



PCG 2017/D9 - Dividend equivalent payments made by a trustee under an employee share scheme

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 This document has changed over time. This version was published on *8 June 2017*



Dividend equivalent payments made by a trustee under an employee share scheme

Relying on this draft Guideline

This draft Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Guideline sets out the safe harbour terms on which the Commissioner will accept, for income tax purposes, that a dividend equivalent payment made to an employee¹ participant of an employee share scheme² (ESS) is not connected with the employee's employment and will not be assessable to the employee under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

¹ 'Employee' in this draft Guideline has its common law meaning, as extended by section 83A-320 of the *Income Tax Assessment Act 1997* (ITAA 1997) (which includes relationships similar to employment within the scope of Division 83A of the ITAA 1997, dealing with employee share schemes). It includes a director of an incorporated company and may include a past employee who is still a participant of the ESS.

² Within the meaning of subsection 83A-10(2) of the ITAA 1997.

2. If a dividend equivalent payment does not meet all of the safe harbour terms set out in this draft Guideline, it does not mean that the payment will be deemed to be connected to the employee's employment. It merely means that there is no certainty provided under this Guideline. Employees will need to otherwise demonstrate that the dividend equivalent payment was not connected to the employee's employment for the amount of the payment not to be assessable as remuneration under section 6-5 of the ITAA 1997.

3. For the purpose of this draft Guideline, the term 'dividend equivalent payment' refers to a cash payment paid by a trustee of a trust to an employee participant of an ESS (who is also a beneficiary of the trust) and that cash payment is funded from dividends (or income from other sources) that the trustee has been assessed on in previous income years because no beneficiary of the trust was presently entitled to the income.³ The amount of the dividend equivalent payment is ordinarily calculated by reference to the amount of the dividends (or other income) received by the trustee during a specified period, less the amount of tax paid by the trustee on that income.

4. In this draft Guideline, the term 'trust' is a reference to a trust that is set up by an employer under an ESS to provide employees with an ESS interest.⁴

5. On 7 June 2017, the Commissioner issued draft Taxation Determination TD 2017/D2 *Income tax: when will a dividend equivalent payment, made by a trustee under an employee share scheme that delivers ESS interests taxed by Subdivision 83A-B or 83A-C of the Income Tax Assessment Act 1997, be assessable as remuneration under section 6-5?*

6. TD 2017/D2 sets out the Commissioner's view that a dividend equivalent payment paid by a trustee under an ESS is assessable to an employee as ordinary income⁵ where the payment has a sufficient connection with the employee's employment. The final Determination, when issued, will apply to ESS interests issued on or after 1 October 2017.

Date of effect

7. When finalised, this draft Guideline is proposed to apply to dividend equivalent payments where they are paid under the terms and conditions attached to ESS interests issued on or after 1 October 2017.

Does this Guideline apply to you?

8. This Guideline applies to you if you receive a dividend equivalent payment that is paid under the terms and conditions attached to an ESS interest issued to you on or after 1 October 2017.

³ The trustee is assessed and liable to pay tax on this income under section 99A of the *Income Tax Assessment Act 1936* (ITAA 1936).

⁴ As defined in section 83A-10 of the ITAA 1997.

⁵ Under section 6-5 of the ITAA 1997.

Guideline

9. The Commissioner will accept that the payment is not connected to your employment, and therefore is not assessable to you as remuneration under section 6-5 of the ITAA 1997, if all of the following are satisfied in relation to the payment:

- the trustee of the trust is an independent trustee, that is not an associate⁶ of your employer
- the dividend equivalent payment is consideration for an arm's length surrender, exercise or disposal of an asset (property or rights) and that asset was acquired by you in return for valuable and arm's length consideration (or as remuneration, and those rights were appropriately dealt with as such)
- the dividend equivalent payment arises because you are a beneficiary of a trust and the trustee has exercised its power under the deed to provide the dividend equivalent payment to you independent of an arrangement or understanding with, or direction by, your employer
- the dividend equivalent payment does not rely on you continuing employment with your employer, nor does the trustee have regard to, nor is the payment conditional upon, individual employment-related performance conditions
- the timing and amount of the dividend equivalent payment is identical in respect of all beneficiaries who hold the same asset, regardless of their employment relationship with your employer, and
- the trustee paid tax on the dividends (or other trust income) that the dividend equivalent payment is calculated on⁷ in the income year the dividends or other income were received.

Commissioner of Taxation

8 June 2017

⁶ Within the meaning of section 318 of the ITAA 1936.

⁷ Under section 99A of the ITAA 1936.

Your comments

10. You are invited to comment on this draft Practical Compliance Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

Due date: 7 July 2017

Contact officer details have been removed.

References

ATOlaw topic(s)	Income tax ~~ Assessable income ~~ Employee share schemes ~~ Other Income tax ~~ Assessable income ~~ Employment related ~~ Employee benefits
Legislative references	ITAA 1997 ITAA 1997 6-5 ITAA 1997 Div 83A ITAA 1997 Subdiv 83A-B ITAA 1997 Subdiv 83A-C ITAA 1997 83A-10 ITAA 1997 83A-10(2) ITAA 1997 83A-320 ITAA 1936 ITAA 1936 99A ITAA 1936 318
Related Rulings/Determinations	TD 2017/D2
ATO references	1-BFNE1EY
BSL	PGH

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