


CR 2013/9 - Income tax: foreign income tax offset: employee share scheme interests - ACE Insurance Ltd and ACE Group

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Class Ruling

Income tax: foreign income tax offset: employee share scheme interests – ACE Insurance Ltd and ACE Group

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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

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 section 770-10 of the *Income Tax Assessment Act 1997* (ITAA 1997)

3. All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

4. The class of entities to which this Ruling applies is employees of ACE Insurance Limited (ACE) or any of its subsidiaries (ACE group) who acquire stock options, rights to shares or restricted shares (the ESS interests) under the ACE Limited 2004 Long-term Incentive Plan (the plan) on or after 1 July 2008 and:

- were a resident of, and exercising employment in, Singapore for the purpose of that country's tax law and the Singaporean agreement¹ at the time of acquisition of the ESS interests;
- before the ESS interests irrevocably vest, cease working in Singapore, repatriate to Australia and work within the ACE group in Australia;
- upon repatriation, become a resident of Australia (within the meaning of that term in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)) and for the purposes of the Singaporean agreement and are not a temporary resident (within the meaning of that term in subsection 995-1(1)); and
- include an amount in their assessable income in the relevant income year in respect of the ESS interests under section 83A-110.

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

Qualifications

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 10 to 14 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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¹ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1969] ATS 14.

Date of effect

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

9. The description of the scheme set out below 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 dated 20 January 2012;
- ACE Limited 2004 Long-term Incentive Plan;
- communications with representatives of the applicant dated 1 May 2012.

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. ACE established the plan in 2004 to attract, retain and motivate employees eligible to participate in the plan.

11. The plan is administered by a committee who select the employees to be granted awards under the plan (the participants) and to whom invitations are sent, the types of awards to be granted and the applicable terms, conditions, performance criteria, restrictions and other provisions of such awards.

12. Where ESS interests are granted to participants, the date of the grant is specified in the invitation.

13. The exercise or vesting (as appropriate) of the ESS interests is subject to the satisfaction of certain conditions, including that a participant remain an employee for the ACE Group during the vesting period. The ESS interests are generally granted each February and do not vest for a period of time not more than ten (10) years after the date of grant.

Ruling

14. Under subsection 770-10(1), a participant will be entitled to a tax offset for the income year for Singaporean tax a participant has paid on gains derived from an ESS interest that are included in the participant's assessable income for that income year.

Class Ruling

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Page status: **legally binding**

Commissioner of Taxation

30 January 2013

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.*

Taxing of ESS interests

15. Prior to the participant's departure from Singapore, the participant is subject to tax in Singapore on the amount of the gains from the ESS interests based on the difference between the market value of the underlying shares one month prior to departure and the exercise price.² The participant pays Singapore tax at that point in respect of the amount of the gains from the ESS interests.

16. Depending on the point in time at which the ESS interests were granted to a participant, Australia taxes the ESS interests granted under the plan in accordance with either former Division 13A of the ITAA 1936 or Division 83A.

17. ESS interests granted under the plan prior to 1 July 2009 are 'qualifying shares or rights' under Division 13A of the ITAA 1936³ and the taxing point is deferred until the earliest cessation event.⁴ When the cessation event occurs, any gain in relation to the ESS interests is included in the participant's assessable income, except to the extent that the amount relates to employment in Singapore. The extent to which the amount relates to employment in Singapore is based on the number of days during which employment is exercised in Singapore during the vesting period to the total number of days of the vesting period.

18. The ESS interests granted after 30 June 2009 meet the conditions for deferred taxation under Subdivision 83A-C. Consequently, there will be no tax payable on the discount until the earliest deferred taxing point. As the participant is a resident of Australia at the time of the deferred taxing point, his or her assessable income in Australia includes the whole gain on the ESS interests as at the deferred taxing point.

² Under Section 10(6) of the *Singapore Income Tax Act* (SITA), gains derived by any person from a right or benefit to acquire shares, by reason of any office or employment held are employment income derived from Singapore. Under section 10(7) of the SITA, the participant is deemed to have derived gains from unexercised or unvested ESS interests when they cease employment in Singapore, regardless of whether the participant is a resident of Singapore for tax purposes. Such gains are included in assessable income of the participant.

³ Including ESS interests which are deemed to have been acquired prior to 1 July 2009 through the operation of section 83A-340.

⁴ ESS interests granted before 1 July 2009 that have not had a cessation event occur before 1 July 2009 are transitioned to Division 83A by Division 83A of the *Income Tax (Transitional Provisions) Act 1997*. The transitional rules preserve the time of the taxing point as the cessation time under the former Division 13A of the ITAA 1936.

Entitlement to foreign income tax offset

19. In order to be entitled to a tax offset for foreign income tax under subsection 770-10(1), the participant must have paid an amount of foreign tax in relation to the gains from the ESS interests that are included in their assessable income.
20. Subsection 770-15(1) defines 'foreign income tax' to mean, for present purposes, tax that is imposed by a law other than an Australian law and is a tax on income.
21. The tax paid by the participant has been levied by Singapore in accordance with the SITA, a law other than an Australian law. Furthermore, the tax imposed by the SITA is a tax on income, profits or gains. Accordingly, the tax paid by the participant in Singapore is 'foreign income tax' as defined.
22. Where the foreign jurisdiction has a tax treaty with Australia, the foreign income tax includes only the tax that has been correctly imposed in accordance with that tax treaty.⁵ As Singapore taxes the gains from the ESS interests at a time when the participant is a resident of Singapore for the purposes of the Singapore tax law, such income has been taxed in accordance with the Singaporean agreement.
23. Therefore, the conditions in subsection 770-15(1) have been satisfied.

Exception for certain residence based income taxes

24. Subsection 770-10(3) provides that foreign income tax does not count toward the tax offset for the year if that tax is paid to a foreign country because the participant is a resident of that country for tax purposes and in respect of amounts sourced outside that country.
25. While the participant is a resident of Singapore for the purposes of the Singapore tax law when the tax is paid, the tax on the gains from the ESS interests would be payable regardless of whether the participant is a resident of Singapore for tax purposes or not (see footnote 2). Therefore, the tax was paid not because the participant was a resident of Singapore and subsection 770-10(3) does not apply in this case.
26. Accordingly, the tax paid in Singapore on the gains from the ESS interests which is included in the assessable income of the participant in Australia for the income year will count towards the foreign income tax offset for the purposes of subsection 770-10(1).

⁵ See the note to subsection 770-15(1).

Gains from ESS interests acquired pre 1 July 2009

27. The gain from the ESS interests acquired prior to 1 July 2009 that relates to employment in Australia is included in the assessable income of a participant. Therefore, the tax paid in Singapore on the gains from the ESS interests will count towards the foreign income tax offset to the extent that Singapore tax has been paid on the gain included in the assessable income of a participant.⁶

Gains from ESS interests acquired post 1 July 2009

28. The whole gain from the ESS interests acquired after 1 July 2009 is included in assessable income. Therefore, the full amount of the tax paid in Singapore on the gains on the ESS interests will count towards the foreign income tax offset.

29. However, where the market value of the underlying shares at the taxing point in Singapore exceeds the market value of the underlying shares used to calculate the gain on the ESS interests in Australia, only a proportionate share of the tax paid in Singapore (the share that corresponds to the part that is included in assessable income) will count towards foreign income tax offset.

Foreign income tax offset limit

30. The amount of the foreign income tax that counts towards the foreign income tax offset is subject to the foreign income tax offset limit.⁷

31. Where the participant is claiming a foreign income tax offset of more than \$1,000, he or she must calculate their foreign income tax offset limit.⁸ If the amount of the foreign income tax offset exceeds the limit, then the tax offset must be reduced by the amount of the excess⁹ to the amount of the limit. Any foreign income tax paid in excess of the limit is not available to be carried forward to a later income year and cannot be refunded to the participant.

⁶ See subsection 770-10(1).

⁷ See subsection 770-75(2).

⁸ More information about how to calculate the foreign income tax offset limit is contained in the 'Guide to the foreign income tax offset rules'.

⁹ See subsection 770-75(1).

Refund of tax paid in Singapore

32. If a participant becomes entitled at any time to a refund of any amount of the tax paid in Singapore on the gains from the ESS interests, the amount of any such refund is taken under section 770-140 not to be an amount of foreign income tax paid. Accordingly, the amount of any foreign income tax offset to which a participant is entitled is reduced. In such instances, the participant should request an amendment to ensure their assessment reflects the correct amount of foreign income tax offset.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes
- foreign tax credits

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 Div 13A
- ITAA 1997 Div 83A
- ITAA 1997 SubDiv 83A-C
- ITAA 1997 83A-110
- ITAA 1997 83A-340
- ITAA 1997 770-10(1)
- ITAA 1997 770-10(3)
- ITAA 1997 770-15(1)
- ITAA 1997 770-75(1)

- ITAA 1997 770-75(2)

- ITAA 1997 770-140

- ITAA 1997 995-1(1)

- *Income Tax (Transitional Provisions) Act 1997 Div 83A*

- TAA 1953

- Copyright Act 1968

- *Singapore Income Tax Act 10(6)*

- *Singapore Income Tax Act 10(7)*

Other references:

Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1969] ATS 14

ATO references

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