

CR 2019/80 - AXA Australia Employers - AXA SA 2019 Classic Plan share offer for Australian employees



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Class Ruling

AXA Australia Employers – AXA SA 2019 Classic Plan share offer for Australian employees

❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out tax consequences of the AXA SA 2019 Classic Plan share offer (the Classic Plan) presented by Eureka Funds Management Administration Pty Limited, XL Insurance Company SE (AU) and Catlin Australia Pty Ltd (together, the AXA Australia Employers) to their Australian employees.
2. Relevant details of the Classic Plan are set out in paragraphs 12 to 32 of this Ruling.

Note: By issuing this Ruling, the ATO is not endorsing this plan. Potential participants must form their own view about the plan.

Who this Ruling applies to

3. This Ruling applies to you if you are an Australian resident employed by the AXA Australia Employers who participates in the offer under the arrangement described below.
4. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in relation to the scheme outlined in paragraphs 12 to 32 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

5. This Ruling applies from 1 July 2019 to 30 June 2025.

Ruling

6. When units in AXA Shareplan Direct Global (the Fund) are issued to an Australian resident employee, the units constitute a fringe benefit as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). Fringe benefits are exempt from income tax in the hands of the employee under section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936).

7. Income of the Fund is included in the assessable income of the Australian resident employee based on the number of units they hold in the Fund as a proportion of the total number of units issued by the Fund. The income is derived by the Australian resident employee when it is received by the Fund and dealt with on his or her behalf by reinvestment and the issue of additional units on account of the reinvested income (subsection 6-5(4) or subsection 6-10(3) of the ITAA 1997 applies).

8. If an Australian resident unit holder redeems his or her units, CGT event C2 occurs pursuant to section 104-25 of the ITAA 1997. A capital gain results if the capital proceeds exceed the cost base of the units. A capital loss occurs if the capital proceeds are less than the reduced cost base.

9. The capital proceeds with respect to CGT event C2 will be the cash amount received in consideration for the redemption.

10. For units acquired by subscription, the cost base or reduced cost base of the units redeemed consists of the subscription price paid for the units. For additional units acquired on account of reinvested income, the income so applied forms the cost base (section 110-25 of the ITAA 1997 applies).

11. If an Australian resident unit holder makes a capital gain on redemption of his or her units and the units were acquired 12 months or more prior to CGT event C2 happening, the gain is a discount capital gain pursuant to Division 115 of the ITAA 1997.

Scheme

12. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

13. The AXA SA 2019 Classic Plan share offer for Australian employees (the Classic Plan) is an arrangement under which Australian resident employees, together with other employees of the AXA Australia Employers, could invest in securities concerning a portfolio of AXA SA shares.

14. The Classic Plan was offered to Australian employees in conjunction with the AXA SA 2019 Leveraged Plan Share Offer for Australian employees (the Leveraged Plan). The tax consequences of the Leveraged Plan are provided in Class Ruling CR 2019/81 *AXA Australia Employers – AXA SA 2019 Leveraged Plan share offer for Australian employees*.

15. The Classic Plan involved the use of a collective shareholding savings vehicle, Fonds Commun de Placement D'Entreprise (FCPE), named 'Shareplan AXA Direct Global' through its classic compartment which is the Fund.
16. Under the Classic Plan, participating employees subscribed for units in the FCPE.
17. The Subscription Price for each unit was at a discount of 20% to the Reference Price.
18. The Reference Price was the average of the trading prices of AXA SA shares (VWAP)¹ on the Paris Stock Exchange over the 20 trading days preceding 17 October 2019.
19. The FCPE manager then subscribed for AXA shares on the employees' behalf.
20. The Classic Plan had a reservation period from 27 August 2019 to 10 September 2019 during which employees were invited to submit reservation orders.
21. After the Subscription Price was determined, from 17 October 2019 to 21 October 2019 (Retraction/Subscription Period) employees could revoke their reservation orders or, only if they have not reserved, submit new subscriptions.
22. There was no minimum subscription for the Classic Plan. The maximum amount of an employee's total investment, together with any subscription in the Leveraged Plan (including bank contributions), must not have exceeded 25% of their estimated gross annual remuneration for 2019.
23. The subscription to the Classic Plan was made by a temporary FCPE at the end of November 2019, pursuant to a capital increase reserved to employees of the AXA Group on a worldwide basis. The temporary FCPE was merged into the FCPE's classic compartment following subscription. The shares were held by the FCPE custodian in the name of the Fund.
24. Employees were initially allotted units in the Fund. Each unit holder benefited from a co-ownership right on the assets of the Fund that was proportional to the number of units they held. When a unit of the temporary FCPE was issued, one unit was equivalent to the value of the Subscription Price. From that time the value of a unit will be the Net Asset Value (NAV) as defined under the FCPE Regulations.
25. The NAV of the units will be calculated on each trading day with the exception of legal holidays in France and any day on which the Euronext Paris stock exchange does not close at its regular closing times.
26. Dividends received by the FCPE will be reinvested in AXA SA shares and the unit holders will be credited with additional units on account of their entitlements to the Fund income.
27. Employees will not get access to their FCPE units during a lock up period of approximately five years ending on 3 July 2024 (Lock up Period), subject to certain exceptions for Australian member employees. Those exceptions are death, total and permanent disablement and cessation of employment with the AXA Australia Employers.
28. At the expiration of the Lock up Period (or on early redemption, where relevant), an Australian employee unit holder may continue holding the FCPE units or redeem the FCPE units for cash. The cash amount will be equal to the NAV calculated in accordance with Article 12 of the temporary FCPE Regulations or Article 15 of the FCPE Regulations, as relevant.

¹ The 'volume-weighted average prices' is the arithmetical average of the average prices of the AXA SA shares exchanged in one trading day, weighted by the number of AXA SA shares exchanged for each price on Euronext Paris (excluding the opening and closing prices).

29. The investment in the Classic Plan is not subject to any form of guarantee. If the AXA SA share price has fallen below the Subscription Price when the units are redeemed, the full investment will not be recovered.

30. If the share price rises or remains stable compared with the Reference Price, the unit holder will receive the Euro value of the initial investment, the benefit of the initial 20% discount to the Reference Price, the benefit of any price increase above the Reference Price and the benefit resulting from the reinvestment of dividends in to the Fund.

31. Subscription to the Classic Plan is separate from the employee's employment contract and is in no way a part of it. The decision to participate in the Classic Plan shall not have any favourable or unfavourable effect on the employee's employment with the AXA Australia Employers. Subscription to the Classic Plan does not increase the expected payments from the redemption of units acquired through the plan. The redemption payments will not reflect or are not related to the employee's performance and/or their contribution to the profit of the AXA Australia Employers or their associates.

32. The employment contracts or agreements of eligible employees do not guarantee or provide any other undertakings about the value of the redemption payments from the Classic Plan regardless of the value of the FCPE units or the underlying AXA shares.

Appendix – Explanation

ⓘ *This Explanation 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.*

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Provision of units is a fringe benefit

33. A fringe benefit is defined in subsection 136(1) of the FBTAA as a benefit that is provided by an employer or associate of the employer, to an employee or an associate of the employee, in respect of the employment of the employee. The provision of the units in the Fund as outlined in paragraphs 12 to 32 of this Ruling is a 'benefit' as defined in relation to the employee's employment by the AXA Australia Employers.

34. The fringe benefit is classified as an external property fringe benefit, the taxable value of which falls for determination under section 43 of the FBTAA.

35. In accordance with section 23L of the ITAA 1936, Australian resident employees acquiring units in the Fund are exempt from tax on the benefit obtained.

Benefit is not exempted

36. Subsection 136(1) of the FBTAA details a number of exceptions to what would otherwise constitute the provision of a fringe benefit. The most relevant exceptions in this situation are contained in paragraphs (f), (h) and (ha) of the definition of 'fringe benefit' in the FBTAA.

Not exempted by paragraph (f)

37. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (f) of the definition of 'fringe benefit' in the FBTAA as it is not a payment of salary or wages or a payment that would be salary or wages if salary or wages included exempt income for the purposes of the ITAA 1936. Subscription to the Classic Plan is separate from the employee's employment contract and is in no way a part of it.

Not exempted by paragraph (h)

38. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (h) of the definition of 'fringe benefit' in the FBTAA as it is not a benefit constituted by the acquisition by a person of an employee share scheme (ESS) interest under an employee share scheme (within the meaning of the ITAA 1997) to which Subdivision 83A-B or 83A-C of the FBTAA applies.

39. Under subsection 83A-10(1) of the ITAA 1997, an ESS interest in a company is either a beneficial interest in a share in the company, or a right to acquire a beneficial

interest in a share in the company. In this regard the unit holder's interest under the Fund regulations (a chose in action) is not identical with the inherent or underlying interests that the unit holder may have in shares that are part of the net assets.

40. The FCPE is a contractual arrangement formed with the intention of creating a situation of common ownership of an investment portfolio.

41. The unit holder's interest under the Fund's regulations is, in essence, a fractional interest in net assets with rights to a share of reinvested income. This interest (a chose in action) is not identical with the inherent or underlying interest that the unit holder may have in shares that are part of the net assets. It is considered that, even if under French law the unit holders may be regarded as co-owners, the interest in shares cannot be severed and dealt with separately for the purpose of the application of the Australian taxation law.

42. The FCPE concept, being a collective investment vehicle that is neither a separate legal entity nor a trust according to French law, is analogous in some respects to a partnership, although it is not actually a partnership.

43. The unit holder's interest is comparable to the interest of a partner in a partnership. In this regard, the dicta of the majority in *Taxation, Commissioner of (Cth) v Everett* [1980] HCA 6 lends support to the view expressed in paragraph 41 of this Ruling:

...the partner's fractional interest [in the partnership] is an entire chose in action; it is capable of division by assignment into further fractions, but it is not capable of division by assignment so that the right to participate in partnership profits which is inherent to the interest is hived off from the rest of that interest. Consequently, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.

44. Accordingly, the property right that a unit holder may have in particular assets, for example shares, cannot be substituted for the entire chose. In other words, the relevant interest is that arising from the provision of the units, not a benefit associated with any inherent or underlying property.

45. An FCPE is not a trust for the purpose of section 83A-320 of the ITAA 1997 which ensures employees with a beneficial interest in an employee share trust are taxed as though they are the legal owners of those shares. As stated in paragraphs 42 and 43 of this Ruling, an FCPE is not a trust according to French law and the unit holder's interest is comparable to the interest of a partner in a partnership. Paragraph 1.279 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 indicates FCPE units are beyond the scope of section 83A-320, stating:

These rules apply to both Australian trusts and to foreign entities that are treated in a consistent manner to Australian trusts. Entities that have similar characteristics to employee share scheme trusts but are treated in a manner more consistent with a different Australian entity are not covered by these rules.

46. The FCPE unit is also not an indeterminate right for ESS purposes as defined by section 83A-340 of the ITAA 1997 as the FCPE unit is redeemable for cash only and will never convert into an ESS interest.

Not exempted by paragraph (ha)

47. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) of the definition of 'fringe benefit' in the FBTAA as it is not a benefit constituted by the acquisition of money or property by an employee share trust (within the meaning of the ITAA 1997). The FCPE is not an employee share trust as defined by subsection 130-85(4) of the ITAA 1997 as it does not provide any ESS interests to employees.

48. As the benefit is provided to the employee in respect of their employment it is a fringe benefit.

Income received by custodian is assessable income

49. Income (principally dividends) received on assets held in the Fund is income in the hands of the unit holder if there is an entitlement to the income under the terms of the investment.

50. The dividends are paid to the FCPE custodian who receives them in that capacity. The unit holder's entitlement to income under the Fund regulations is not a claim for immediate payment of the dividends received by the custodian but a right to have that money reinvested in the Fund on their behalf, in consideration for the allocation of additional units.

51. A unit holder's entitlement incorporating an unconditional right to have income reinvested in the Fund on the unit holder's behalf is an entitlement to the income as it is received notwithstanding that it cannot be enjoyed as an immediate cash distribution. In accordance with subsections 6-5(4) and 6-10(3) of the ITAA 1997 income is derived by the unit holder when it is received and dealt with on the unit holder's behalf.

Capital gains tax

52. The general capital gains tax rules under Parts 3-1 to 3-3 of the ITAA 1997 apply to CGT events in relation to the interests in net assets of the Fund represented by units and shares acquired via redemption of units. The units are not units in a unit trust and Taxation Determination TD 2000/32 *Income tax: capital gains: for capital gains purposes is the unit held by a unit holder in a unit trust the relevant CGT asset?* does not apply.

53. Section 104-25 of the ITAA 1997 provides that CGT event C2 happens if ownership of an intangible CGT asset ends by it being redeemed or cancelled. Accordingly, when an Australian resident unit holder redeems his or her units there will be a CGT event.

54. The capital proceeds with respect to CGT event C2 will be the cash amount received in consideration for the redemption.

55. Under Division 110 of the ITAA 1997, the cost base or reduced cost base of the units acquired by subscription includes the Subscription Price paid by the employee. The cost base or reduced cost base of units obtained on account of reinvested income is the amount of the reinvested income.

56. For the purposes of Division 115 of the ITAA 1997 (discount capital gains) the time of acquisition of units will be the date that the units were subscribed for by the unit holder or in the case of reinvested income when the units are issued.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2019/81; TD 2000/32

Legislative references:

- ITAA 1936 23L
- ITAA 1997 Pt 3-1
- ITAA 1997 Pt 3-3
- ITAA 1997 6-5(4)
- ITAA 1997 6-10(3)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-320
- ITAA 1997 83A-340
- ITAA 1997 104-25
- ITAA 1997 Div 110

- ITAA 1997 110-25
- ITAA 1997 Div 115
- ITAA 1997 130-85(4)
- ITAA 1997 Div 230
- FBTA 43
- FBTA 136(1)
- TAA 1953

Case references:

- Taxation, Commissioner of (Cth) v Everett [1980] HCA 6; 143 CLR 440; 80 ATC 4076; 10 ATR 608

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No.2) Bill 2009

ATO references

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