CR 2020/75 - Qantas Airways Limited - 2019/20 Qantas short term incentive plan

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Class Ruling

Qantas Airways Limited – 2019/20 Qantas short term incentive plan

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.

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling sets out the income tax consequences for employees of Qantas Airways Limited (Qantas) and its subsidiaries (collectively, the Qantas Group) who are granted a right to be allocated a Qantas share under the 2019/20 Qantas Short Term Incentive Plan (the Plan).

2. Full details of this employee share scheme (ESS) are set out in paragraphs 20 to 39 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.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an employee of the Qantas Group who:

- is granted a right to be allocated a Qantas share under the Plan (STIP Right), and
- is a resident of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936*.

When this Ruling applies

5. This Ruling applies from 1 July 2019 to 30 June 2023.

Ruling

6. The STIP Right granted to you under the Plan will be an indeterminate right (section 83A-340).

7. Once the vesting conditions are met and the STIP Right is settled with a Qantas share, the STIP Right will be treated as a right to acquire a beneficial interest in a share (that is, it will be treated as an ESS interest under an ESS for the purposes of section 83A-10) from the time the STIP Right was granted to you (subsection 83A-340(2)).

8. Division 83A will not apply if a STIP Right granted to you is settled with cash.

9. Subdivision 83A-C will apply to the STIP Right granted to you.

10. Where your STIP Right vests and it is settled with a Qantas share, the ESS deferred taxing point will (subject to the 30-day period in subsection 83A-120(3)) be the earliest of:

- the time when you cease employment (subsection 83A-120(5)), and
- the end of two years from when the Qantas share is allocated (Deferral Period) and an additional one-year period (Holding Lock Period) (collectively, the Trading Restriction Period) (subsection 83A-120(7)).

11. Your assessable income for the income year in which the ESS deferred taxing point occurs (as determined in section 83A-120) includes the market value of the Qantas share acquired upon vesting of the STIP Right at the ESS deferred taxing point reduced by the cost base of the STIP Right (subsection 83A-110(1)).

12. However, no amount will be included in your assessable income from forfeiting a STIP Right, or a Qantas share acquired upon vesting of a STIP Right, where the forfeiture occurs before the deferred taxing point (subsection 83A-110(1)).

13. Division 83A will not apply, and you will not include an amount in your assessable income, where the forfeiture occurs on or after the deferred ESS taxing point but before the end of the Trading Restriction Period, and the forfeiture is not the result of your choice (other than a choice to cease employment) (section 83A-310).

14. You will not make a capital gain or a capital loss from forfeiting a STIP Right or Qantas share (section 104-25 and section 130-80).

15. Where the ESS deferred taxing point occurs, you are deemed to have acquired the Qantas share immediately after the ESS deferred taxing point for its market value (section 83A-125).

16. For capital gains tax (CGT) purposes, the first element of the cost base and reduced cost base of the Qantas share is its market value immediately after the ESS deferred taxing point (section 112-15, subsection 110-25(2) and subsection 110-55(2)).

17. If you dispose of your Qantas share acquired upon vesting of the STIP Right on or before the ESS deferred taxing point (including where the ESS deferred taxing point is extended under the 30-day rule in subsection 83A-120(3)), any capital gain or capital loss is disregarded (subsection 130-80(1)).

18. Where you dispose of a Qantas share after the ESS deferred taxing point, the disposal will constitute a CGT A1 event (section 104-10) and a capital gain will be made if the capital proceeds from the disposal are more than the share's cost base. A capital loss is made if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)).

19. If you make a capital gain from CGT event A1 happening to your Qantas share you may be entitled to treat the gain as a discount capital gain in respect of the share if it has been held for at least 12 months from the date the ESS deferred taxing point occurred, provided the other requirements of Subdivision 115-A are satisfied (section 115-25 and section 83A-125).

Scheme

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

The Plan

21. The Plan provides a means for the delivery of equity ownership to Qantas Group employees. The objectives of the Plan are to, among other things, align the interests of employees who participate in the Plan with shareholders and provide incentives to retain those employees.

The Plan terms and invitation letter

22. Qantas sends out letters to eligible employees of the Qantas Group outlining the following information:

- the value of STIP Rights being offered
- details of any performance measures that Qantas and you will need to achieve (Performance Measures) during the income year (Performance Period)
- the time at which a STIP Right may vest
- the circumstances in which the STIP Right may lapse
- details of any disposal restrictions which attach to a Qantas share acquired after vesting, and
- any other relevant terms and conditions attaching to the STIP Right or any Qantas shares acquired upon vesting.

23. The STIP Right is subject to satisfaction of the vesting conditions (which are Performance Measures to be met by Qantas and you) during the Performance Period.

24. No consideration is payable by you upon the grant or vesting of the right.

25. When your right vests, one-third of the total rights will be delivered as Qantas shares and two-thirds will be delivered as a cash payment. However, this is subject to an overriding discretion of the Board to vary the form of the vested right. With regard to the STIP Right, it is subject to a restriction of sale or transfer for three years (Trading Restriction Period) comprising of two years from when the Qantas share is allocated (Deferral Period) and an additional one-year period (Holding Lock Period).

26. If the Board determines to pay cash upon the vesting of a right, you will be paid the net amount of any applicable taxes and other withholdings. This amount will be paid by a member of the Qantas Group, not by the Trustee of the Qantas Employee Share Plan Trust (the Trust).

27. To the extent the Performance Measures have been achieved, a STIP Right will generally vest, provided you remain employed by the Qantas Group at the date of vesting and do not commit an act of misconduct in relation to the Qantas Group.

28. Qantas shares allocated to you will be held on your behalf by the Trust until the end of the Trading Restriction Period. Subject to the Board's overriding discretion to vary the Trading Restriction Period, for the STIP Right that is delivered as a Qantas share, the Trading Restriction Period is intended to end at the earlier of the date you cease employment with the Qantas Group, or the day after the Holding Lock Period ends.

29. Qantas shares are acquired on market or issued to the Trust prior to the allocation of the shares to you upon the vesting of the STIP Right.

30. Unless the Board otherwise determines, a STIP Right that does not vest will lapse if:

- you resign in circumstances not approved by the Board
- your employment is terminated for cause, or
- your employment is terminated in other circumstances determined by the Board to involve unacceptable performance or conduct.

31. Where you are employed for at least six months of a Performance Period, and cease employment with the Qantas Group by reason of death, disability or other reason with approval of the Board, you may be entitled to a pro-rated amount of the STIP Right based on the proportion of the Performance Period that has elapsed at the time of cessation and based on actual performance against the Performance Measures.

32. Where, in the opinion of the Board, you act fraudulently or dishonestly, or are in breach of your obligations to the Group, the Board may:

- deem all or any of your STIP Rights to have lapsed
- deem all or any shares held by you following the vesting of the STIP Right to be forfeited, and/or
- impose additional vesting conditions for all or any STIP Rights, or shares acquired from vesting of the STIP Rights, or for the release of any trading restriction.

33. In any case, any STIP Rights for which the vesting conditions are not met for the Performance Period will lapse.

34. At the end of the Holding Lock Period, you may deal with your shares (subject to applicable laws and the Qantas employee share trading policy contained in the Qantas Code of Conduct and Ethics).

35. Any Qantas shares which are subject to the Trading Restriction Period will be forfeited if you resign in circumstances not approved by the Board (except during the Holding Lock Period), your employment is terminated for cause, or terminated in other circumstances determined by the Board as involving unacceptable performance or conduct.

36. When a Qantas share is forfeited, all your rights and interests in respect of that Qantas share immediately cease.

37. In the event of a takeover or change of control, and unless the Board determines otherwise, Qantas shares will be released from restriction within a specified time following the relevant event.

38. Immediately after the acquisition of the STIP Right under the Plan, no participant in the Plan will hold more than 10% of the shares in Qantas or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of Qantas.

39. The predominant business of Qantas is not the acquisition, sale or holding of shares, securities or other investments, whether directly or indirectly through one or more companies, partnerships or trusts.

Commissioner of Taxation
16 December 2020

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.

Table of Contents **Paragraph**

Where a short-term incentive plan right is settled with a share

40. 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, (including past or prospective employees) of:
>
> (a) the company; or
>
> (b) subsidiaries of the company;
>
> in relation to the employees' employment.

Indeterminate right

41. An indeterminate right is a beneficial interest in a right that may later become a right to acquire a beneficial interest in a share (subsection 83A-340(1)).

42. A person will acquire an indeterminate right when they can enforce it against their employer under the terms of contract rights that will later become a beneficial interest in a share (Taxation Determination TD 2016/17 *Income tax: in what circumstances does a contractual right, which is subject to the satisfaction of a condition, become a right to acquire a beneficial interest in a share for the purposes of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*).

43. When a STIP Right is granted, it is a beneficial interest in a right, but not a right to acquire a beneficial interest in a share.

44. When a STIP Right vests and the Board determines not to cash settle the STIP Right, the STIP Right becomes a right to acquire a beneficial interest in a share in Qantas. Therefore, the STIP Right is an indeterminate right under subsection 83A-340(1).

45. Subsection 83A-340(2) provides that where an employee acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

46. Division 83A will apply so that the STIP Right is taken to have always been a right to acquire a beneficial interest in a share from the time the STIP Right is granted to you.

Employee share scheme interest

47. An ESS interest in a company is a beneficial interest in a share in the company or a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

48. A STIP Right that vests and is settled with a Qantas share is a right to acquire beneficial interest in an ordinary share in Qantas and is an ESS interest (subsection 83A-10(1)). The Plan is an ESS as the Plan provides ESS interests to employees of the Qantas Group who may participate in the Plan (subsection 83A-10(2)).

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

50. As the STIP Right is granted to you for nil consideration under the Plan, you acquired the STIP Right at a discount pursuant to subsection 83A-20(1). Subdivision 83A-B will apply to the STIP Right acquired by you under the Plan, unless Subdivision 83A-C applies.

Assessability of a short-term incentive plan right under Subdivision 83A-C

51. Subdivision 83A-C allows the discount in relation to the ESS interest to be included in assessable income at a later time if the following conditions are satisfied:

- Subdivision 83A-B would, apart from section 83A-105, apply to the interest
- paragraph 83A-105(1)(aa) results in a participant continuing to receive a discount in relation to the interest
- subsections 83A-45(1), (2), (3) and (6) apply to the interest, and
- there is a real risk that the 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).

52. In relation to the first condition listed at paragraph 51 or this Ruling, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the STIP Right because it is:

- a beneficial interest in a right to acquire beneficial interest in an ordinary share of Qantas, and
- provided to you as an employee of the Qantas Group in relation to your employment and will be provided for nil consideration (that is, at a discount).

53. In relation to the second condition listed at paragraph 51 of this Ruling, paragraph 83A-105(1)(aa) requires that after applying section 83A-315 (which refers to the regulations for calculating the market value of an ESS interest where it is an unlisted right), there is still a discount given in relation to the interest.

54. Regulation 83A-315.03 of the *Income Tax Assessment Regulations 1997* states:

> If the lowest amount that must be paid to exercise a right to acquire a beneficial interest in a share is nil or can not be determined, the value of the right on a particular day is the same as the market value of the share on that day.

As the STIP Right is provided for nil consideration, that is a discount to the market value of an ordinary share in Qantas. As such, you will receive a discount in relation to the STIP Right.

55. In relation to the third condition listed at paragraph 51 of this Ruling, subsections 83A-45(1), (2), (3) and (6) apply to the STIP Right granted because:

- when the STIP Right is acquired, you were employed by a company in the Qantas Group (subsection 83A-45(1))
- all of the ESS interests available for acquisition under the Plan relate to ordinary shares of Qantas (subsection 83A-45(2))
- the predominant business of the Qantas Group is not the acquisition, sale or holding of shares, securities or other investments (subsection 83A-45(3)), and
- immediately after the acquisition of the STIP Right, you will not hold a beneficial interest in more than 10% of the shares in Qantas nor be in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of Qantas (subsection 83A-45(6)).

56. In relation to the fourth condition listed at paragraph 51 of this Ruling, Subdivision 83A-C applies if, under the conditions of the Plan when the STIP Right is granted, there is a real risk that you will forfeit or lose the STIP Right (other than by disposing of it, exercising the right or letting it lapse).

57. Real risk of forfeiture in a scheme may include conditions where retention of an ESS interest is subject to performance hurdles or a minimum term of employment. In cases where an ESS has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test.

58. As you can lose some (or all) of the STIP Rights (or Qantas shares held on your behalf) during the one-year vesting period if you breach the STIP terms and conditions, it is accepted that the real risk of forfeiture test is met.

59. As a result, Subdivision 83A-C applies to the STIP Right, and Subdivision 83A-B does not apply. The taxation of the STIP Right received under the Plan will be deferred until an ESS deferred taxing point occurs.

Employee share scheme deferred taxing point

60. Section 83A-120 provides the rules for determining when the ESS deferred taxing point occurs for a right to acquire a share. This will be the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts immediate disposal of the right (subsection 83A-120(4))
- when you cease employment (within the meaning of section 83A-330) in respect of which you acquired the right (subsection 83A-120(5))
- 15 years after you acquired the right (subsection 83A-120(6), and
- after the right is exercised, when there is no real risk of forfeiting or losing the share, and the scheme no longer genuinely restricts disposal of the share (subsection 83A-120(7)).

61. However, if you dispose of the vested right or the share within 30 days of the earliest time outlined in paragraph 60 of this Ruling, the ESS deferred taxing point will instead be the time of disposal (paragraph 83A-120(3)(b)).

62. For the purposes of Division 83A, the concept of 'exercising a right' is not considered to necessarily require an action or activity by the beneficial owner of the right. It is enough that they become the beneficial owner of the share that is the subject of the STIP Right, (this can happen automatically or at the instigation of the participant, the employer or another party). Therefore, you are taken to have exercised the STIP Right when a Qantas share is allocated upon vesting of the STIP Right.

63. Under the Plan, where your STIP Right vests, the ESS deferred taxing point will (subject to the 30-day rule) be the earliest of:

- the time when you cease employment (subsection 83A-120(5)), and
- the end of the Holding Lock Period (subsection 83A-120(7)).

64. However, if you dispose of the Qantas share acquired from vesting of the STIP Right within 30 days of the earliest time outlined in paragraph 60 of this Ruling, the ESS deferred taxing point will be the date of disposal (subsection 83A-120(3)).

Amount to be included in assessable income

65. In accordance with section 83A-110, the amount to be included as assessable income at the ESS deferred taxing point will be the market value of the ESS interest reduced by the cost base of that interest.

66. Where the ESS interest is a right, the market value of the STIP Right at the ESS deferred taxing point is the market value of the Qantas share acquired (regulation 83A-315.03 of the *Income Tax Assessment Regulations 1997*).

67. Therefore, the amount included in your assessable income at the ESS deferred taxing point is the market value of the Qantas share acquired upon vesting of a STIP Right at the ESS deferred taxing point, less the cost base of the STIP Right. As the STIP Right is granted for nil consideration and no amount is paid to exercise the STIP Right, the first element of the cost base of the STIP Right is nil (subsection 83A-110(1) and subsection 110-25(2)).

Forfeiture

68. No amount will be included in your assessable income if your STIP Right, or a Qantas share acquired upon vesting of a STIP Right, is forfeited before the deferred taxing point would have occurred (subsection 83A-110(1)).

69. Section 83A-310 provides that an amount is not included in assessable income in relation to an ESS interest if:

- either
  - the individual forfeits the interest, or
  - in the case of an ESS interest that is a beneficial interest in a right – the individual forfeits or loses the interest (without having disposed of the interest or exercised the right), and
- the forfeiture or loss is not the result of
  - a choice made by the individual (other than a choice by that individual to cease particular employment), or
  - a condition of a scheme that has the direct effect of protecting (wholly or partly) the individual against a fall in the market value of the interest.

70. Where in relation to a STIP Right or Qantas share acquired upon vesting of a STIP Right under the Plan:

- disregarding section 83A-310, an amount is included in your assessable income under Subdivision 83A-C
- you forfeit or lose the STIP Right (without having disposed of it), and
- the forfeiture or loss is not the result of a choice by you, other than a choice to cease employment,

then an amount is not included in your assessable income as Division 83A is taken never to have applied (section 83A-310).

Capital gains tax consequences of forfeiture

71. Where a STIP Right or Qantas share is forfeited, CGT event C2 happens in accordance with subsection 104-25(1).

72. Where CGT event C2 happens, you make a capital gain if the capital proceeds 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)). Where CGT event C2 happens because a STIP Right or Qantas share is forfeited on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss (subsection 130-80(2)).

73. As you pay no consideration for the STIP Right or Qantas share, the cost base and reduced cost base will remain nil as the market value substitution rule in section 112-20 does not apply to the STIP Right or Qantas share forfeited or lost (subsection 130-80(4)).

74. As you receive no capital proceeds from the forfeiture of a STIP Right or a Qantas share, the capital proceeds will remain nil as the market value substitution rule in section 116-30 also does not apply (subsection 130-80(4)).

75. Therefore, you will not make a capital gain or a capital loss from forfeiting a STIP Right or Qantas share.

Capital gains tax consequences after employee share scheme deferred taxing point

Time of acquisition

76. Where you dispose of your Qantas share acquired by you pursuant to a STIP Right after the ESS deferred taxing point, for CGT purposes you are deemed to have acquired that share immediately after the ESS deferred taxing point for its market value (section 83A-125). This resets the acquisition time of the share and its cost base to the market value immediately after the ESS deferred taxing point.

First element of the cost base of a share

77. The first element of the cost base and reduced cost base of a Qantas share acquired by you pursuant to a STIP Right is the market value of the share immediately after the ESS deferred taxing point of the STIP Right (section 83A-125, section 112-15, subsection 110-25(2) and subsection 110-55(2)).

Disposal within 30 days

78. Where you dispose of the Qantas share acquired by you pursuant to a STIP Right within 30 days after what would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal (paragraph 83A-120(3)(b)). The amount included in your assessable income will be the market value of the Qantas share at the time of disposal (section 83A-110).

79. Notwithstanding CGT event A1 happens as a result of the disposal (section 104-10), any capital gain or capital loss made from that disposal is disregarded (subsection 130-80(1)).

Disposal after 30 days

80. CGT event A1 happens when you dispose of a Qantas share (subsection 104-10(1)). A capital gain is made if the capital proceeds from the disposal are more than the share's cost base. A capital loss is made if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)).

Discount capital gain

81. If you make a capital gain from the disposal of a Qantas share you may be entitled to treat the gain as a discount capital gain in respect of the share that has been held for at least 12 months from the date the ESS deferred taxing point occurred, provided the other requirements of Subdivision 115-A are satisfied (section 115-25).

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10, TD 2016/17

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-B
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-45(1)
- ITAA 1997 83A-45(2)
- ITAA 1997 83A-45(3)
- ITAA 1997 83A-45(6)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(1)(aa)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(3)(b)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-125
- ITAA 1997 83A-310
- ITAA 1997 83A-330
- ITAA 1997 83A-340
- ITAA 1997 83A-340(1)
- ITAA 1997 83A-340(2)
- ITAA 1997 104-10
  ITAA 1997 104-10(1)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 112-15
- ITAA 1997 112-20
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 116-30
- ITAA 1997 130-80
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(2)
- ITAA 1997 130-80(4)
- Income Tax Assessment Regulations 1997 83A-315.03

ATO references

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