



# ***TD 2021/D5 - Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme?***

 This cover sheet is provided for information only. It does not form part of *TD 2021/D5 - Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme?*

This document has been finalised.

 There is a Compendium for this document: **[TD 2022/4EC](#)** .



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Status: **draft only – for comment**

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## Draft Taxation Determination

# Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme?

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### **❶ Relying on this draft Determination**

This publication is a draft for public comment. It represents the Commissioner’s preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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### What this draft Determination is about

1. Division 83A of the *Income Tax Assessment Act 1997*<sup>1</sup> applies when certain benefits (ESS interests<sup>2</sup>) are provided to employees<sup>3</sup> (you) at a discount to their market value under an employee share scheme<sup>4</sup> (ESS). Generally, you include the discount in your assessable income in the income year that you acquire shares or rights to shares. However, where certain conditions are met<sup>5</sup>, the amount included in your assessable income is deferred to a later point in time (the ESS deferred taxing point).
2. Your ESS deferred taxing point for ESS interests that are shares<sup>6</sup> or rights to acquire shares<sup>7</sup> occurs at the earliest of the times set out in subsections 83A-115(4) to (6) for shares, or subsections 83A-120(4) to (7) for rights.<sup>8</sup> One ESS deferred taxing point occurs if, at the time you acquired your ESS interest, the scheme 'genuinely restricted you immediately disposing of the interest'. In those circumstances, the ESS deferred taxing point arises when you are no longer so restricted. You therefore need to establish whether you were 'genuinely restricted' by the scheme and the time when the scheme no longer restricted you. This is also referred to as the restrictions being 'lifted'.
3. This draft Determination<sup>9</sup> sets out the principles for working out when a scheme's disposal restrictions were 'genuine disposal restrictions' and, if they were, when you are no longer genuinely restricted by the scheme for the purposes of determining the ESS deferred taxing point.<sup>10</sup> This Determination does not consider the 'real risk of forfeiture' test, which is another condition in subsections 83A-115(4) and 83A-120(4) and (7).

## Ruling

### What disposal restrictions are relevant?

4. You must establish what disposal restrictions existed within the scheme at the time you acquired your ESS interest. You only need to consider whether these disposal restrictions were a genuine disposal restriction and, if they were, the time they no longer restricted you.
5. Disposal restrictions that were added or imposed by the exercise of a discretion after you acquired your ESS interest are not relevant to determining when your ESS deferred taxing point occurs. Restrictions imposed by the exercise of a discretion are only

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<sup>1</sup> All legislative references in this draft Determination are to the *Income Tax Assessment Act 1997* unless otherwise stated.

<sup>2</sup> As defined in subsection 83A-10(1).

<sup>3</sup> For the purposes of this draft Determination, an 'employee' has its common-law meaning as extended by section 83A-325. It includes a director of an incorporated company, an independent contractor, and may include a past employee who is still a participant of the ESS.

<sup>4</sup> As defined in subsection 83A-10(2).

<sup>5</sup> Outlined in section 83A-105.

<sup>6</sup> Section 83A-115 applies if the ESS interest is a beneficial interest in a share.

<sup>7</sup> Section 83A-120 applies if the ESS interest is a beneficial interest in a right to acquire a beneficial interest in a share.

<sup>8</sup> If you dispose of your ESS interest (or the share acquired on exercise of the right) within 30 days after the deferred taxing point, your ESS deferred taxing point will instead be the date of that disposal (this is called the 30-day rule), as per subsections 83A-115(3) (for shares) and 83A-120(3) (for rights).

<sup>9</sup> All further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Ruling will not take effect until finalised.

<sup>10</sup> The relevant provisions referring to the scheme genuinely restricting you immediately disposing of the relevant ESS interest are paragraphs 83A-115(4)(b) (for shares) and 83A-120(4)(c) and 83A-120(7)(d) (for rights). To the extent necessary, this Determination also applies to paragraph 83A-105(6)(b). This Determination does not apply to subsection 83A-45(4).

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relevant if that discretion was exercised in a way that meant you were genuinely restricted from immediately disposing of your ESS interest at the time you acquired it.

### **When is a disposal restriction a genuine disposal restriction?**

6. Whether a restriction on disposal of an ESS interest constitutes a genuine disposal restriction requires consideration of both the form and the substance of the restriction.

7. The terms ‘genuinely’, ‘immediately’ and ‘disposing’ are undefined and take their ordinary meaning, having regard to their statutory context.

#### ***The meaning of ‘genuinely’***

8. Relevantly, the ordinary meaning of ‘genuine’ is ‘... being truly such; real; authentic: *genuine regret; genuine worth*. ... properly so called ...’.<sup>11</sup>

9. The Courts have considered something to be genuine when it is ‘... put forward in good faith [and] more than a mere assertion’<sup>12</sup>, ‘... bona fide ... and not spurious, hypothetical, illusory or misconceived’<sup>13</sup>, and with ‘... an existence that is objectively demonstrable independently of the exigencies [which] evoked it’.<sup>14</sup>

10. To be genuine, a scheme’s disposal restrictions must be sufficiently identifiable (real and objectively demonstrable), certain and legally enforceable (not spurious or hypothetical). There must be serious and enforced consequences when a breach of a scheme’s disposal restriction occurs.<sup>15</sup> Conversely, a disposal restriction is not genuine if it is open to manipulation such that it does not in a real, practical sense limit the disposal.

11. A requirement to make an application to your employer or a company discretion to allow trade do not necessarily constitute genuine disposal restrictions. This is because you control whether and when to apply for approval to dispose of your ESS interest (see Examples 1 and 3 of this Determination).

12. A broad discretion conferred on a company board will often allow unfettered lifting of restrictions based on a variety of subjective considerations. Where a board routinely approves requests to trade, this discretionary power is not a genuine disposal restriction. On the other hand, if there are clear, fixed and objectively measured criteria to be applied by the board the restriction may be a genuine disposal restriction (see Examples 2 and 4 of this Determination).

13. A disposal restriction will still be considered a genuine disposal restriction if it is able to be lifted in exceptional and extraordinary circumstances, for example, severe financial hardship.<sup>16</sup>

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<sup>11</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 18 May 2021.

<sup>12</sup> *John Shearer Ltd & Anor v Gehl Company* [1995] FCA 1034.

<sup>13</sup> *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681.

<sup>14</sup> *JJMMR P/L v LG International Corporation* [2003] QCA 519 at [18].

<sup>15</sup> Paragraph 1.193 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the EM).

<sup>16</sup> Paragraph 1.194 of the EM.

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### ***The meaning of ‘immediately’***

14. The ordinary meaning of ‘immediately’ includes ‘without lapse of time, or without delay ...’.<sup>17</sup>

15. A scheme’s genuine disposal restrictions must prevent you from presently disposing of your ESS interest, rather than imposing a restriction at a future time. In this statutory context, a requirement to take certain process steps (for example, complete an application form) before disposing of the interest is not regarded as a restriction on you disposing of the interest immediately.

### ***The meaning of ‘disposing’***

16. A scheme’s genuine disposal restrictions must prevent or prohibit you from disposing of your interest. Whether you are able to take action that constitutes you ‘disposing of’ your ESS interest is a question of fact.

17. The meaning of ‘disposing of’ is not defined in the context of Division 83A.<sup>18</sup>

18. Courts have confirmed the phrase ‘disposed of’ in other income tax provisions ‘are not words possessing a technical legal meaning, although they are frequently used in legal instruments. Speaking generally, they cover all forms of alienation’<sup>19</sup>, including ‘compulsory acquisition of property’.<sup>20</sup>

19. In ordinary usage, the terms ‘dispose’ and ‘disposal’ are relevantly defined as:

#### **Dispose<sup>21</sup>**

*verb (... disposing)...*

–phrase **5. dispose of,**

**a.** to deal with definitely: to dispose of the matter.

**b.** to get rid of; dump ...

...

**d.** to make over or part with (property), as by gift or sale.

#### **Disposal<sup>22</sup>**

*noun* **1.** the act of disposing, or of disposing of, something; arrangement.

**2.** a disposing of as by gift or sale; bestowal or assignment.

**3.** power or right to dispose of a thing; control: *left to his disposal...*

20. Therefore, to be a genuine disposal restriction, the scheme’s restriction must control or limit your power or right to (voluntarily or compulsorily) sell, transfer, assign, deal with, make over or part with your ESS interest (whether legally or beneficially).

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<sup>17</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 18 May 2021.

<sup>18</sup> The definition of ‘dispose of’ in subsection 995-1(1) applies to the disposal of a CGT asset (in its capacity as a CGT asset). When dealing with disposal restrictions relating to an ESS interest, we are dealing with an interest that is an ESS interest and not in its capacity as a CGT asset. Therefore, the definition of ‘dispose of’ in subsection 995-1(1) (and in turn, section 104-10) does not apply to Division 83A and ESS Interests.

<sup>19</sup> *Commissioner of Taxation (Cth) v Wade* [1951] HCA 66.

<sup>20</sup> *Henty House Pty Ltd (In Vol Liq) v Commissioner of Taxation (Cth)* [1953] HCA 54.

<sup>21</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 18 May 2021.

<sup>22</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 18 May 2021.

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21. For example, if you are able to participate in a share buy-back, or to gift or transfer your ESS interest to your spouse or family trust, you are not genuinely restricted from immediately disposing of your ESS interest. Similarly, if you have already done this, you were not genuinely restricted from immediately disposing of your ESS interest at that point in time.

### **How do I show I am genuinely restricted from disposing of my ESS interest?**

22. The scheme's genuine disposal restrictions, as they applied at the time you acquired your ESS interest, may be contained in documents that you are required to comply with to participate in the scheme, such as:

- the scheme rules
- the offer document
- other governing documents of the scheme
- documented company policies, or
- your employment contract.

23. Australian Securities Exchange (ASX) Listing Rules and the *Corporations Act 2001* may also contain restrictions which prevent you from disposing of your ESS interest in certain circumstances.

24. It is also relevant to consider what action you have actually taken (or could take) in relation to your ESS interest where there are inconsistencies between the documents that show your ESS interest is restricted or you must satisfy certain conditions.<sup>23</sup>

25. The scheme's genuine disposal restrictions may prevent you from disposing of your ESS interest when you possess price-sensitive information. Such a restriction will usually exist together with a company's other documented rules (for example, an internal share trading policy) which prevent or restrict the company's employees from disposing of their interests in the company. To be a genuine disposal restriction, you must:

- have, or be able to obtain, objective evidence that reasonably shows how the information you held prevented you from immediately disposing of your ESS interest, and
- show that you held that information at all times when you were otherwise able to dispose of your interest.

26. Your position in a company is not evidence that you possessed price-sensitive information at a particular time. You must show you actually possessed such information. You can show this with contemporaneous records or other evidence that identifies the information, the date from which you held it, and the period it was price-sensitive.<sup>24</sup>

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<sup>23</sup> For example, in *Munnery and Commissioner of Taxation* [2012] AATA 175 (*Munnery*), the ESS's trust deed contained a clause preventing disposal within five years but the Tribunal found at [16] the ESS deferred taxing point was three years after acquisition, when the taxpayer was entitled to unrestricted shares.

<sup>24</sup> For example, an email informing your employer of the price-sensitive information you hold and noting you will not be able to trade your interests during a specific trading window.

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**When are you no longer restricted?**

27. A scheme's genuine disposal restrictions may operate for either a fixed or variable period of time. The period of time may be determined by reference to:

- performance or vesting conditions<sup>25</sup>
- internal share trading policies, or
- insider trading prohibitions in the *Corporations Act 2001*.

28. A scheme's genuine disposal restrictions will no longer restrict you on the first date on which you have an opportunity to dispose of your ESS interest.<sup>26</sup> This will be the first time you can take some action to deal with or realise your ESS interest (for example, by way of sale, transfer or gift).

29. It does not matter whether you in fact take action or whether the lifting of trading restrictions only occurs temporarily (for example, during a short-term trading window after which restrictions are reimposed). The scheme will no longer restrict you at the commencement of the first trading window, or the first trading day after the restrictions are lifted, even if they are lifted only temporarily.

30. When you acquired your ESS interest, there may have been more than one disposal restriction preventing you from immediately disposing of your ESS interest. The scheme will no longer restrict you from immediately disposing of the ESS interest when all of the genuine disposal restrictions are lifted.

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**Example 1 – shares – board approval to trade**

31. *Green Co, an Australian-resident company, establishes an ESS to provide ESS interests to its employees at a discount. Kim is an employee of Green Co and is invited to participate in the ESS. Kim accepts the invitation and receives 500 shares in Green Co on 30 September 2019.*

32. *According to the plan documentation, Kim is entitled to all income benefits on the shares, however she is not able to dispose of the shares until the third anniversary of acquiring the ESS interests. Kim must then seek approval of the Green Co Board, who at their discretion may grant their permission to allow her to dispose of the shares.*

33. *The mere requirement to obtain approval to dispose of the shares is not a genuine disposal restriction. The approval process is subjective; and the relevant decision maker (Green Co's Board) has a broad discretion, with no clear, fixed, objectively-measured criteria to be applied. Further, Kim can choose whether or when to apply for approval and Green Co's Board routinely approves requests to trade shares.*

34. *Assuming Kim remains employed with Green Co until the third anniversary of acquisition of the 500 shares, Kim's ESS deferred taxing point will be the first trading day after that date (30 September 2022), being when the shares are no longer restricted.*

**Example 2 – rights – subject to restrictions and holding of sensitive information**

35. *AusInvest Co, an Australian-resident company, establishes an ESS to provide ESS interests to its executive employees at a discount. The scheme's rules incorporate*

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<sup>25</sup> For example, the disposal restriction may be enforced by a holding lock or by the shares being held in a trust.

<sup>26</sup> Paragraph 1.195 of the EM. The first possible taxing point in *Munnery* was when the three-year vesting period had been lifted and the taxpayer was granted the unrestricted shares.

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*AusInvest Co's Internal Share Trading Policy, which enforces the insider trading prohibitions in the Corporations Act 2001.*

36. *Jude is an executive employee of AusInvest Co and is invited to participate in the ESS. Jude is offered one million options to acquire fully paid ordinary shares in the capital of AusInvest Co at a nil exercise price. On 1 July 2016, Jude accepts the invitation and is granted one million options, which are subject to certain vesting conditions, for nil consideration. The options are ESS interests under Division 83A.*

37. *According to the ESS documentation, Jude's options will vest subject to satisfaction of all of the following conditions:*

- *Performance Vesting Condition – Jude must meet certain key performance indicators over the first three years from the date of grant of the options.*
- *Continued Employment Condition – Jude must have continuous employment with AusInvest Co for at least three years, otherwise the options will be forfeited.*
- *Board Approval Condition – Jude must seek approval from the AusInvest Co Board prior to the sale of the ordinary shares obtained via exercise of the options.*

38. *The Board Approval Condition provides that AusInvest Co's Board must be satisfied that any transfer or disposal of its shares will not breach AusInvest Co's Internal Share Trading Policy. That policy restricts executive employees who hold price-sensitive or confidential information not yet disclosed to the market from dealing with AusInvest shares (including shares which are ESS interests).*

39. *AusInvest Co contracts with a plan administrator, who manages any requirements relating to an AusInvest Co employee's disposal of AusInvest Co ESS interests. This means that even where an employee wants or attempts to sell their shares, they are unable to do so.*

40. *As soon as practicable after the date the Continued Employment Condition is satisfied, the AusInvest Co Board, in its absolute discretion, will determine the extent to which the vesting conditions were satisfied and the number of options that can be exercised by Jude.*

41. *Of itself, the Board Approval Condition is not a genuine disposal restriction. This requirement supports and reflects AusInvest Co's Internal Share Trading Policy. Past practice suggests the AusInvest Co Board will approve all transfers or disposals of shares consistent with that policy.*

42. *On 10 July 2019, the AusInvest Co Board determines Jude has satisfied the Performance Vesting and Continued Employment Conditions. Jude's options vest in full, and he opts to exercise his options immediately and acquires one million AusInvest Co shares. Those shares are administered, on his behalf and in accordance with the ESS documentation, by the plan administrator.*

43. *Leading up to the vesting date of 10 July 2019, Jude received numerous emails with detailed information about AusInvest Co's financial results. Noting his upcoming vesting date of 10 July 2019, and his possession of price-sensitive and confidential information, Jude notifies the plan administrator that he will be restricted by AusInvest Co's Internal Share Trading Policy from disposing of the one million shares he acquired when the options vested on 10 July 2019 and until this information is released to the market.*

44. *On 10 July 2019, Jude was genuinely restricted from immediately disposing of the shares he acquired by exercising the options he acquired on 1 July 2016 and will remain*



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*restricted until he no longer has possession of the price-sensitive or confidential information.*

45. *On 20 August 2019, AusInvest Co released its financial results. As Jude no longer held price-sensitive or confidential information, he could apply to the AusInvest Co Board and be approved to sell his shares per the Board Approval Condition and AusInvest Co's Internal Share Trading policy. At this time, Jude ceased to be genuinely restricted by the scheme from disposing of the one million shares.*

46. *The ESS deferred taxing point for the one million AusInvest Co options Jude acquired on 1 July 2016 was 20 August 2019<sup>27</sup>, unless Jude disposed of the shares within 30 days of 20 August 2019. If that occurred, the ESS deferred taxing point would instead be the date Jude disposed of the shares.<sup>28</sup>*

### **Example 3 – director of a closely-held company**

47. *Close Co Ltd, an Australian-resident company, establishes an ESS to provide ESS interests to its employees. Under the scheme, Chloe, a director and shareholder, acquires the shares in Close Co Ltd for nil consideration.*

48. *Under the terms of the Close Co Ltd's ESS, an employee's disposal of shares is subject to the grant of permission to dispose of their shares by the scheme administrator.*

49. *The scheme administrator is an associate of, was appointed by and may be dismissed by Chloe at her discretion. The administrator habitually acts in accordance with Chloe's wishes.*

50. *Chloe contends she is genuinely restricted by the scheme of disposing of the shares received under the ESS.*

51. *As Chloe is in a position to control the decisions of the scheme administrator, including whether she can dispose of her shares, the scheme's disposal restriction is illusory. It is therefore not a genuine disposal restriction.*

### **Example 4 – shares – restriction periods and trading policy**

52. *Beach Co, an Australian-resident company, established an ESS after 1 July 2015 to provide ESS interests to its employees at a discount.<sup>29</sup>*

53. *On 1 July 2018, Hamish, an employee of Beach Co, accepted an invitation to receive 200 fully paid ordinary shares in Beach Co for nil consideration under Beach Co's ESS, subject to certain restrictions.*

54. *The restrictions on the Beach Co shares are described in the ESS documentation and include:*

- *a nominated restriction period*
- *an ASX Holding Lock, and*
- *Beach Co's Securities Dealing Policy, which applies to all employees and is strictly enforced by Beach Co.*

55. *Nominated restriction period – Hamish must, per the plan documentation, nominate a disposal restriction period when entering into Beach Co's ESS. The nominated restriction*

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<sup>27</sup> Subsection 83A-120(7).

<sup>28</sup> Subsection 83A-120(3).

<sup>29</sup> Beach Co's ESS satisfies the conditions in section 83A-105.

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*period must be between three years and 15 years after the commencement of the income year in which the ESS interests are granted and cannot be amended. During this time, Hamish may not dispose of, or grant a security interest over, any of the allocated ESS interests. Hamish chose a three-year restriction period (ending 1 July 2021). This is a genuine disposal restriction.*

56. *ASX Holding Lock – the shares will have a holding lock (within the meaning of the ASX Listing Rules) applied. During the holding lock, Hamish will be unable to dispose of the shares until after the nominated restriction period end date (that is, until after 1 July 2021). This is a genuine disposal restriction.*

57. *Beach Co Securities Dealing Policy – this policy prohibits Beach Co employees, including Hamish, from dealing in Beach Co securities during blackout periods as notified by Beach Co, and at all times if they possess any price-sensitive information (as defined in the policy). Beach Co considers breaches of this policy to be serious and may result in disciplinary action against an employee, including termination of their employment. Such a policy is a genuine disposal restriction only if Beach Co enforces breaches of its Securities Dealing Policy.*

58. *When Hamish’s nominated restriction period ends on 1 July 2021, Hamish does not hold price-sensitive information at that time. Therefore, the ESS deferred taxing point for the 200 shares he acquired on 1 July 2018 is 1 July 2021.*

59. *If Hamish disposes of the shares within 30 days of this date, the ESS deferred taxing point would instead be the date of disposal of the shares.<sup>30</sup>*

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#### **Date of effect**

60. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to you to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

14 October 2021

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<sup>30</sup> Subsection 83A-115(3).

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## **Appendix – Your comments**

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61. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

62. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on **ato.gov.au**

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 12 November 2021

**Contact officer:** Contact officer details have been removed following publication of the final determination.

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Legislative references:*

- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-45(4)
- ITAA 1997 83A-105
- ITAA 1997 83A-105(6)(b)
- ITAA 1997 83A-115
- ITAA 1997 83A-115(3)
- ITAA 1997 83A-115(4)
- ITAA 1997 83A-115(4)(b)
- ITAA 1997 83A-115(5)
- ITAA 1997 83A-115(6)
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(4)(c)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-120(7)(d)
- ITAA 1997 83A-325
- ITAA 1997 104-10
- ITAA 1997 995-1(1)

- TAA 1953

- Corporations Act 2001

*Cases relied on:*

- Commissioner of Taxation (Cth) v Wade [1951] HCA 66; (1951) 84 CLR 105; [1951] ALR 962; 9 ATD 337; 25 ALJ 626
- JJMMR P/L v LG International Corporation [2003] QCA 519
- John Shearer Ltd & Anor v Gehl Company [1995] FCA 1034; 134 ALR 1; 18 ACSR 780; 60 FCR 136; [1996] ATPR 41-499
- Henty House Pty Ltd (In Vol Liq) v Commissioner of Taxation (Cth) [1953] HCA 54; 88 CLR 141; [1953] ALR 828; 10 ATD 231; 27 ALJ 405
- Munnery and Commissioner of Taxation [2012] AATA 175
- Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd [1997] FCA 681; 76 FCR 452; 147 ALR 444; 24 ACSR 353; 15 ACLC 1001

*Other references:*

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

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