPSP were cancelled and each of the key executives were granted an equivalent number of entitlements to acquire EQTHL shares on substantially the same terms as the cancelled entitlements to acquire EQT shares.

33. Unvested Awards granted to participants under the EPSP will continue to be tested in accordance with the vesting schedule set at the time of acquiring the original Awards.

34. On exercise of vested Awards under the EPSP, EQTHL shares will be delivered instead of EQT shares.

35. ESAP participants participated in the Restructure in the same way as other EQT Shareholders. Their EQT shares were exchanged for EQTHL shares, and continue to be held under the terms of the amended Employee Share Acquisition Plan.

36. EQT SSSP participants participated in the Restructure in the same way as other EQT Shareholders. Their EQT shares were exchanged for EQTHL shares, and continue to be held under the terms of the amended SSSP.

Other

37. Under the Restructure, at the time the new shares or Awards in EQTHL were acquired:

- no participant held, nor was treated as holding, a beneficial interest in more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the shares in EQTHL, and/or
- no participant was in a position to cast, nor was treated as being in a position to cast or control the casting of, more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the maximum number of votes that might be cast at a general meeting of EQTHL.

38. Participants were employed by the EQT Group at the time they acquired their ESS interests and did not cease that employment as a result of the Restructure when EQT became a 100% subsidiary of EQTHL.

Ruling

ESS Interests

39. The shares or Awards acquired by participants under each of the EQT Share Plans are ESS interests as defined under subsection 83A-10(1).

Restructure of the EQT Group

40. The Restructure constitutes a restructure for the purposes of Subdivision DA of former Division 13A of the ITAA 1936 and section 83A-130.

Continuation of shares or Awards

41. Under the Restructure, where a participant's Awards acquired under the EPSP are replaced with EQTHL Awards, the replacement Awards are treated as a continuation of the original Awards for the purposes of:

- (a) Subdivision DA of former Division 13A of Part III to the ITAA 1936, and/or
- (b) section 83A-130.

42. Under the Restructure, where a participant's EQT shares acquired under the EPSP or SSSP were held in trust and those shares were replaced with shares in EQTHL, the replacement shares are treated as a continuation of shares in EQT for the purposes of:

- (a) Subdivision DA of former Division 13A of the ITAA 1936, and/or
- (b) section 83A-130.

43. As the EQTHL Awards held under the EPSP and the EQTHL shares held under the EPSP and SSSP are treated as a continuation of the EQT Awards and shares respectively, the disposal of the EQT Awards and shares did not cause an ESS deferred taxing point.

Continuation of employment

44. For participants who acquired shares or Awards under the EPSP, ESAP or SSSP before the Restructure, their employment by EQTHL or a subsidiary of EQTHL after the Restructure is treated as a continuation of the employment in respect of which they acquired their shares or Awards in EQT for the purposes of:

- (a) former section 139DQ of the ITAA 1936, and/or
- (b) section 83A-130.

Continuation of exemption

45. Where under the Restructure EQT shares acquired by participants under the ESAP were replaced with EQTHL shares, the replacement shares are treated as a continuation of the EQT shares under subsection 83A-130(2) and the disposal restriction condition under the former subsection 83A-35(8) or subsection 83A-45(4) is taken to be satisfied under subsection 83A-130(3). Any discount previously excluded from a participant's assessable income under former section 139BA of the ITAA 1936 or section 83A-35 in respect of those shares will continue to be excluded.

Capital gains tax consequences

46. Any capital gains or losses that arise under the Restructure as a result of the exchange of shares or Awards held under the EPSP, ESAP or SSSP are disregarded under subsection 130-80(1).

Commissioner of Taxation

16 December 2015

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

47. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

48. By reason of Subdivision 83A-A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), Division 83A also applies to certain shares, rights and stapled securities acquired before 1 July 2009.

49. The shares or Awards (rights) acquired by participants under each of the EQT Share Plans are ESS interests as defined under subsection 83A-10(1).

Restructure of the EQT Group

50. The employee share scheme rules are designed to ensure that employees are not adversely affected by takeovers and restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to a corporate restructure.

51. The term 'restructure' is described in subparagraph 83A-130(1)(a)(ii) as:

...a change (the **restructure**) in the ownership (including the structure of the ownership) of the old company;

52. The Commissioner accepts that the Restructure constitutes a restructure for the purposes of section 83A-130 as the ownership of EQT changed.

Employee Share Schemes

Shares or rights acquired pre 1 July 2009

53. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) applies in relation to shares or rights granted to a participant under either the EPSP or the SSSP because:

- the shares or rights were acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009

- former subsection 139B(3) of the ITAA 1936 applied in relation to the shares or rights (the Commissioner accepts that the shares or rights acquired by the participant were qualifying shares or rights within the meaning of former section 139CD of the ITAA 1936 and the participant did not make an election covering those shares or rights under former section 139E of the ITAA 1936), and
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 and former section 139CA or former section 139CB for those shares or rights did not occur before 1 July 2009.

ESS deferred taxing point

54. Where Division 83A-C applies to an ESS interest, an amount will be included in the assessable income of a participant under subsection 83A-110(1) in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs.

55. The ESS deferred taxing point for shares or rights is worked out under section 83A-115 or section 83A-120. However, because Subdivision 83A-C applies to shares or rights acquired before 1 July 2009 by virtue of subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

56. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that the ESS deferred taxing point for a share or right acquired before 1 July 2009 will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-115(3) or subsection 83A-120(3), respectively.

57. Therefore, whether an ESS deferred taxing point arises as a consequence of the Restructure will depend on whether a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 would result from the Restructure.

58. A cessation time for a share or right acquired before 1 July 2009 would occur at the time the participant disposes of the share or right as a result of the Restructure (former paragraph 139CA(2)(a) or paragraph 139CB(1)(a) of the ITAA 1936).

59. However, there would be no disposal where the participant's replacement shares in EQTHL are, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, treated as a continuation of shares or rights in EQT (provided also that the participant does not cease employment within the meaning of former 139CB(2) of the ITAA 1936). In such circumstances, the Restructure would not trigger a cessation time and therefore there would be no ESS deferred taxing point.

Conditions for the continuation of shares or rights

60. The Commissioner accepts that the Restructure constitutes a restructure within the meaning of former section 139GCC of the ITAA 1936.

61. Former subsection 139DQ(1) of the ITAA 1936 relevantly provides that where, as a result of a restructure:

- an employee acquires matching shares or rights in a new company to replace shares or rights in an old company that were acquired under an employee share scheme, and
- the conditions specified in former section 139DR of the ITAA 1936 are met.

the matching shares or rights are treated, for the purposes of former Division 13A of the ITAA 1936, as if they are a continuation of the shares or rights the employee held in the old company.

62. The Commissioner accepts that, for the purposes of former Division 13A of the ITAA 1936, when a participant ceased to hold shares or rights in EQT (old company) acquired under the EPSP or the SSSP and instead held shares or rights in EQTHL (new company), the participant is regarded as having acquired matching shares or rights in EQTHL that replace shares or rights in EQT that were acquired under these plans.

63. Former section 139DR of the ITAA 1936 sets out the following conditions that must be met before replacement shares or rights are treated as a continuation of existing shares or rights under former section 139DQ of the ITAA 1936:

- immediately before the restructure the participant held shares or rights in the old company under an employee share scheme
- where the participant has not made an election under section 139E in relation to their shares or rights in the old company, the participant must at or about the time they acquire their replacement shares or rights in the new company be an employee of the group
- the shares or rights in the new company must be ordinary shares, or rights to acquire ordinary shares, in the new company, and
- at the time, the participant acquires their shares or rights in the new company:
 - they do not hold a legal or beneficial interest in more than 5% of the shares in the new company, and
 - they are not in a position to cast, or control the casting of more than 5% of the maximum number of votes that may be cast at a general meeting of the new company.

64. The Commissioner accepts that former subsection 139DQ(1) of the ITAA 1936 applies to the participant's replacement shares in EQTHL as:

- the Restructure is a restructure within the meaning of former section 139GCC of the ITAA 1936
- the participant acquired matching shares or rights in EQTHL that replaced shares or rights in EQT that were acquired under an employee share scheme, and
- the conditions specified in former section 139DR of the ITAA 1936 are met.

Thus, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, the replacement shares or rights in EQTHL are treated as if they are a continuation of the participant's shares or rights in EQT.

65. Therefore, the Restructure does not trigger a cessation time under former Division 13A of the ITAA 1936 and consequently there is no ESS deferred taxing point for the purposes of Subdivision 83A-C for the shares or rights that were acquired before 1 July 2009.

Shares or rights acquired on or after 1 July 2009

66. Under the Restructure, when a participant ceased to hold shares or rights in EQT and instead held shares or rights in EQTHL, the participant is, for the purposes of Division 83A, taken to have disposed of their shares or rights. Under subsection 83A-115(3) for shares or subsection 83A-120(3) for rights, the disposal may give rise to an ESS deferred taxing point triggered by the Restructure.

67. However, there would be no disposal where the participant's replacement shares or rights in EQTHL are, for the purposes of section 83A-130, treated as a continuation of shares or rights in EQT. In such circumstances, the Restructure alone would not trigger an ESS deferred taxing point (provided also that the participant does not cease employment within the meaning of section 83A-330).

Conditions for the continuation of shares or rights

68. Section 83A-130 relevantly provides that where as a result of a restructure (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests
- the replacement ESS interests relate to ordinary shares

- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company at or about the time of the restructure, and
- the employee at the time they acquire the replacement ESS interests:
 - does not hold or is not treated as holding a beneficial interest in more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the shares in the new company, or
 - is not in a position to cast or is not treated as being in a position to cast or control the casting of more than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the maximum number of votes that might be cast at a general meeting of the new company,

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

69. The Commissioner accepts that the conditions specified in section 83A-130 have been met under the Restructure. Accordingly, the participants' replacement shares or rights in EQTHL are, for the purposes of section 83A-130, treated as a continuation of their shares or rights in EQT. Therefore, the disposal of the EQT Awards or shares does not trigger an ESS deferred taxing point for the purposes of Subdivision 83A-C for the shares or rights that were acquired on or before 1 July 2009.

Continuation of employment

70. For participants who continued to be employed by EQTHL or a subsidiary of the EQTHL after the Restructure, their employment is treated as a continuation of the employment in respect of which they acquired their shares or rights in EQT for the purposes of former Division 13A of the ITAA 1936, and/or section 83A-130. Accordingly, they have not ceased their employment within the meaning of the former sections 139CA and 139CB of the ITAA 1936, and/or section 83A-330.

Capital gains tax consequences

71. Any capital gains or capital losses that arise under the Restructure as result of the exchange of shares or rights held under the EPSP, ESAP or SSSP are disregarded as each of the relevant requirements in subsection 130-80(1) are satisfied and subsection 130-80(2) does not apply.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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- ITAA 1936 Pt III Div 13A
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