

CR 2007/39 - Income tax: Shell Group - Global Employee Share Purchase Plan



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Class Ruling

Income tax: Shell Group – Global Employee Share Purchase Plan

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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 (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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 139CA of the ITAA 1936;
- section 139CB of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139DD of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FE of the ITAA 1936;
- section 110-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);

- section 110-55 of the ITAA 1997;
- section 130-60 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- subsection 974-75(1) 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 participate in the Global Employee Share Purchase Plan (the Plan) while they are working in Australia. They are persons who:

- are employed by an Australian subsidiary of Royal Dutch Shell plc (RDS);
- are working in Australia from the time they purchase shares under the Plan until the time additional matching shares (if any) are awarded under the Plan;
- are Australian residents (within the meaning of subsection 6(1)) during this period; and
- are not temporary residents (within the meaning of section 995-1 of the ITAA 1997) during this period.

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 12 to 25 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 from the income year ended 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).

Scheme

12. 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 (CR9) from Allens Arthur Robinson dated 1 May 2006;
- Annexure A – The Global Employee Share Purchase Plan rules;
- Annexure B – Global Employee Share Purchase Plan Schedule of Variance – Australia; and
- Annexure C – Global Employee Share Purchase Plan Schedule of Variance for EBAS Expatriates Host Country – Australia.

13. The Shell group of international companies (the Shell group) operates a number of employee share schemes including the Plan.

14. Under the Plan eligible employees are invited to make monthly after tax contributions (Australian dollar contributions) to an approved deposit taking institution.

15. Where an eligible employee makes contributions, they become a participant (hereinafter referred to as a participating employee) in the Plan.

16. Where the participating employee's employment is governed by local Australian terms and conditions their monthly contributions are converted into Euros (Euro contributions) on a quarterly basis and remitted to an independent third party appointed to operate the Plan (the Plan administrator).

17. Where the participating employee's employment is not governed by local Australian terms and conditions their monthly contributions are notionally converted into Euros (Euro contributions) each month and at the end of the quarter the sum of these amounts are remitted to the Plan administrator.

18. The Plan administrator uses the Euro contributions to acquire RDS Class 'A' ordinary shares (shares) on either the Amsterdam or London Stock Exchange, over a 14 day buying period.

Acquired shares

19. The shares (Acquired shares) are allocated to participating employees at the end of each buying period in proportion to a participating employee's Euro contributions and are held on trust by the Plan administrator for the benefit of participating employees.

20. The applicant has advised that:

- participating employees are employed by an Australian subsidiary of RDS;
- at the time a share is acquired under the Plan at least 75% of the permanent employees of each of the Australian subsidiary employers, whose employees are participating employees, will be entitled to acquire shares under the Plan or another employee share scheme; and
- immediately after the acquisition of a share or right under the Plan, no participating employee will:
 - hold a legal or beneficial interest in more than 5% of the shares of RDS; or
 - be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of RDS.

Reinvestment shares

21. Any dividends paid in respect of Acquired shares are applied by the Plan administrator to purchase further shares (Reinvestment shares) which are held on trust by the Plan administrator for the benefit of participating employees.

Matched shares

22. Where Acquired shares are held by the Plan administrator (under the Plan) from the date of purchase until the following 31 October, participating employees are awarded additional shares (Matched shares) equal to 15% of the number of Acquired shares that were kept in the Plan until 31 October. Where Matched shares are awarded under the Plan they are held on trust by the Plan administrator for the benefit of participating employees.

23. The entitlement or right to be awarded Matched shares is created in a participating employee at the time Acquired shares are allocated to the participating employee. A participating employee does not provide any consideration to acquire an entitlement or right to be awarded Matched shares and does not provide any consideration to exercise such an entitlement or right.

24. A participating employee may (at any time) request that any Acquired shares, Reinvestment shares or Matched shares held on trust by the Plan Administrator for their benefit, be transferred to the participating employee, or be sold and the proceeds given to the participating employee.

25. If a participating employee ceases employment before Acquired shares have been held in the Plan for the requisite period, rights to Matched shares will generally lapse (except where the cessation of employment is by reason of 'special circumstances'). Special circumstances include injury, disability or bona fide redundancy. Where special circumstances apply, Acquired shares will be treated as if they had been held for the entire period necessary to qualify for Matched shares, and such shares will be awarded.

Ruling

Acquired share purchased at a discount

26. Where, under the Plan:

- the Plan administrator allocates an Acquired share to a participating employee; and
- the consideration (Australian dollar contributions) given by the participating employee for the acquisition of the Acquired share is less than its market value as determined under Subdivision F of Division 13A of Part III (market value) at the time it is allocated,

the participating employee will acquire a qualifying share within the meaning of section 139CD.

27. Under the Plan, a participating employee will not acquire a right under an employee share scheme (for the purposes of Division 13A of Part III (Division 13A)) before Acquired shares are allocated to the participating employee.

Where an election is made

28. Where the participating employee makes an election under section 139E in respect of the qualifying Acquired share, an amount, being the discount received in relation to the share, will be included in their assessable income in the year of income in which the Acquired share is allocated to the participating employee, pursuant to subsection 139B(2).

29. The amount of the discount is the market value of the Acquired share (in Australian dollars) at the time it is allocated less the Australian dollar contributions made by the participating employee as consideration for the acquisition of the Acquired share, pursuant to subsection 139CC(2).

30. For capital gains tax (CGT) purposes, the first element of the cost base of the Acquired share is its market value when it is allocated to the participating employee by the Plan administrator, pursuant to subsection 130-80(3) of the ITAA 1997.

Where no election is made

31. Where the participating employee does not make an election under section 139E in respect of the qualifying Acquired share, an amount, being the discount received in relation to the share, is included in their assessable income in the year of income in which the Acquired share is allocated to the participating employee (being the cessation time pursuant to subsection 139CA(1)).

32. The amount of the discount in respect of the Acquired share to be included in the participating employee's assessable income will depend on whether the Acquired share is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

33. Where the participating employee disposes of the Acquired share in an arm's length transaction within 30 days of its allocation, the amount of the discount is (in accordance with subsection 139CC(3)) the amount they receive from the disposal less the amount of their Australian dollar contributions that were applied to purchase the Acquired share.

34. For CGT purposes, pursuant to subsection 130-83(2) of the ITAA 1997, any capital gain or capital loss on the disposal of the Acquired share is disregarded.

Disposal not within 30 days

35. Where the participating employee does not dispose of the Acquired share in an arm's length transaction within 30 days of its allocation, the amount of the discount included is (in accordance with subsection 139CC(4)) the market value of the Acquired share at the time it was allocated less the amount of the participating employee's Australian dollar contributions that were applied to purchase the Acquired share.

36. For CGT purposes, pursuant to subsection 130-83(3) of the ITAA 1997, the first element of the cost base and reduced cost base of the Acquired share will be its market value when it was allocated to the participating employee by the Plan administrator.

Acquired share not purchased at a discount

37. Where the consideration (Australian dollar contributions) given by the participating employee for the acquisition of an Acquired share is equal to or more than its market value at the time it is allocated, the participating employee will not acquire a share under an employee share scheme for the purposes of Division 13A.

38. For CGT purposes the first element of the cost base and reduced cost base of the share will be the amount of the participating employee's Australian dollar contributions that were applied to purchase the Acquired share, pursuant to subsections 110-25(2) and 110-55(2) of the ITAA 1997.

Reinvestment share

39. Where a dividend paid in respect of an Acquired share is used by the Plan administrator to purchase a Reinvestment share, and the Reinvestment share is allocated to a participating employee, the Reinvestment share will not be acquired by the participating employee under an employee share scheme for the purposes of Division 13A.

40. For CGT purposes, the first element of the cost base of a Reinvestment share will be the amount of the dividend (net of any applicable Dutch withholding tax) applied to purchase the Reinvestment share.

Matched share

41. Where a participating employee is allocated an Acquired share under the Plan and they become entitled to be awarded a Matched share, they will acquire a qualifying right for the purposes of Division 13A.

42. For CGT purposes, a right to a Matched share is a convertible interest of the kind referred to in subsection 974-75(1) of the ITAA 1997. Any capital gain or capital loss made on conversion of the right (that is, on the award of a Matched share) is disregarded in accordance with subsection 130-60(3) of the ITAA 1997.

Right to Matched share where election is made

43. Where a participating employee makes an election under section 139E in relation to a right to a Matched share:

- the discount given in relation to the right will be included in their assessable income in the year they acquire the right (pursuant to subsection 139B(2)); and
- the amount of the discount included in their assessable income will be the market value of the right at the acquisition time (pursuant to section 139FE), being the market value of the Matched share at this time.

44. For CGT purposes:

- any capital gain or capital loss made on the conversion of the right to a Matched share (convertible interest) into a Matched share is disregarded, pursuant to subsection 130-60(3);

- the acquisition date of the Matched share is the date the Matched share is awarded, pursuant to subsection 130-60(2); and
- the first element of the cost base of the Matched share is:
 - the cost base of the right to the Matched share pursuant to subsection 130-60(1); and
 - the cost base of the right is the market value of the right at the time the right is acquired, pursuant to subsection 130-80(2); and
 - this is the market value of the Matched share on the day the right is acquired (pursuant to section 139FE).

Right ends before Matched share is awarded

45. To the extent that a participating employee's right to a Matched share ends without them receiving a Matched share due to them disposing of Acquired Shares before the requisite date (31 October) or in any other circumstances:

- there will be no amount assessable to the participating employee in respect of the right and where appropriate the participating employee will be entitled to request an amendment to their assessment, pursuant to section 139DD; and
- the participating employee will not make a capital gain.

Right to Matched share where no election is made

46. Where a participating employee does not make an election under section 139E in relation to a right to a Matched share, the discount given in relation to the right will be included in their assessable income in the year of income that the cessation time happens (pursuant to subsection 139B(3)).

47. Where a participating employee ceases employment (pursuant to subsection 139CB(2)) by reason of special circumstances (refer to paragraph 25 of this Ruling), and is awarded a Matched share, the cessation time in relation to the right to a Matched share will occur when they cease employment.

48. Where the participating employee does not cease employment, the cessation time in relation to the right to a Matched share will occur when they are awarded a Matched share.

49. The amount of the discount in respect of the right to a Matched share to be included in the participating employee's assessable income will depend on whether the Matched share is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

50. Where a participating employee disposes of a Matched share in an arm's length transaction within 30 days of the cessation time, the discount included in assessable income is the amount of consideration they receive for the disposal of the share, pursuant to subsection 139CC(3).

51. For CGT purposes any capital gain or capital loss made as a consequence of the disposal of a Matched share is disregarded in accordance with subsection 130-83(2) of the ITAA 1997.

Disposal not within 30 days

52. Where a participating employee does not dispose of a Matched share in an arm's length transaction within 30 days of the cessation time, the discount included in assessable income will be:

- where the cessation time occurs on the award of a Matched share, the market value of the share at the cessation time; or
- where the cessation time occurs on the cessation of employment, the market value of the right to a Matched share at the cessation time.

53. For CGT purposes the first element of the cost base of a Matched share is:

- in accordance with subsection 130-60(1) of the ITAA 1997, the cost base of the right; and
- the cost base of the right is in accordance with subsection 130-83(3):
 - where the cessation time occurs on the award of a Matched share, the market value of the share at the cessation time; or
 - where the cessation time occurs on the cessation of employment, the market value of the right to a Matched share, at the cessation time, which will be the market value of a Matched share at the cessation time, pursuant to section 139FE.

Right ends before Matched share is awarded

54. Where a participating employee's right to a Matched share lapses under the Plan (for example, they cease employment or dispose of an Acquired share before the requisite date):

- the discount received in relation to the right is not included in their assessable income for the purposes of Division 13A, pursuant to section 139DD; and
- they will not make a capital gain.

Commissioner of Taxation16 May 2007

Appendix 1 – Explanation

① *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.*

Acquired share purchased at a discount

55. An employee will acquire a qualifying share under an employee share scheme for the purposes of Division 13A where that share:

- is acquired within the meaning of section 139G;
- is acquired in respect of employment (subsection 139C(1));
- is acquired for less than market value (subsection 139C(3)); and
- satisfies the relevant conditions set out in section 139CD.

56. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a legal or beneficial interest in the share, or having it allotted or transferred to them by another person. Under the Plan, a participating employee will acquire a beneficial interest in a share when it is allocated to them by the Plan administrator. Thus, they will acquire an Acquired share within the meaning of section 139G at this time.

57. The Plan has been established to enable eligible employees of the Shell group to acquire shares in RDS. As such, an Acquired share purchased under the Plan is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

58. Subsection 139C(3) provides that a share is not acquired under an employee share scheme unless it is acquired at a discount (that is for less than its market value).

59. Thus, where the market value of an Acquired share (in Australian dollars) on the day it is allocated to a participating employee is greater than the amount of the participating employee's Australian dollar contributions allocated to acquire the share, the Acquired share will be acquired under an employee share scheme for the purposes of Division 13A.

60. Section 139CD sets out a number of conditions that must be satisfied for a share in a company to be a qualifying share. These conditions are:

- the share is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));

- the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3));
- all the shares available for acquisition under the scheme are ordinary shares (subsection 139CD(4));
- at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
 - shares or rights under the scheme; or
 - shares or rights in the employer, or a holding company of the employer, under another employee share scheme (subsection 139CD(5)),
- immediately after the acquisition of the share, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

61. Where an Acquired share is acquired at a discount, it will be acquired under an employee share scheme, thus the first condition will be satisfied.

62. To satisfy the second condition, the Acquired share must be a share in the participating employee's employer or the holding company of their employer (that is, RDS or a subsidiary of RDS). The applicant has advised that participating employees are employed by an Australian subsidiary of RDS, thus the second condition is satisfied.

63. The shares available for acquisition under the Plan are ordinary shares, thus the third condition is satisfied.

64. The applicant has advised that at the time Acquired shares are acquired, at least 75% of the permanent employees of each of the Australian subsidiary employers whose employees are participating employees, will be entitled to acquire shares under the Plan or another employee share scheme. The Commissioner therefore accepts that the fourth condition is satisfied.

65. The applicant has advised that immediately after the acquisition of an Acquired share, no participating employee will:

- hold a legal or beneficial interest in more than 5% of the shares of RDS; or
- be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of RDS,

thus, the Commissioner accepts that the last of the conditions is satisfied.

66. Thus, where under the Plan a participating employee is allocated an Acquired share and the share is acquired at a discount, the participating employee will acquire a qualifying share within the meaning of section 139CD and therefore for the purposes of Division 13A.

Entitlement to an Acquired share

67. The entitlement to an Acquired share that a participating employee obtains when they make monthly after tax contributions under the Plan, is conditional on a number of things, including:

- the dollar value of the contributions the participating employee makes over a specified period;
- the conversion rate to Euros for the purpose of remitting contributions to the Plan administrator; and
- the acquisition of shares over a 14 day buying period.

This means that the number of Acquired shares that a participating employee may acquire under the Plan is unknown at the time the entitlement is obtained.

68. Therefore, it is concluded that the entitlement that a participating employee obtains when they make monthly contributions towards purchasing Acquired shares under the Plan, is not a right for the purposes of Division 13A.

Where a share is acquired under an employee share scheme

69. Where an employee acquires a share under an employee share scheme, the discount given in relation to the share is included in their assessable income in accordance with Subdivision B of Division 13A. Where the share is a qualifying share, the amount of the discount, and the year of income in which the discount is included is dependent on whether the employee makes a section 139E election.

Where an election is made

70. Where a participating employee makes an election under section 139E in respect of the year of income in which an Acquired share which is a qualifying share, is allocated (acquired):

- the discount given in relation to the Acquired share is included in their assessable income in the year of income in which the share is allocated, pursuant to subsection 139B(2); and
- the amount of the discount is the market value of the Acquired share at the allocation date less the amount of the participating employee's Australian dollar contributions that were applied by the Plan administrator to acquire the Acquired share, pursuant to subsection 139CC(2).

Capital gains tax

71. Subsection 130-80(3) of the ITAA 1997 provides that where a person acquires a qualifying share from an employee share trust and makes an election under section 139E in respect of the share, the first element of the cost base and reduced cost base of the share is its market value when they acquired it.

72. Pursuant to section 109-5 of the ITAA 1997, a person acquires a share when they become the owner of the share or they become absolutely entitled to the share. As a participating employee is able to request that an Acquired share (allocated to them and held on trust by the Plan administrator for their benefit) be transferred to them at any time, they are considered to be absolutely entitled to the Acquired share when it is allocated.

73. Thus, where a participating employee acquires an Acquired share at a discount and makes an election under section 139E in respect of the share, the first element of the share's cost base will be its market value at the time the Plan administrator first allocates the share to the participating employee, pursuant to section 130-80(3) of the ITAA 1997.

Where no election is made

74. Where an employee does not make an election under section 139E in respect of the year of income in which a qualifying share is acquired:

- the discount given in relation to the share is included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3); and
- the amount of the discount included in their assessable income is calculated under either subsection 139CC(3) (disposal within 30 days) or subsection 139CC(4) (disposal not within 30 days).

75. As an Acquired share that is a qualifying share will not be subject to disposal restrictions or forfeiture under the Plan, the cessation time will be the time when the participating employee acquires it (when it is allocated), pursuant to subsection 139CA(1).

Disposal within 30 days

76. Subsection 139CC(3) provides that where a participating employee:

- acquires an Acquired share that is a qualifying share;
- does not make a section 139E election in respect of the Acquired share; and

- disposes of the Acquired share in an arm's length transaction at or within 30 days of the cessation time,

the amount of the discount included in their assessable income will be the amount received for the disposal of the Acquired share less the amount of the Australian dollar contributions paid by the participating employee for the acquisition of the Acquired share.

Capital gains tax

77. Subsection 130-83(2) of the ITAA 1997 provides that where a participating employee:

- acquires an Acquired share that is a qualifying share;
- an election is not made under section 139E in respect of the Acquired share; and
- disposes of the Acquired share (CGT event A1) or CGT event C2, E1, E2, E5 or I1 happens in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time,

any capital gain or capital loss the participating employee makes on disposal of the Acquired share is disregarded.

Disposal not within 30 days

78. Subsection 139CC(4) provides that where a participating employee:

- acquires an Acquired share that is a qualifying share;
- does not make a section 139E election in respect of the Acquired share; and
- does not dispose of the share in an arm's length transaction within 30 days of the cessation time,

the discount to be included in assessable income is the market value of the Acquired share at the time it was allocated, less the amount of the Australian dollar contributions paid by the participating employee for the acquisition of the Acquired share.

Capital gains tax

79. Subsection 130-83(3) of the ITAA 1997 provides that where a participating employee:

- acquires an Acquired share that is a qualifying share;
- an election is not made under section 139E in respect of the Acquired share; and

- does not dispose of an Acquired share (CGT event A1) or C2, E1, E2, E5 or I1 does not happen in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time,

the first element of the cost base and the reduced cost base of the Acquired share is its market value at the acquisition time (cessation time).

Acquired share not purchased at a discount

80. Where an Acquired share is:

- acquired by a participating employee;
- in respect of employment (under the Plan); and
- the consideration (Australian dollar contributions) provided by the participating employee for the acquisition of the share is more than or equal to (that is, the Acquired share is not purchased or acquired at a discount) the market value of the Acquired share at the time it is allocated,

the share will not be acquired under an employee share scheme, for the purposes of section 139C and thus Division 13A.

Capital gains tax

81. For CGT purposes the first element of the cost base and reduced cost base of an Acquired share will be determined under Part 3-1 of the ITAA 1997. It will be the amount of the participating employee's Australian dollar contributions that were applied to purchase the Acquired Share, pursuant to subsections 110-25(2) and 110-55(2) of the ITAA 1997.

Reinvestment shares

82. A share is only acquired under an employee share scheme as that term is defined in section 139C of the ITAA 1936, if the share is acquired in respect of, or for or in relation directly or indirectly to, employment. While the expression in section 139C has not been considered by the courts, a similar term in the *Fringe Benefits Tax Assessment Act 1986* has been considered by the courts on numerous occasions.

83. In *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22, it was noted that the term 'in respect of employment', includes benefits where there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment.

84. The dividend reinvestment facility in the Plan that gives rise to a Reinvestment share is a specific but relatively minor component of that Plan. Therefore, it is accepted that the acquisition of a Reinvestment share under the Plan has a causal connection with the employment of a participating employee. However, as all RDS shareholders have access to similar dividend reinvestment facilities, it is also accepted that the allocation of a share under the reinvestment component of the Plan to a participating employee is primarily associated with the status of being a shareholder and therefore does not have a sufficient or material connection with the employment relationship of a participating employee.

85. The lack of a sufficient or material connection with employment means that the acquisition of a Reinvestment share by a participating employee does not satisfy the test in subsection 139C(1). Thus, such a share cannot be said to have been acquired under an employee share scheme for the purposes of Division 13A.

Capital gains tax

86. As a Reinvestment share is not acquired under an employee share scheme, the first element of its cost base and reduced cost base is determined under subsections 110-25(2) and 110-55(2) of the ITAA 1997, being the amount applied by the Plan administrator on behalf of a participating employee (that is, the amount of the dividend (net of any applicable Dutch withholding tax) to purchase it).

Matched shares

87. A taxpayer will acquire a right under an employee share scheme for the purposes of Division 13A where the right is:

- a right for the purposes of Division 13A;
- acquired within the meaning of section 139G;
- acquired in respect of the employment of an employee, pursuant to subsection 139C(1);
- acquired for less than market value, pursuant to subsection 139C(3); and

such a right will be a qualifying right for the purposes of Division 13A if the conditions specified in section 139CD are satisfied.

88. Under the Plan, a participating employee who purchases Acquired shares becomes entitled to a Matched share where their Acquired shares are held by the Plan administrator under the Plan until 31 October. The Commissioner considers that this entitlement or right to a Matched share is a right for the purposes of Division 13A.

89. Section 139G provides that a person may acquire a right in several circumstances, including when another person creates the right in the person or they acquire a legal interest in the right from another person.

90. Under the Plan, a right (right to a Matched share) is created in a participating employee when they acquire (are allocated) an Acquired share, thus the participating employee acquires a right at this time within the meaning of section 139G.

91. The Plan has been established to enable eligible employees to acquire shares. As such, the right to a Matched share is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

92. Subsection 139C(3) provides that a right is not acquired under an employee share scheme unless it is acquired at a discount (that is for less than its market value).

93. Thus, as the right to a Matched share is acquired for no consideration, the Commissioner considers that it is acquired at a discount and is therefore a right acquired under an employee share scheme for the purposes of Division 13A.

94. Section 139CD sets out a number of conditions that must be satisfied for a right to acquire a share in a company to be a qualifying right. These conditions are as follows:

- the right is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));
- the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3));
- all the rights available for acquisition under the scheme are rights to acquire ordinary shares (subsection 139CD(4));
- immediately after the acquisition of the right, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

95. Where an Acquired share is purchased and a participating employee becomes entitled to a Matched share, the Commissioner considers they will acquire a right under an employee share scheme, thus the first condition will be satisfied.

96. To satisfy the second condition, the Matched Share must be a share in the participating employee's employer or the holding company of their employer (that is, RDS or a subsidiary of RDS). The applicant has advised that participating employees are employed by an Australian subsidiary of RDS, thus the second condition is satisfied.

97. The shares available for acquisition under the Plan are ordinary shares, thus the third condition is satisfied.

98. The applicant has advised that immediately after the acquisition of a share or right under the Plan no participating employee will:

- hold a legal or beneficial interest in more than 5% of the shares of RDS; or
- be in a position to cast, or control the casting of, more than 5% of the maximum number of votes at a general meeting of RDS,

thus, the Commissioner accepts that the last of the conditions is satisfied.

99. Thus, where under the Plan a participating employee is allocated an Acquired share and becomes entitled to a Matched share, the participating employee will acquire a qualifying right for the purposes of Division 13A.

Right to Matched share is a convertible interest for CGT purposes

100. Where an employer creates a contractual or other right in an employee, that employee will acquire a CGT asset, pursuant to subsection 109-5 of the ITAA 1997. A convertible interest in a company is defined in subsection 995-1(1) of the ITAA 1997 to be an interest of the kind referred to in item 4 of the table in subsection 974-75(1) of the ITAA 1997. Item 4 of that table relevantly defines a convertible interest as an interest issued by a company that gives the holder a right to be issued with an equity interest in the company or a connected entity of the company.

101. Thus, for CGT purposes, a participating employee will acquire a convertible interest (a CGT asset) when they are allocated an Acquired share and an entitlement or right to be awarded a Matched share is created in the participating employee.

102. Any capital gain or capital loss made by the participating employee on the conversion of the right into a Matched share which occurs when a Matched share is awarded, is disregarded pursuant to subsection 130-60(3) of the ITAA 1997.

Right to Matched share where election is made

103. Where a participating employee acquires a right to a Matched share which is a qualifying right, the discount given in relation to the right is included in their assessable income, pursuant to subsection 139B(1).

104. Where the participating employee elects under section 139E that subsection 139B(2) apply in respect of all shares or rights acquired by the participating employee in a year of income, the discount given in relation to a right to a Matched share acquired by the employee will be included in their assessable income in the year in which the right is acquired.

105. The amount of the discount is calculated in accordance with subsection 139CC(2) and is the market value of the right at the time it was acquired by the participating employee less any consideration paid or given by the employee for the acquisition of the right.

106. Thus, the discount will be the market value of the right when it was acquired, as they are not required to pay or give any consideration for their right to a Matched share and the market value of the right is the market value of the Matched share at the acquisition time, pursuant to section 139FE.

Capital gain tax

107. Where an employee acquires a right to acquire a share that is a convertible interest, Subdivision 130-C of the ITAA 1997 relevantly provides that:

- any capital gain or capital loss the employee makes on the conversion of the right is disregarded (subsection 130-60(3) of the ITAA 1936);
- the share acquired on conversion of the right will be acquired when the conversion happens (subsection 130-60(2) of the ITAA 1997); and
- the first element of the cost base of the share will be the cost base of the right at the conversion time plus any amount paid to convert the right (subsection 130-60(1) of the ITAA 1997).

108. Thus, where a participating employee acquires a right to a Matched share and makes an election under section 139E in relation to the right:

- any capital gain or capital loss on conversion of the right (the award of a Matched share) is disregarded;
- the Matched share is acquired when it is awarded; and

- the first element of the cost base of the Matched share will be the cost base of the right at the conversion time, which pursuant to subsection 130-80(2) will be the market value of the right at the acquisition time. As no amount is required to exercise the right, its market value, pursuant to section 139FE, is the market value of a Matched share at the time the right was acquired.

Right ends before Matched share is awarded

109. Section 139DD provides that where a qualifying right is lost without being exercised, the right is deemed to have never been acquired for the purposes of Division 13A.

110. Thus, where a participating employee acquires a right to a Matched share and it lapses before the receipt of a Matched share, section 139DD applies to deem the right to never have been acquired for the purposes of Division 13A.

111. As a consequence, the participating employee will be entitled to request an amendment to excise any amount included in their assessable income in respect of the acquisition of the right, pursuant to section 139DD.

Capital gains tax

112. For CGT purposes, the lapse of a right will constitute the ending of an intangible CGT asset (CGT event C2). Thus, pursuant to subsection 104-25(3) of the ITAA 1997, the participating employee may make a capital gain or a capital loss on the lapse of a right to a Matched share.

113. However, as the participating employee's lapsed right to a Matched Share is deemed never to have been acquired for the purposes of Division 13A (pursuant to section 139DD), Subdivision 130-D of the ITAA 1997 has no application and any capital gain or capital loss is determined under Part 3-1 of the ITAA 1997.

114. The first element of the cost base of the right to a Matched share will be nil as a participating employee does not provide any consideration for the acquisition of the right. The market value substitution rule has no application, pursuant to Item 5 in the table in subsection 112-20(3) of the ITAA 1997.

115. Whilst a participating employee will not receive any capital proceeds from the lapse of the right to a Matched share, the market value substitution rule will not apply as it is accepted that the lapse of the right constitutes an ending by expiry, pursuant to subsection 116-30(3) of the ITAA 1997.

116. As such, a participating employee will not make a capital gain where a right to a Matched share lapses under the Plan.

117. Whilst the first element of the cost base of a right to a Matched share is nil, a participating employee may nonetheless make a capital loss on the lapse of the right where other costs or expenditure are incurred, pursuant to section 110-25 of the ITAA 1997.

Right to Matched share where no election is made

118. 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).

119. Section 139CB(1) provides that where a share acquired on exercise of a right is not subject to restrictions or forfeiture, the cessation time for the right will be the earlier of:

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

120. Thus, where a participating employee:

- ceases employment (within the meaning of subsection 139CB(2)) by reason of special circumstances and receives a Matched share, the cessation time in relation to the right to a Matched share will occur when they cease employment; or
- does not cease employment and receives a Matched share on operation of the right, the cessation time in relation to the right to a Matched share will occur when they receive a Matched share.

121. The Commissioner considers that the exercise of a right does not necessarily require an action or activity by the owner of the right. Thus, where a right operates to give the owner of the right a share, the Commissioner considers the right to have been exercised for the purposes of Division 13A.

122. The amount of the discount to be included is determined under section 139CC and will depend on whether the right, or any share acquired in respect of the right, is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

123. Where a participating employee disposes of a Matched share in an arm's length transaction within 30 days of the cessation time, the amount of the discount included in their assessable income is, pursuant to subsection 139CC(3), the amount or value of the consideration they receive for the disposal of the Matched share.

124. For CGT purposes, any capital gain or capital loss made by a participating employee on the disposal of the Matched share (being a share acquired on exercise of a qualifying right in respect of which no section 139E election has been made) is disregarded where CGT event A1 happens to the Matched share in an arm's length transaction within 30 days of the cessation time, pursuant to subsection 130-83(2).

Disposal not within 30 days

125. Where the cessation time happens on the award of a Matched share and a participating employee does not dispose of the Matched share in an arm's length transaction within 30 days of the cessation time, the amount of the discount included in their assessable income is, pursuant to subsection 139CC(4), the market value of the Matched share at the cessation time.

126. Where the cessation time happens on the cessation of employment and a participating employee does not dispose of the Matched share in an arm's length transaction within 30 days of the cessation time, the amount of the discount included in their assessable income is, pursuant to subsection 139CC(4), the market value of the right to a Matched share at the cessation time. This will, pursuant to section 139FE, be the market value of a Matched share at the cessation time.

Capital gains tax

127. The first element of the cost base of a Matched Share (being a share acquired on exercise of a qualifying right in respect of which no section 139E election has been made) is in accordance with subsection 130-60(1) of the ITAA 1997, the cost base of the right and any amount paid to exercise the right. The cost base of the right to the Matched share is the market value of:

- the Matched share at the cessation time, where cessation occurs on the award of the Matched share and where CGT events A1, C2, E1, E2, E5, or I1 do not happen in relation to the share in an arm's length transaction within 30 days of the cessation time; or

- the right at the cessation time, where cessation occurs on ceasing employment and where CGT events A1, C2, E1, E2, E5, or I1 do not happen in relation to the right (or share) in an arm's length transaction within 30 days of the cessation time.

128. Where no amount is payable to exercise a right, the market value of the right on a particular day is the market value of the share that can be obtained on exercise of the right, pursuant to section 139FE. Thus, the market value of the right to a Matched share will be the market value of the Matched share.

Right ends before Matched share is awarded

129. Section 139DD provides that where a qualifying right is lost without being exercised, the right is deemed to have never been acquired for the purposes of Division 13A.

130. Thus, where a participating employee acquires a right to a Matched share and it lapses without having been exercised, section 139DD applies to deem the right to have never been acquired for the purposes of Division 13A.

131. As a consequence, the participating employee will not be assessable under Division 13A in respect of the right.

132. For CGT purposes, no capital gain will arise where a right to a Matched share lapses. Further details are as explained in paragraphs 112 to 117 of this Ruling.

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital proceeds
- CGT event C1-C3 - end of a CGT asset
- convertible interest
- cost base
- employee share scheme
- ordinary share
- resident
- rights
- share
- shareholder

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