



CR 2006/56 - Income tax: Shell Group Restructure - Employee Share Scheme - Tax exempt

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Class Ruling

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

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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 139BA of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA to section 139FF of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 139GF of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);

- section 106-50 of the ITAA 1997; and
- section 130-80 of the ITAA 1997.

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 Exempt Scheme' (the tax exempt 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 19 to 22 of this Ruling:

- held shares that were subject to disposal restrictions;
- were employed by a company in the Shell group of International companies (the Shell group); and
- had made an election under section 139E 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 23 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 (CR6) 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);
- Annexures C & D – Shell Companies in Australia Employee Share & Save Plan – Plan Rules and Amendments to the Rules (the Rules);
- The Royal Dutch Petroleum Company Articles of Association;
- E-mail from the applicant dated 30 June 2005 headed CR6; 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, including the 'Shell Companies in Australia Employee Share & Save Plan' (the Plan). The Plan was established in Australia to allow employees of The Shell Company of Australia Limited and Shell Refining (Australia) Pty Ltd to acquire shares (RD shares) in the Royal Dutch Petroleum Company (RD).

15. Under the Plan as it operated prior to the restructure (as described in paragraphs 19 to 22 of this Ruling), employees could acquire RD shares at less than market value under a tax exempt scheme or a tax deferred scheme.

16. Where an employee elected to acquire shares under the tax exempt 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 Rules. Such shares were subject to disposal restrictions in accordance with the Rules.

17. The Rules provided that where there was a 'takeover bid, public exchange offer or other formal scheme for the acquisition of RD shares' (a takeover offer), a participating employee was not permitted to instruct the Trustee to accept the takeover offer, nor was the Trustee able to accept the takeover offer where those shares were subject to disposal restrictions.

18. The applicant has advised that shares acquired by participating employees under the tax exempt scheme were qualifying shares within the meaning of section 139CD, and that the scheme had been operated and will continue to be operated in accordance with the requirements in section 139CE, notwithstanding the restructure.

Restructure of the Shell group

19. 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).

20. 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 of England and Wales 1985), between STT, shareholders in STT and bearer warrant holders in STT.

21. 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 restructure.

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

Subsequent internal restructure

23. As a result of a subsequent internal restructuring of the Shell group, RD shares held by participating employees lapsed or ceased to exist on 21 December 2005. Participating employees were provided with consideration for the loss of the RD shares.

Ruling

24. Where under the tax exempt 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).

25. Where the participating employee made an election under section 139E in respect of those shares, the discount given in relation to the shares was only included in the assessable income of the participating employee to the extent that it was greater than \$1,000, in accordance with section 139BA.

Subsequent internal restructure – lapse of RD shares

26. When the restricted RD shares held by the Trustee on behalf of the participating employee lapsed or ceased to exist as a consequence of the subsequent internal restructure, the operation of section 139BA was not affected. Thus, the participating employee is not required to include in assessable income any amount that was previously excluded from assessable income by the operation of section 139BA.

27. For capital gains tax (CGT) purposes when, pursuant to the internal restructure, a restricted RD share held by the trustee on behalf of a participating employee lapsed or ceased to exist, a CGT event C2 happened.

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 may acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

29. For the purposes of the Ruling, the Commissioner accepts the statement by the applicant that RD shares acquired under the tax exempt scheme are qualifying shares for the purposes 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 in accordance with Subdivision B of Division 13A.

31. Where the share is a qualifying share and the employee makes an election under section 139E in respect of the share, the discount is included in the employee's assessable income in the year of income in which the share is acquired, subject to section 139BA.

32. Where the share is acquired under a scheme that satisfies the exemption conditions specified in section 139CE, the first \$1,000 of the discount otherwise included in the employee's assessable income is excluded from the assessable income of the employee, pursuant to section 139BA.

33. The exemption conditions that must be satisfied require that the scheme:

- not have any conditions that could result in an employee forfeiting ownership of shares acquired under it;
- be operated on a non-discriminatory basis (within the meaning of section 139GF); and
- be operated so that no employee would be permitted to dispose of a share acquired under it, before the earlier of:
 - (a) the end of the period of 3 years after the time of the acquisition of the scheme share; or
 - (b) the time when the employee ceases, or first ceases, to be employed by their employer (within the meaning of subsection 139CE(5)).

34. Thus for the first \$1,000 of a discount to continue to be excluded from an employee's assessable income, the scheme needs to continue to be operated in a manner that satisfies the exemption conditions.

35. For the purposes of the Ruling the Commissioner accepts the applicant's assurance that the tax exempt scheme has been operated and will continue to be operated in a manner that satisfies the exemption conditions.

36. Where there is a takeover offer, the Rules in relation to the tax exempt scheme provide that where shares are subject to disposal restrictions, a participating employee is not permitted to instruct the Trustee to accept the takeover offer, nor is the Trustee able to accept the takeover offer.

Subsequent internal restructure – lapse of RD shares

37. When under the subsequent internal restructure, RD shares held by the Trustee for participating employees lapsed or ceased to exist, this did not constitute the forfeiture of shares acquired under the tax exempt scheme as participants received consideration for the loss of the shares. Further, it did not mean that the scheme was operated so as to permit the disposal of the RD shares that were subject to disposal restrictions under the Rules.

38. Thus, as the Commissioner accepts that the tax exempt scheme has been operated in a manner that satisfies the exemption conditions, participating employees will not be required to include in their assessable income any amount that was previously excluded from their assessable income by section 139BA.

Capital gains tax

39. A person generally acquires a CGT asset when they become the owner. However, a person may also acquire a CGT asset in other circumstances, including where the person as a beneficiary under a trust becomes absolutely entitled to a CGT asset as against the trustee (disregarding any legal disability).

40. The Rules provide that upon the allocation of shares to a participating employee by the Trustee, the participating employee becomes absolutely entitled to those shares as against the Trustee, except that any dealing by the participating employee will be restricted as provided for in the Rules. Thus, a participating employee will acquire a RD share for CGT purposes when the Trustee allocates the RD share to them and they become absolutely entitled, notwithstanding the disposal restrictions.

Subsequent internal restructure – lapse of RD shares

41. Section 106-50 of the ITAA 1997 provides that if a person is absolutely entitled to a CGT asset as against the trustee of a trust (disregarding any legal disability), Part 3-1 and Part 3-3 of the ITAA 1997 apply to an action done by the trustee in relation to the asset as if the person had done it.

42. Thus, when the subsequent internal restructure occurred and an RD share held by the Trustee for the benefit of a participating employee lapsed or ceased to exist, the participating employee's ownership of the share is considered to have ended (which includes cancellation, expiration, surrender etc) within the meaning of section 104-25 of the ITAA 1997 and therefore a CGT event C2 happened in relation to the share.

43. The participating employee will make a capital gain if the capital proceeds (that is the consideration received for the loss of the share) exceed the cost base. Conversely, the participating employee will make a capital loss if the reduced cost base exceeds the capital proceeds from the loss of the share.

44. The first element of the cost base of an RD share will in these circumstances be the market value of the share worked out under sections 139FA to 139FF when the employee acquired the share, that is, when the trustee allocated the share to the participating employee and the employee became absolutely entitled to the RD share, pursuant to subsection 130-80(2) of the ITAA 1997.

Appendix 2 – Detailed contents list

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References

<i>Previous draft:</i>	- ITAA 1936 139CD
Not previously issued as a draft	- ITAA 1936 139CE
	- ITAA 1936 139CE(5)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139E
CR 2006/53; CR 2006/54;	- ITAA 1936 139FA
CR 2006/55	- ITAA 1936 139FAA
	- ITAA 1936 139FB
	- ITAA 1936 139FC
<i>Subject references:</i>	- ITAA 1936 139FD
- capital gains tax	- ITAA 1936 139FE
- employee share scheme	- ITAA 1936 139FF
- exemption conditions	- ITAA 1936 139G
- restructure	- ITAA 1936 139GF
- shares lapse or cease to exist	- ITAA 1997 Pt 3-1
	- ITAA 1997 104-25
<i>Legislative references:</i>	- ITAA 1997 106-50
- TAA 1953	- ITAA 1997 Pt 3-3
- TAA 1953 Sch 1 357-75(1)	- ITAA 1997 130-80
- Copyright Act 1968	- ITAA 1997 130-80(2)
- ITAA 1936 Pt III Div 13A	
- ITAA 1936 Pt III Div 13A Subdiv B	
- ITAA 1936 139BA	

ATO references

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