


CR 2015/109 - Income tax: Alphabet Inc. - employee share schemes, scrip for scrip roll-over, Division 615 roll-over

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Class Ruling

Income tax: Alphabet Inc. – employee share schemes, scrip for scrip roll-over, Division 615 roll-over

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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, 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 provisions dealt with in this Ruling are:

- former section 139CB of the *Income Tax Assessment Act 1936* (ITAA 1936)
- former section 139CD of the ITAA 1936
- former section 139DQ of the ITAA 1936
- former section 139DR of the ITAA 1936
- former section 139GCC of the ITAA 1936
- section 83A-130 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 115-30 of the ITAA 1997

- section 124-15 of the ITAA 1997
- Subdivision 124-M of the ITAA 1997
- Section 130-80 of the ITAA 1997
- Division 615 of the ITAA 1997
- section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

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

Class of entities

3. The class of entities to which this Ruling applies is either or both:
- persons (Participants) who are Australian resident employees of Google Inc. and its subsidiaries, Google Australia Pty Ltd (Google Australia) and Google Payments Australia Pty Ltd (Google Payments Australia) and, immediately prior to the restructure, held any of the following:
 - stock options (that are qualifying rights as defined under former section 139CD of the ITAA 1936) acquired before 1 July 2009 and are not covered by an election made under former section 139E of the ITAA 1936 and have not had a cessation time as mentioned in former section 139B(3) of the ITAA 1936 happen to them before the restructure (Pre-1 July 2009 interests), or
 - Google Stock Units (GSUs) or stock options acquired on or after 1 July 2009 to which Subdivision 83A-C applies, and they have not had an ESS deferred taxing point happen to them before the restructure, or
 - stock options that have been subject to an ESS deferred taxing point and the holder is not a ‘significant stakeholder’ or ‘common stakeholder’ in relation to the scheme within the meaning of these expressions in Subdivision 124-M (Google Option Holders)
 - Australian resident shareholders in Google Inc. (Google Shareholders)

who are not temporary residents (within the meaning of subsection 995-1(1)), and do not hold their relevant Pre-1 July 2009 interests, GSUs, stock options or shares as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, they hold their relevant Pre-1 July 2009 interests, GSUs, stock options or shares on capital account.

4. The class of entities to which this Ruling applies does not extend to those subject to the Taxation of Financial Arrangements rules in Division 230 in relation to gains and losses on their Google shares and stock options.

(Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them).

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 22 of this Ruling.

7. 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.

Date of effect

8. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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 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:

- Class Ruling application dated 11 September 2015
- Google Inc. 2004 Stock Plan
- Google Inc. 2004 Stock Plan Stock Option Agreement
- Google Inc. 2004 Google Stock Unit Agreement
- Google Inc. 2012 Stock Plan

- Google Inc. 2012 Stock Plan Google Restricted Stock Unit Agreement.

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. Google Inc. (Google) is a foreign resident company. It was listed on the NASDAQ and was the ultimate parent of the Google group.

11. Google had two classes of shares listed on the NASDAQ:

- Class A shares, which had one voting right each
- Class C shares, which had no voting rights, but were considered ordinary shares.

The restructure

12. On 2 October 2015, the Google group underwent a restructure whereby Alphabet Inc. became the new parent of the Google group. The restructure involved the following steps:

- Google formed two new entities – Alphabet Inc. (Alphabet), and Maple Technologies Inc. (Merger Sub). Alphabet was a direct, wholly-owned subsidiary of Google, and Merger Sub was a direct, wholly-owned subsidiary of Alphabet.
- On the date of the restructure, Merger Sub merged into Google, with Google being the surviving company.
- By virtue of the merger and without any further action, each share of Google converted into a share of the same class in Alphabet and each share of Merger Sub converted into a share of Google.
- Google cancelled its shares in Alphabet, and Alphabet listed on the NASDAQ in place of Google.

13. The restructure was conducted under the General Corporation Law of the State of Delaware.

14. The restructure had no substantive effect on, nor required any investment decision by, Google shareholders.

15. The restructure did not alter the percentage ownership or rights of Google's shareholders, nor required them to pay any monetary consideration for each Alphabet share they received for the surrender of Google shares.

16. The rights attaching to shares in Alphabet are equivalent in all material respects to the rights attached to shares in Google, and the relative value of the replacement Alphabet shares is the same as the original Google shares.

Google stock plans

17. Google maintained the Google Inc. 2004 Stock Plan and the Google Inc. 2012 Stock Plan (Plans) under which employees of the Google group were granted GSUs and stock options. Upon grant, employees became Participants in the Plans.

18. GSUs and stock options acquired by Participants were governed by the rules of the Plans, and were subject to the Google Stock Unit Agreement or the Google Stock Option Agreement, as the case required.

19. GSUs or stock options were granted to Participants for no consideration.

20. A portion of stock options held by Participants were acquired prior to 1 July 2009 (Pre-1 July 2009 interests). Google stopped granting stock options to employees in Australia from 1 July 2009.

Impact of restructure on Google stock plans

21. Following the restructure, Alphabet assumed all the rights and obligations of Google in relation to outstanding unvested GSUs and all outstanding unvested and vested stock options under the Plans. The Plans were renamed Alphabet Inc. 2004 Stock Plan and Alphabet Inc. 2012 Stock Plan.

22. The GSUs and stock options are subject to the same terms and conditions as applied prior to the restructure, but automatically converted into GSUs and stock options over shares in Alphabet.

Ruling

No ESS deferred taxing point upon restructure

23. The restructure constituted a restructure within the meaning of both section 83A-130 and former section 139GCC of the ITAA 1936.

24. Where Participants held Pre-1 July 2009 interests, the replacement interests in Alphabet are treated as a continuation of Pre-1 July 2009 interests for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, and no ESS deferred taxing point arises as a result of the restructure.

25. Where the Participants held GSUs and stock options issued on or after 1 July 2009 that have not been subject to an ESS deferred taxing point, the replacement GSUs and stock options in Alphabet are treated as a continuation of the GSUs and stock options for the purposes of section 83A-130, and no ESS deferred taxing point arises as a result of the restructure.

Disposal of GSUs, shares and stock options – CGT event A1

26. CGT event A1 happened as a result of the disposal by a Google Shareholder of their interests in Google for replacement shares in Alphabet. Likewise, CGT event A1 happened as a result of the disposal by a Google Option Holder of their stock options which have been subject to an ESS deferred taxing point, for replacement stock options in Alphabet.

27. CGT event A1 also happened as a result of the disposal by a Participant of their Pre-1 July 2009 interests, GSUs and stock options that have not been subject to an ESS deferred taxing point, for replacement GSUs and stock options in Alphabet.

28. The time of CGT event A1 was when the disposal of the interests occurred, which was on the date of restructure (paragraph 104-10(3)(b)).

29. A Google Shareholder or a Google Option Holder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Google share or stock option exceeded its cost base. A Google Shareholder or a Google Option Holder made a capital loss if the capital proceeds from the disposal of a Google share or stock option were less than its reduced cost base (subsection 104-10(4)).

30. Likewise, a Participant made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Pre-1 July 2009 interest, GSU or stock option that have not been subject to an ESS deferred taxing point exceeded its cost base. A Participant made a capital loss if the capital proceeds from the disposal of a Pre-1 July 2009 interest, GSU or stock option were less than its reduced cost base (subsection 104-10(4)).

31. However, any capital gain or loss arising from the disposal of a Pre-1 July 2009 interest, GSU or stock option that have not been subject to an ESS deferred taxing point is disregarded pursuant to subsection 130-80(1).

Application of Division 615 roll-over

32. A Google Shareholder is eligible to choose roll-over under Division 615.

33. Roll-over relief under Division 615 is not available for any capital gain or capital loss made on the disposal of stock options.

34. A Google Shareholder who chooses roll-over under Division 615 will disregard any capital gain or capital loss made from the disposal of Google shares for Alphabet shares at the time of the restructure.

35. For Google Shareholders who choose roll-over relief under Division 615, the first element of the cost base and reduced cost base of each Alphabet share they have acquired under the restructure will be the total of the cost bases of all Google shares (worked out when the Google Shareholder disposed of their shares) apportioned over the number of Alphabet shares (sections 124-15 and 615-40).

36. For the purposes of determining whether a capital gain made from any later disposal of Alphabet shares is eligible to be treated as a discount capital gain, a Google shareholder who chooses roll-over relief under Division 615 will be taken to have acquired their Alphabet shares on the same date they acquired their Google shares (item 2 of the table in subsection 115-30(1)).

Application of scrip for scrip roll-over under Subdivision 124-M

37. A Google Shareholder cannot obtain a scrip for scrip roll-over under Subdivision 124-M as they are eligible to choose roll-over under Division 615 (subsection 124-795(3)).

38. A Google Option Holder who made a capital gain from the disposal of their stock options is eligible to choose scrip for scrip roll-over under Subdivision 124-M. Scrip for scrip roll-over is not available for a capital loss.

39. A Google Option Holder who chooses for the scrip for scrip roll-over to apply will disregard any capital gain made on the disposal.

40. For Google Option Holders who choose for the scrip for scrip roll-over to apply, the first element of the cost base and reduced cost base of each replacement stock option in Alphabet received is determined by reasonably attributing to it the cost base of each stock option exchanged (subsection 124-785(2)).

41. For the purposes of determining whether a capital gain made from any later disposal of Alphabet stock options is eligible to be treated as a discount capital gain, a Google Option Holder who chooses scrip for scrip roll-over under Subdivision 124-M will be taken to have acquired their stock options in Alphabet on the same date they acquired their Google stock options (item 2 of the table in subsection 115-30(1)).

Commissioner of Taxation

16 December 2015

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.*

No ESS deferred taxing point upon restructure

Pre-1 July 2009 interests

42. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to the Subdivision) applies in relation to the Pre-1 July 2009 interests because:

- the rights were acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009
- former subsection 139B(3) of the ITAA 1936 applied in relation to the rights
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 and former section 139CB of the ITAA 1936 for those rights did not occur before 1 July 2009.

43. The ESS deferred taxing point for rights is usually worked out under section 83A-120. However, because Subdivision 83A-C applies to the Pre-1 July 2009 interests by virtue of subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

44. Paragraph 83A-5(4)(b) of the IT(TP)A 1997 provides that the ESS deferred taxing point for Pre-1 July 2009 interests is the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-120(3).

45. Therefore, whether an ESS deferred taxing point arises as a consequence of the restructure will depend on whether a cessation time mentioned in former subsection 139B(3) of the ITAA 1936 results from the restructure.

46. Former Subdivision DA of the ITAA 1936 can affect whether a Participant is treated as having disposed of a right or ceased employment. Provided that the conditions under former section 139DR of the ITAA 1936 are met, former subsection 139DQ(1) of the ITAA 1936 provides that the replacement rights that the Participants acquired as a result of the restructure are considered a continuation of the Pre-1 July 2009 interests.

47. The restructure as described in the scheme description is a restructure for the purposes of subsection 139DQ(1) of the ITAA 1936, having satisfied former 139GCC of the ITAA 1936.

48. Participants who held Pre-1 July 2009 interests meet the conditions under former section 139DR of the ITAA 1936 as:

- immediately before the restructure, Participants held rights in the old company (Google) under the Plans
- the Participants are employees of Alphabet or one of its subsidiaries at the time they receive replacement options in Alphabet
- the replacement options are considered matching rights of the Pre-1 July 2009 interests and are rights to acquire ordinary shares
- at the time the Participant acquired the replacement options in Alphabet, the Participant did not hold a legal or beneficial interest in more than 5% of the shares of Alphabet, nor was 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 Alphabet.

49. Accordingly, the replacement options in Alphabet are considered a continuation of the Pre-1 July 2009 interests, and therefore the restructure did not trigger an ESS deferred taxing point.

GSUs and stock options acquired after 1 July 2009 that have not been subject to an ESS deferred taxing point

50. Where the Participant's replacement GSUs or stock options are, for the purposes of section 83A-130, treated as a continuation of GSUs or stock options in Google, the restructure alone would not trigger an ESS deferred taxing point.

51. Section 83A-130 relevantly provides that where as a result of a change in ownership (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching any of the old ESS interests
- the replacement ESS interest relate to ordinary shares;
- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company

- the employee at the time they acquire the replacement ESS interest:
 - does not hold and is not taken to hold a beneficial interest in more than 5% of the shares in the new company (or 10% for ESS interests acquired on or after 1 July 2015)
 - is not in a position and is not taken to be 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 new company (or 10% for ESS interests acquired on or after 1 July 2015).

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

52. The restructure as described in the scheme description is a restructure for the purposes of section 83A-130, having satisfied subparagraph 83A-130(1)(a)(ii) and a Participant:

- stopped holding ESS interests in Google that were acquired under an employee share scheme
- is regarded as acquiring replacement ESS interests in the replacement company, Alphabet:
 - that relate to ordinary shares
 - that can reasonably be regarded as matching the ESS interests in Google
- is employed by Alphabet or a subsidiary of Alphabet
- at the time they acquired their replacement ESS interests
 - does not hold and is not taken to hold a beneficial interest in more than 5% of the shares in the new company (or 10% for ESS interests acquired on or after 1 July 2015)
 - is not in a position and is not taken to be 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 new company (or 10% for ESS interests acquired on or after 1 July 2015).

53. Accordingly, the Participant's replacement ESS interests are, for the purposes of Division 83A, treated as a continuation of the ESS interests in Google, and the restructure does not cause an ESS deferred taxing point to occur.

CGT treatment of Pre-1 July 2009 interests, GSUs, stock options that have not been subject to an ESS deferred taxing point

54. CGT event A1 happened upon the disposal of Pre-1 July 2009 interests, GSUs and stock options in Google in exchange for GSUs and stock options in Alphabet at the time of the restructure.

55. Pursuant to subsection 104-10(4), a capital gain will arise upon the conversion of ESS interests in Google to ESS interests in Alphabet if the capital proceeds from the disposal were more than the ESS interest's cost base. Similarly, a capital loss will arise if the capital proceeds from the disposal were less than the ESS interest's cost base.

56. However, subsection 130-80(1) applies to disregard any capital gain or capital loss made from CGT event A1 happening to the Pre-1 July 2009 interests, GSUs and stock options, as:

- they are ESS interests that were acquired under an employee share scheme (paragraph 130-80(1)(a))
- the CGT event that happens is not CGT E4, G1 or K8 (paragraph 130-80(1)(b))
- Subdivision 83A-C applies to the Pre-1 July 2009 interests, GSUs and stock options, and CGT event A1 happened before the ESS deferred taxing point (subparagraph 130-80(1)(d)(ii))
- Subdivision 83A-C applies to the Pre-1 July 2009 interests, GSUs and stock options, and CGT event A1 did not happen because the ESS interest was forfeited or lost (paragraphs 130-80(2)(a) and (b)).

Conditions for roll-over under Division 615 are satisfied

57. The roll-over relief provided under Division 615 enables a member of a company to disregard a capital gain or capital loss from a share or a unit that is either disposed of, or redeemed or cancelled, as part of a reorganisation of the affairs of the company, where the member becomes the owner of new shares in another company in exchange.

58. Division 615 contains a number of conditions for eligibility to choose roll-over. The main conditions that are relevant to the disposal of shares in Google are:

- at least two entities must own all the shares or units in the original entity (paragraph 615-5(1)(b))
- there must be a scheme for reorganising the original entity's affairs, and consideration for the disposal of the shares or units in the original entity must consist of receiving shares in another company (the interposed company) and nothing else (paragraph 615-5(1)(c))

- the interposed company must own all the shares or units in the original entity immediately after all the exchanging members have disposed of their shares or units in the original entity (the completion time) (section 615-15)
- immediately after the completion time, each exchanging member must own a whole number of shares in the interposed company (paragraph 615-20(1)(a))
- immediately after the completion time, each exchanging member must own a percentage of the shares in the interposed company that were issued to all the exchanging members of the original entity that is equal to the percentage of the shares or units in the original entity that the exchanging member owned (paragraph 615-20(1)(b))
- immediately after the completion time, the exchanging members must own all the shares in the interposed company, or entities other than those members must own no more than 5 shares in the interposed company and the market value of those shares is such that it is reasonable to treat the exchanging members as owning all the shares (subsection 615-25(3))
- the shares issued in the interposed company must not be redeemable shares (subsection 615-25(1))
- the ratio test in subsection 615-20(2) is met.

59. Under the restructure, Google Shareholders received ordinary shares in Alphabet for their shares in Google. Following the restructure, Alphabet owns all the shares in Google, and Google Shareholders own all of the shares in Alphabet, in a percentage equal to the percentage of shares they previously held in Google. All shareholders own a whole number of shares in Alphabet.

60. Accordingly, Google Shareholders satisfy the conditions for roll-over under Division 615.

61. For Google Shareholders who choose roll-over relief under Division 615, the roll-over consequences are set out in paragraphs 34 to 36 of this Ruling.

Conditions for scrip for scrip roll-over are satisfied

62. Scrip for scrip roll-over enables a shareholder or an option holder to disregard a capital gain made from a share or option to acquire shares that is disposed of as part of a corporate takeover or scheme of arrangement if the shareholder or option holder receives a replacement share or option in the exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share or option.

63. Scrip for scrip roll-over is unavailable where a shareholder or an option holder is eligible to choose roll-over under Division 615 or Division 122.

64. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder or option holder being eligible to choose scrip for scrip roll-over. The main conditions that are relevant to this scheme are:

- shares in a company are exchanged for shares in another company
- the exchange occurs as part of a single arrangement;
- conditions for roll-over are satisfied
- further conditions are not applicable or are satisfied
- exceptions to obtaining scrip for scrip roll-over are not applicable.

65. Under the scheme, the conditions for a Google Option Holder to be eligible to choose scrip for scrip roll-over under Subdivision 124-M are satisfied.

66. For Google Option Holders who choose scrip for scrip roll-over to apply, the roll-over consequences are set out in paragraphs 39 to 41 of this Ruling.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936
 - ITAA 1936 Div 13A
 - ITAA 1936 139B(3)
 - ITAA 1936 139CB
 - ITAA 1936 139CD
 - ITAA 1936 Subdiv DA
 - ITAA 1936 139DQ
 - ITAA 1936 139DQ(1)
 - ITAA 1936 139DR
 - ITAA 1936 139E
 - ITAA 1936 139GCC
 - ITAA 1997
 - ITAA 1997 Div 83A
 - ITAA 1997 Subdiv 83A-C
 - ITAA 1997 83A-120(3)
 - ITAA 1997 83A-130
 - ITAA 1997 83A-130(1)(a)(ii)
 - ITAA 1997 104-10
 - ITAA 1997 104-10(3)(b)
 - ITAA 1997 104-10(4)
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 - ITAA 1997 Div 230
 - ITAA 1997 Div 615
 - ITAA 1997 615-5(1)(b)
 - ITAA 1997 615-5(1)(c)
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 - ITAA 1997 615-20(2)
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 - ITAA 1997 977-50
 - ITAA 1997 995-1(1)
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ATO references

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Income tax ~~ Capital gains tax ~~ Restructures / mergers and acquisitions / demergers
Income tax ~~ Capital gains tax ~~ Rollovers ~~ Scrip for scrip

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