



CR 2006/55 - Income tax: Shell Group Restructure - Employee Share Scheme - Tax Deferred

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Class Ruling

Income tax: Shell Group Restructure – Employee Share Scheme – Tax Deferred

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

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

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

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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.

Relevant provision(s)

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

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CB of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139DQ of the ITAA 1936;
- section 139DR of the ITAA 1936;
- section 139E of the ITAA 1936;

- section 139G of the ITAA 1936; and
- section 139GCC of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who acquired shares under the 'Shell Companies in Australia Employee Share & Save Plan – (Tax Deferred Scheme)' while they were employed in Australia by either The Shell Company of Australia Limited or Shell Refining (Australia) Pty Ltd. They are persons who immediately prior to the restructure as described in paragraphs 20 to 23 of this Ruling:

- held those shares;
- were employed by a company in the Shell group of International companies (the Shell group);
- had not made an election under section 139E in relation to those shares; and
- had not had a cessation time happen, within the meaning of section 139CA, in relation to those shares.

In this Ruling, a person belonging to this class of entities is referred to as a 'participating employee'.

Qualifications

4. The Commissioner makes this ruling based on the precise scheme identified in this Ruling.

5. 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 13 to 24 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the income years ended 30 June 2005 and 30 June 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

12. This Ruling is withdrawn on and ceases to have effect after 30 June 2006. The Ruling continues to apply in respect of the relevant provisions ruled upon to all entities within the specified class who entered into the specified scheme during the term of the Ruling. Thus the Ruling continues to apply to those entities, even following its withdrawal, for the scheme entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

13. The scheme that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- The request for class ruling (CR2) from Allens Arthur Robinson dated 6 May 2005;
- Annexure A – Background Information;
- Annexure B – The Shell Companies in Australia Employee Share & Save Plan – Deed of Trust (the Trust Deed);
- Annexure C – Shell Companies in Australia Employee Share & Save Plan – Plan Rules (the Plan Rules);
- Annexure D – Shell Companies in Australia Employee Share & Save Plan (Amendments to the Rules);
- The Royal Dutch Petroleum Company Articles of Association; and
- Addendum to class ruling application from Allens Arthur Robinson dated 16 December 2005.

14. The Shell group operates a number of employee option and share plans. Participants in these plans include persons employed in Australia by The Shell Company of Australia Limited and Shell Refining (Australia) Pty Ltd (Shell employees).

15. The 'Shell Companies in Australia Employee Share & Save Plan' (the Plan) was established in Australia to allow Shell employees to acquire shares (RD shares) in the Royal Dutch Petroleum Company (RD).

16. Under the Plan Shell employees could elect to acquire RD shares under a 'Tax Exempt Scheme' or a 'Tax Deferred Scheme' (the deferred scheme).

17. Where the Shell employee elected to acquire shares under the deferred scheme, RD shares were acquired by Shell Custodian Pty Ltd (the Trustee) and allocated to the employee to be held for the benefit of the employee in accordance with the Plan Rules.

18. The shares acquired and held for the benefit of Shell employees were subject to disposal restrictions which prevented Shell employees from disposing of or dealing with shares held on their behalf.

19. The applicant has advised that shares acquired by participating employees under the deferred scheme were qualifying shares within the meaning of section 139CD.

Restructure of the Shell group

20. A major restructure of the Shell group was undertaken to enable the two former publicly held foreign parent companies (RD and the Shell Transport and Trading Company plc (STT)) to be unified (referred to as 'top-hatting') under a single parent company, Royal Dutch Shell plc (RDS).

21. The restructure was subject to shareholder and regulatory approval and was implemented by a combination of:

- a public exchange offer by RDS (the RD offer) (under appropriate Dutch and US laws) for all ordinary shares in RD; and
- a scheme of arrangement (pursuant to the *Companies Act 1985* of England and Wales), between STT, shareholders in STT and bearer warrant holders in STT.

22. The terms of the RD offer and the scheme of arrangement reflected the ownership of the Shell group by RD and STT and sought to ensure that:

- ordinary shareholders in RD and STT; and
- holders of bearer warrants and American deposit receipts in STT,

were offered securities in RDS representing the equivalent economic interest in the Shell group following implementation of the top-hatting as their securities represented in the Shell group prior to the restructure.

23. The last condition to the RD offer was satisfied on 20 July 2005 and the restructure proceeded.

24. The applicant has advised that:

- disposal restrictions imposed under the Plan Rules were lifted for participating employees on behalf of whom the Trustee had accepted the RD offer during the RD offer period and participating employees restricted RD shares were exchanged for RDS 'A' shares pursuant to the terms of the RD offer;

- participating employees were employees of the Shell group after the restructure;
- the RDS 'A' shares are ordinary shares; and
- at the time the participating employees acquired their RDS 'A' shares, no participating employee held a legal or beneficial interest in more than 5% of the shares in RDS and no participating employee was 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 RDS.

Ruling

25. Where under the deferred scheme, the Trustee acquired an RD share and held it for the benefit of a participating employee, the participating employee acquired a qualifying share for the purposes of Division 13A of Part III (Division 13A).

26. The discount given in relation to the RD share is included in the assessable income of the participating employee in the year that the cessation time happens in relation to the RDS share.

27. When the Trustee, on behalf of a participating employee, accepted the RD offer, the RDS 'A' share received by the Trustee as a replacement for an RD share is treated as if it was a continuation of the RD share for the purposes of Division 13A. Thus, this event did not trigger a cessation time.

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.*

28. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

29. For the purposes of this Ruling, the Commissioner accepts the statement by the applicant that RD shares acquired under the deferral scheme are qualifying shares within the meaning of section 139CD. Thus, a participating employee will have acquired a qualifying share when the Trustee acquired and allocated the share to the participating employee under the Plan and the participating employee acquired a beneficial interest in the share.

30. Where an employee acquires a share under an employee share scheme the discount given in relation to the share is included in the assessable income of the employee, pursuant to subsection 139B(1).

31. Where an employee acquires a qualifying share and does not make an election under section 139E, the discount given in relation to the share is included in assessable income in the year of income in which the cessation time occurs, in accordance with subsection 139B(3).

32. As RD shares acquired under the deferral plan are subject to disposal restrictions, the cessation time will be determined in accordance with subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share;
- the time when any restriction preventing the disposal of the share by the participating employee and any forfeiture conditions cease to have effect;
- the time when the participating employee ceases to be employed by either their employer (being their employer at the time they acquired the share) or a group company, pursuant to subsection 139CA(3); or
- the end of the ten year period starting when the participating employee acquired the share.

Rollover provisions

33. Subdivision DA of Division 13A which came into effect from 1 April 2005, was implemented to provide relief from the possible early application of sections 139CA or 139CB (determination of a cessation time) in the event of a corporate takeover or restructure occurring on or after 1 July 2004.

34. If these provisions are applicable, RDS 'A' shares acquired by a participating employee under the restructure are treated as if they are a continuation of the RD shares, and the restructure does not trigger an early cessation time.

The effect of a restructure on an employee share scheme

35. The rollover provisions are intended to apply to certain types of takeovers and restructures and in that regard section 139GCC defines the meaning of restructure for the purposes of this provision. A restructure of a company is a change in the ownership, or the structure of the ownership of the company as a result of which some or all shares or rights held in the company under an employee share scheme immediately before the change are replaced, or could reasonably be regarded as having been replaced, wholly or partly by shares or rights in one or more other companies. It is accepted that the Shell group restructure satisfies this definition and is a restructure within the meaning of section 139GCC.

36. Section 139DQ sets out in the first instant the circumstances that the provision will apply to. In this case the relevant requirements are that:

- a) an employee acquires a share in a new company;
- b) that share can reasonably be regarded as matching a share in another company (the old company);
- c) the share in the old company was acquired under an employee share scheme;
- d) the acquisition of the share in the new company occurs in connection with a restructure of the old company;
and
- e) as a result of the restructure the employee ceased to hold shares in the old company.

37. For the purposes of a) above, a participating employee, who held an RD share prior to the restructure in respect of which the Trustee accepted the RD offer, acquired a share in a new company (RDS).

38. For the purposes of b) above, the note to subsection 139DQ(1) provides a guide as to a factor that is relevant in determining to what extent something can reasonably be regarded as matching a share in the old company. That is, the respective market values of the old shares and the new shares. The Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No. 7) Bill that introduced the rollover provisions, provides further guidance on this issue when it states:

Matching shares or rights should be no more than that which is required to place the employee in the same position financially as if the restructure had not occurred.

39. The applicant has advised that the terms of the RD offer and the scheme of arrangement sought to ensure an outcome where the market value of the RD shares before the restructure would be the same or equivalent to the market value of the replacement shares acquired as a result of the restructure. Further, the applicant has advised that the shares (being qualifying shares) were acquired under an employee share scheme as defined. Thus, it is accepted that the restructure meets the requirements as set out in subparagraph 139DQ(1)(a)(i).

40. Lastly, it is accepted that where a participating employee acquired a share in RDS (the new company) as a result of the restructure, they ceased to hold a share in RD (the old company).

41. Section 139DQ also provides that the treatment of matching shares as a continuation of shares in the old company is subject to the conditions in section 139DR.

Conditions for continuation of shares

42. Section 139DR sets out the following conditions that must be met before matching shares will be treated (for the purposes of Division 13A) as being a continuation of shares in the old company:

- 1) the employee must have held shares in the old company under an employee share scheme immediately before the restructure;
- 2) where the employee has not made an election under section 139E in relation to shares in the old company, the employee, at or about the time they acquire the matching shares must be employed by the new company, a holding company of the new company or a subsidiary of either the new company or a holding company of the new company;
- 3) the matching shares must be ordinary shares; and
- 4) at the time of acquiring the matching shares the employee:
 - a) must not hold a legal or beneficial interest in more than 5% of the shares of the new company; and
 - b) must not be in a position to cast or control more than 5% of the votes at a general meeting of the new company.

43. To determine whether conditions 1), 2) and 3) above are or will be satisfied, is ordinarily a matter of fact.

44. In accordance with the class of entities as described in paragraph 3 of this Ruling, this Ruling only applies to participating employees who acquired shares under the deferred scheme and held those shares immediately prior to the restructure. Therefore it is accepted that the first condition is met.

45. The applicant has advised that participating employees were employees of the Shell group after the restructure (that is, they were employees of RDS or a subsidiary of RDS). Therefore, as participating employees have not made elections under section 139E in relation to their RD shares at the time of the restructure, it is accepted that the second condition is satisfied.

46. The applicant has also advised that RDS 'A' shares are ordinary shares, therefore it is accepted that the third condition is satisfied.

47. In relation to the fourth condition, the applicant has advised that at the time participating employees acquired their matching shares no participating employees held a legal or beneficial interest in more than 5% of the shares of RDS or were in a position to cast or control more than 5% of the votes at a general meeting of RDS. Thus, the fourth condition is also satisfied.

48. In summary, it is accepted that the circumstances described in section 139DQ were present and the conditions set out in section 139DR were met. Therefore the acquisition by a participating employee of a share in RDS as a consequence of the restructure is treated as if it was a continuation of the RD share for the purposes of Division 13A.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2006/53; CR 2006/54;
CR 2006/56

Subject references:

- cessation time
- disposal
- employee share scheme
- restructures

Legislative references:

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(3)

- ITAA 1936 139C
- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(3)
- ITAA 1936 139CB
- ITAA 1936 139CD
- ITAA 1936 Pt III Div 13A Subdiv DA
- ITAA 1936 139DQ
- ITAA 1936 139DQ(1)
- ITAA 1936 139DQ(1)(a)(i)
- ITAA 1936 139DR
- ITAA 1936 139E
- ITAA 1936 139G
- ITAA 1936 139GCC
- Companies Act 1985 (UK)

Other references:

- Explanatory Memorandum to the
Tax Laws Amendment (2004
Measures No. 7) Bill

ATO references

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