


# ***CR 2009/57 - Income tax: Shell Group - 2009 Performance Share Plan Award***

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## Class Ruling

### Income tax: Shell Group – 2009 Performance Share Plan Award

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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

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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 provision dealt with in this Ruling is Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936).

#### Class of entities

3. The class of entities to which this Ruling applies is persons who are granted (and do not decline) a 2009 performance share award (award) under the Royal Dutch Shell plc (RDS) Performance Share Plan (the plan) while employed in Australia by a member of the RDS group of international companies (the Shell group) and who:

- are residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936); and

- are not temporary residents (within the meaning of subsection 995-1(1) of the *Income Tax Assessment Act 1997*),

from the time the award is granted until the time the award lapses or is satisfied.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

## 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 9 to 20 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

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8. This Ruling applies from 1 July 2008. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- The request for Class Ruling from Allens Arthur Robinson dated 26 June 2009;
- Rules of the Long Term Incentive Plan (Performance Share Plan), Restricted Share Plan and Deferred Bonus Plan (plan rules);
- The Australian supplement and a sample award certificate which apply to grants made in the year ended 30 June 2009;
- Relief instrument in relation to the operation of the plan which was issued by the Australian Securities Investment Commission in December 2008; and
- RDS plc Securities Dealing Policy.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. The operation of the plan is governed by a combination of the plan rules, the Australian supplement and an award certificate.

### Grant of an award

11. In the income year ended 30 June 2009, eligible employees of the Shell group in Australia were granted an award over a specified number of Class 'A' ordinary shares (shares) in the capital of RDS.

12. Eligible employees are notified of the grant of an award via an email. Acceptance of the award is deemed unless the employee disclaims the award in writing within 90 days of the award date. The applicant has advised that the date for disclaiming the award has subsequently been extended by agreement with eligible employees.

13. Where a participant does not disclaim an award within the notified period, the participant is deemed to have accepted the award on the award date as specified on the award certificate. An award is considered to be granted on the award date.

14. A participant is not required to pay for the grant of the award or on vesting, the delivery of any shares.

15. If a participant ceases employment prior to the award vesting, the award will lapse at that time. However, if the cessation of employment is a result of certain events such as injury, retirement and redundancy, the award will continue to be subject to the vesting conditions.

## **Vesting conditions**

16. Vesting of awards granted under the plan are subject to:
- performance conditions which are usually measured over a 3 year period; and
  - any other terms and conditions specified in the award certificate or in the plan.
17. The number of shares an award may be converted into will depend on the outcome of the performance measures.
18. To the extent that the vesting conditions are satisfied and subject to the ultimate grantor's discretion outlined in paragraph 19 of the Ruling, awards will vest and a participant will receive shares or a cash equivalent.
19. The grantor retains the ultimate discretion to determine whether a participant will receive cash or shares, at any time up until the date on which shares would otherwise have been transferred to a participant.
20. To the extent that the performance conditions are not satisfied, an award will not vest and any entitlement under the award will lapse.

## **Ruling**

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21. Where a participant is notified of an award and does not decline the award within the notified period, they will not acquire a right under an employee share scheme for the purposes of Division 13A at the time the participant is granted the award.

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**Commissioner of Taxation**

30 September 2009

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## Appendix 1 – Explanation

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**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.*

22. The expression 'right' as used in Division 13A is not defined. However, as 'right' and 'right to acquire a share' are used interchangeably throughout Division 13A, the Commissioner considers that a right should be taken to mean a 'right to acquire a share'.

23. Where at the time a right is granted to an employee:

- the employee has a right to acquire a share on the exercise or operation of the right; and
- for the purposes of subsection 139B(2) of the ITAA 1936, the amount of the discount in respect of such a right can reasonably be determined,

the Commissioner considers the right to be a right for the purposes of Division 13A.

24. However, where a taxpayer acquires a right under a scheme that purports to be a right to acquire a share, and the scheme operates so that it is not the taxpayer who makes the ultimate decision as to whether they actually receive a share or cash in lieu of a share, the right granted will not be considered to be a right to acquire a share for the purposes of Division 13A at that time.

25. Under the plan, the grantor of an award may determine, at their discretion, to satisfy a participant's vested right by either the payment of cash or the issue or transfer of shares. The cash discretion is able to be exercised by the grantor at any time up until the date in which shares would otherwise have been transferred to the participant.

26. Therefore, in these circumstances, the Commissioner does not consider that a participant has acquired a right for the purposes of Division 13A at the time that an award is granted to (and not declined by) a participant under the plan.

## **Appendix 2 – Detailed contents list**

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27. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings:*

TR 2006/10

*Subject references:*

- employee share schemes

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B(2)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

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*ATO references*

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