



CR 2006/59 - Income tax: Shell Group Restructure - Employee Share Scheme - Share Entitlements

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Class Ruling

Income tax: Shell Group Restructure – Employee Share Scheme – Share Entitlements

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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 26AAC of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CB of the ITAA 1936;
- section 139CC 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 139FD of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 139GCC of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 108-5 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 136-40 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 entitlements to Royal Dutch Petroleum Company (RD) bearer shares or RD New York shares under the Global Employee Share Purchase Plan. They are persons who immediately prior to the restructure as described in paragraphs 21 to 26 of this Ruling:

- held those entitlements;
- 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 the entitlements; and
- where the person was a non-resident and not an 'Australian employee' (within the meaning of section 221A) at the time of acquiring the entitlements, they subsequently became an Australian employee before 26 June 2005.

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 27 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 (CR5) from Allens Arthur Robinson dated 6 May 2005;
- The supplementary submission from Allens Arthur Robinson dated 16 June 2005;
- Addendum to class ruling application from Allens Arthur Robinson dated 16 December 2005;
- Addendum to class ruling application from Allens Arthur Robinson dated 3 April 2006;
- Annexure A – Background information in support of the class ruling detailing the current and proposed structures of the Shell group;
- Annexure B – The Global Employee Share Purchase Plan – Plan Rules (the Rules); and
- The Articles of Association for the Royal Dutch Petroleum Company.

14. The Shell group operates a number of employee option and share plans including the Global Employee Share Purchase Plan (the Plan).

15. Under the Plan, a participating employee makes contributions to the Plan administrator who uses the contributions to purchase RD bearer shares or RD New York shares (acquired shares) which it holds as nominee for the participating employee.

16. When a participating employee acquires such shares under the Plan they also become entitled to additional RD bearer shares or RD New York shares (matched shares) as appropriate. The applicant advised that no such shares were acquired on or after 26 June 2005 and thus no entitlements to matched shares were acquired on or after this date.

17. The participating employee's entitlement to matched shares is conditional on them holding their acquired shares for a specified holding period. Where the acquired shares are held for the specified holding period the participating employee is awarded matched shares in the following November in proportion to the number of acquired shares they have held in the Plan throughout the holding period.

18. The entitlements to matched shares are respectively referred to as RD bearer share entitlements or RD New York share entitlements.

19. The applicant has advised that entitlements to matched shares acquired by participating employees under the Plan, in respect of employment in Australia, are qualifying rights within the meaning of section 139CD. Further, that such participating employees only acquired entitlements to RD bearer shares.

Non-resident employees

20. The applicant has advised that some participating employees acquired entitlements to matched shares under the Plan, while they were non-residents and other than in respect of employment in Australia (former non-residents). Subsequently, these participating employees came to Australia and became Australian employees before 26 June 2005.

Restructure of the Shell group

21. 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).

22. 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.

23. 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 depositary receipts (ADRs) 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.

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

25. As a result of the restructure a participating employee's acquired shares were replaced with RDS 'A' shares or RDS 'A' ADRs (replacement shares) and the participating employee's entitlements to matching shares were replaced with entitlements to RDS 'A' shares or RDS 'A' ADRs (replacement entitlements).

26. The applicant has advised that RDS 'A' shares are ordinary shares (for the purposes of section 139CD) and that after the restructure:

- participating employees were employed by a subsidiary of RDS;
- participating employees entitlements to RD bearer shares (or RD New York shares) became entitlements to RDS 'A' shares (or RDS 'A' ADR's) in the same ratio as was used in the RD offer; and
- no participating employee holds a legal or beneficial interest in more than 5% of the shares of RDS or is 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.

Shares awarded after the restructure

27. Where a participating employee held their replacement shares for the requisite holding period the participating employee was awarded matching replacement shares in November 2005.

Ruling

Share entitlement granted in respect of Australian employment – where no election is made

28. Where a participating employee, employed in Australia, purchased an RD bearer share under the Plan and became entitled to an additional RD bearer share (RD bearer share entitlement), at the time they received that entitlement, they acquired a qualifying right for the purposes of Division 13A of Part III (Division 13A).

29. Where the participating employee did not make an election under section 139E in relation to the RD bearer share entitlement, the discount given in relation to that entitlement is included in the assessable income of the participating employee in the year that the cessation time happens in relation to the entitlement.

30. When as a result of the restructure the participating employee's RD bearer share entitlement was replaced with an RDS 'A' share entitlement, the replacement entitlement is treated as if it was a continuation of the RD Bearer Share entitlement for the purposes of Division 13A. Thus, the restructure did not trigger a cessation time.

Capital gains tax (CGT)

31. For CGT purposes, any capital gain or capital loss that arose from an RD bearer share entitlement being replaced with an RDS 'A' share entitlement, is disregarded in accordance with subsection 130-83(1A) of the ITAA 1997.

Share awarded after the restructure

32. When in November 2005 a participating employee was awarded an RDS 'A' share in respect of their replacement entitlement, the cessation time in relation to the replacement entitlement happened at the time the RDS 'A' share was awarded, pursuant to section 139CB.

33. The discount received on that entitlement is included in the assessable income of the participating employee in the year that the cessation time occurred, pursuant to subsection 139B(3).

Disposal of awarded share within 30 days

34. Where the awarded RDS 'A' share was disposed of in an arm's length transaction within 30 days of the cessation time, the discount is the amount of consideration received by the participating employee for the disposal of the share.

35. Any capital gain or capital loss made as a consequence of that disposal is disregarded in accordance with subsection 130-83(2) of the ITAA 1997.

Disposal of awarded share after 30 days

36. Where the awarded RDS 'A' share was not disposed of in an arm's length transaction within 30 days of the cessation time, the discount is the market value of the share at the cessation time calculated in accordance with Subdivision F of Division 13A.

37. For CGT purposes, a capital gain or capital loss will arise when the participating employee disposes of the awarded RDS 'A' share. In determining the gain or loss the first element of the cost base, or reduced cost base of the share, will be the market value of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value of the share is determined under Subdivision F of Division 13A.

Share entitlement not granted in respect of Australian employment

38. Where a participating employee was a non-resident and not employed in Australia at the time they acquired an entitlement under the Plan, no amount will be included in the participating employee's assessable income under Division 13A in respect of the entitlement or the replacement entitlement.

Capital gains tax

39. Where a participating employee was a non-resident and not employed in Australia at the time they acquired an entitlement under the Plan and they were a resident at the restructure time, CGT event C2 happens in relation to the entitlement when the replacement entitlement is acquired.

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.*

Share entitlement granted in respect of Australian employment – where no election is made

40. Section 139G provides that a person may acquire a right to acquire a share in an employee share scheme in several circumstances, including when another person creates the right in the employee or they acquire a legal interest in the right from another person.

41. For the purposes of this Ruling, the Commissioner accepts the statement by the applicant that RD bearer share entitlements granted in respect of Australian employment are qualifying rights for the purposes of section 139CD. Thus, a participating employee will have acquired a qualifying right when the participating employee purchased an RD bearer share under the Plan and at the same time received an entitlement to an RD bearer share.

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

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

44. The cessation time is determined in accordance with subsection 139CB(1). Because a share acquired by a participating employee as a result of exercising (refer paragraphs 72 to 76 of this Ruling) an RD bearer share entitlement is not subject to disposal restrictions, nor subject to forfeiture, the cessation time will be the earlier of:

- the time when the participating employee disposes of the entitlement (other than by exercising it);
- the time when the participating employee ceases employment with their employer or a group company, pursuant to subsection 139CB(2);
- the time when the participating employee exercises the entitlement; and
- the end of the 10 year period starting when the participating employee acquired the entitlement.

45. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the right, or any share acquired as a result of the exercise of the right, is disposed of in an arm's length transaction within 30 days of the cessation time.

46. As a result of the restructure of the Shell group, RD bearer share entitlements acquired under the Plan and held by participating employees, were 'rolled over' with the effect that participating employees who retained their interest in acquired shares for the holding period, were awarded RDS 'A' shares.

'Disposal' of RD bearer share entitlements

47. Implicit in the application and operation of Division 13A, is the notion that the reference to (a contract in the form of) a right is not just a right, it must be a right to acquire a share or it will not qualify as a right for the purposes of Division 13A. The terms and conditions attaching to such a right may vary but the primary object of that right must be a share.

48. Under the Plan a participating employee has acquired a right to acquire a share in RD (RD bearer share entitlement). As a result of the restructure, the participating employee no longer holds that right to acquire an RD bearer share and can no longer enforce that original right to acquire an RD bearer share. The rollover of the RD bearer share entitlement is considered to be more than a mere change to the terms and conditions of the original contract. It was a substantial and complete change of the underlying security (a share) that could be acquired under the contract by exercise. A participating employee no longer holds an entitlement to acquire a share in RD as that entitlement has been substituted or replaced by an entitlement to acquire an RDS 'A' share. Accordingly, it is considered that this arrangement in effect amounts to a disposal of the original RD bearer share entitlement.

'Rollover provisions'

49. Subdivision DA of Division 13A which came into effect from 1 April 2005, was implemented to provide relief from the possible early application of the provisions of sections 139CA or 139CB (determination of a cessation time) as a result of takeovers and restructures that occur after 1 July 2004.

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

The effect of a restructure on an employee share scheme

51. 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.

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

- a) an employee acquires a right in a new company;
- b) that right can reasonably be regarded as matching a right in another company (the old company);
- c) the right in the old company was acquired under an employee share scheme;
- d) the acquisition of the right 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 rights in the old company.

For the purposes of paragraph a) above, a participating employee in the Plan who held an RD bearer share entitlement prior to the restructure, is considered to have acquired a right in a new company as a result of the restructure proceeding.

53. For the purposes of paragraph 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 be reasonably be regarded as matching a right in the old company. That is, the respective market values of the old rights and the new rights. The Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No. 7) Bill 2004 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.

54. The applicant has advised that the terms of the restructure sought to ensure an outcome where the market value of the RD bearer share entitlements before the rollover was the same or equivalent to the value of the replacement entitlements to RDS 'A' shares acquired as a result of the rollover. Further, the applicant has advised that the RD bearer share entitlements (being qualifying entitlements) 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)(ii).

55. Lastly, it is accepted that the acquisition by a participating employee of an entitlement to a share in RDS (the new company), occurred in connection with a restructure of RD (the old company) and as a result of that restructure, the participating employee ceased to hold a bearer share entitlement in the old company because the entitlement to acquire a share in RD no longer exists.

56. Section 139DQ also provides that for the matching rights to be treated as a continuation of rights in the old company, the conditions in section 139DR must be met.

Conditions for continuation of rights

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

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

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

59. In accordance with the class of entities as described in paragraph 3 of this Ruling, this Ruling only applies to participating employees who held entitlements to RD bearer shares or RD New York shares immediately prior to the restructure. Therefore it is accepted that the first condition is met.

60. 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, it is accepted that the second condition is satisfied.

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

62. In relation to the fourth condition the applicant has advised that no participating employees will hold a legal or beneficial interest in more than 5% of the shares of the RDS or be in a position to cast or control more than 5% of the votes at a general meeting of RDS. Thus, this condition is also satisfied.

63. 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 an entitlement to acquire an RDS 'A' share as a consequence of the restructure is treated as if it was a continuation of the RD bearer share entitlement for the purposes of Division 13A.

Cessation time of entitlements

64. As the RDS 'A' shares awarded in November 2005 were not subject to disposal restrictions or forfeiture conditions, the cessation time for the entitlement to acquire these shares was (pursuant to section 139CB) the earlier of:

- the time when the participating employee disposed of the entitlement to acquire an RDS 'A' share (other than by exercise);
- the time when the participating employee ceased to be employed by either their employer (being their employer at the time they acquired the RD bearer share entitlement) or a group company, pursuant to subsection 139CB(2);
- the time when the participating employee received an RDS 'A' share on exercise of the entitlement.

Capital gains tax

65. Subdivision 130-D of the ITAA 1997 deals with the CGT implications for taxpayers involved in employee share schemes as defined in Division 13A. These CGT provisions were amended to provide complementary provisions to the rollover provisions in Subdivision DA of Division 13A which came into effect from 1 April 2005 and apply to acquisitions of shares or rights on or after 1 July 2004.

66. Subsection 130-83(1A) of the ITAA 1997 provides that, if a CGT event happens in relation to a right (for example a disposal) and it happens in connection with an acquisition of another right that under section 139DQ is treated as a continuation of the original right, any capital gain or loss from the CGT event is disregarded.

67. Where a participating employee held an RD bearer share entitlement immediately before the restructure and as a result of the restructure acquired an entitlement to an RDS 'A' share, in accordance with paragraph 63 of this Ruling, the replacement entitlement is treated as if it was a continuation of the RD bearer share entitlement for the purposes of section 139DQ.

68. Therefore, for the purposes of subsection 130-83(1A) of the ITAA 1997, where a CGT event happens in relation to the RD bearer share entitlement:

- that CGT event will happen in connection with an acquisition of an entitlement to an RDS 'A' share; and
- under section 139DQ it will be treated as a continuation of the RD bearer share entitlement.

Therefore, any capital gain or loss from the CGT event is disregarded.

Shares awarded after the restructure

69. As explained in paragraphs 51 to 63 of this Ruling, the acquisition by a participating employee of an entitlement to acquire an RDS 'A' share as a consequence of the restructure, is treated as if it is a continuation of the RD bearer share entitlement for the purposes of section 139DQ. Therefore, the restructure does not trigger an early cessation time for the RD bearer share entitlement for the purposes of section 139CB.

70. After the restructure, a participating employee who had an entitlement to an RDS 'A' share which is treated as a continuation of the RD bearer share entitlement, was under the Plan, awarded an RDS 'A' share if they held an acquired share for the holding period. The award of the RDS 'A' share happens without any specific action being taken by the holder of the entitlement other than the holder continuing to hold an acquired share for the holding period.

71. To determine what triggers a cessation time for the purposes of section 139CB in the context of the award of an RDS 'A' share, the relevant subsections of section 139CB refer to the time when the right (the entitlement to an RDS 'A' share) is:

- disposed of; or
- when it is exercised.

72. In this context it is not considered that the award of an RDS 'A' share results from or is a consequence of a disposal of the entitlement to an RDS 'A' share. Therefore it is necessary to consider whether the acquisition of such a share as a consequence of the award results from the exercise of a right to acquire a share.

73. The term exercise (as in to exercise a right) is not defined in Division 13A, so that term takes on its ordinary meaning. *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne, defines exercise as including 'the use or application of a mental faculty, right etc'. That part of the definition that in effect refers to exercise as including the application of a right, suggests that exercise can have a wider meaning than is generally suggested in the definition. That is, exercise generally involves a mental or physical activity or action or to perform something.

74. Even though not specifically defined, Division 13A does provide some indication of the intended meaning of exercise (of a right) when in section 139FD it refers to '...any share that may be acquired as a consequence of the exercise or operation of the right...'. Similarly, subparagraph 26AAC(1)(a)(ii) states that a share is acquired under a scheme for the acquisition of shares by an employee if the share was acquired '...as a result of the exercise or operation of a right to acquire the share...'.

75. It is considered that the concept of the exercise of a right for the purposes of Division 13A does not necessarily require an action or activity by the owner of the right. It is enough that the right to acquire a share vests and the owner of the right becomes the legal owner of a share that was the subject of the right, without the owner having to do anything, that is, it happens automatically or is instigated by the employer or another party. This will particularly apply where the owner of the right is not required to pay anything to exercise that right.

76. In summary, it is concluded that the award of an RDS 'A' share to a participating employee (after the restructure) as a consequence of the participating employee being the holder of an entitlement to an RDS 'A' share, is the exercise of that right for the purposes of section 139CB. Thus, the award of that share gives rise to a cessation time for the purposes of section 139CB at the time of that award.

77. Therefore, the discount received on the entitlement to an RDS 'A' share which is the continuation of an RD bearer share entitlement, will be included in the assessable income of the participating employee in the year that the cessation time occurs under subsection 139B(3).

Disposal within 30 days

78. Where an awarded RDS 'A' share is disposed of in an arm's length transaction within 30 days of the cessation time, in accordance with subsection 139CC(3), the discount assessable at the cessation time will be:

- the amount or value of any consideration received by a participating employee for that disposal, less:
- any amount paid by the employee to acquire the entitlement to an RD bearer share; and
- any amount paid to exercise the entitlement to an RDS 'A' share.

79. As no amounts are paid by a participating employee to acquire or exercise such an entitlement, the discount assessable at the cessation time is equal to the consideration received from the disposal of the RDS 'A' share.

Capital gains tax

80. In accordance with subsection 130-83(2) of the ITAA 1997, if CGT event A1, C2, E1, E2, E5, or I1 happens in relation to a share acquired as a result of exercising a right for the purposes of Division 13A, any capital gain or loss is disregarded where that event happens in an arm's length transaction within 30 days of the cessation time. Thus, any capital gain or loss made as a consequence of the disposal of RDS 'A' shares in the above circumstances, will be disregarded.

Disposal after 30 days

81. Where an awarded RDS 'A' share is not disposed of in an arm's length transaction within 30 days of the cessation time, in accordance with subsection 139CC(4), the discount assessable at the cessation time will be:

- the market value of the share at the cessation time, less:
- any amount paid by the employee to acquire the entitlement to an RD bearer share; and
- any amount paid to exercise the entitlement to an RDS 'A' share.

82. As no amounts are paid by a participating employee to acquire or exercise such an entitlement, the discount assessable at the cessation time is equal to the market value of the RDS 'A' share at the cessation time.

83. For the purposes of subsection 139CC(4), the market value of an RDS 'A' share is determined in accordance with Subdivision F of Division 13A.

Capital gains tax

84. Where an awarded RDS 'A' share is not disposed of in an arm's length transaction within 30 days of the cessation time, any capital gain or loss will arise at the time when the RDS 'A' share is ultimately disposed of by the participating employee. To determine the amount of that gain or loss the first element of the cost base, or reduced cost base, of the RDS 'A' share will be the market value of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value of the share is determined under Subdivision F of Division 13A.

Share entitlement not granted in respect of Australian employment

85. Where a person who is a non-resident:

- acquires a share or right at a discount;
- in respect of their employment;
- whilst employed outside Australia; and
- they subsequently become an Australian employee before 26 June 2005,

the discount in relation to the share or right will not be included in their assessable income under section 139B.

86. Thus, a participating employee, who was a non-resident and not employed in Australia at the time they acquired an entitlement to a matched share and they became an Australian employee before 26 June 2005, will not have any amount included in their assessable income under Division 13A in respect of the entitlement or the replacement entitlement.

Capital gains tax

87. The entitlements to matched shares provided to a non-resident otherwise than in respect of Australian employment are CGT assets as that term is described in section 108-5 of the ITAA 1997.

88. As a result of the restructure, a former non-resident participating employee will no longer hold entitlements to matched shares. The consequential receipt of entitlements to matched replacement shares is considered to be more than a mere change to the terms and conditions of the original entitlement, but is a substantial and complete change of the underlying security that can be acquired under the Plan. Accordingly, it is considered that this amounted to an ending of the original entitlement.

89. Pursuant to paragraph 104-25(1)(d) of the ITAA 1997, CGT event C2 happens if the taxpayer's ownership of an intangible asset ends because it is abandoned, surrendered or forfeited. The Commissioner considers that the arrangement will in effect amount to an end of the original entitlement to a matched share in accordance with this provision. Accordingly, CGT event C2 happened to the former non-resident participating employee when the entitlements to matched shares became entitlements to matched replacement shares.

90. Under subsection 104-25(3) of the ITAA 1997, the former non-resident participating employee will make a capital gain if the capital proceeds from CGT event C2 are more than the cost base of the entitlements to matched shares. If the capital proceeds are less than the reduced cost base of the entitlements to matched shares, the former non-resident participating employee will make a capital loss.

91. Under section 136-40 of the ITAA 1997, the first element of the cost base or reduced cost base of the entitlements to matched shares will be the market value of those entitlements at the date the former non-resident participating employee becomes a resident of Australia.

92. Under paragraph 116-20(1)(b) of the ITAA 1997, the capital proceeds from when the entitlements to matched shares become entitlements to matched replacement shares will be the market value of the entitlements to matched replacement shares.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- CGT event A1
- CGT event C2
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- CGT event E2
- CGT event E5
- disposal
- employee share schemes

Legislative references:

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