


TD 92/D170 - Income tax: employee share acquisition scheme: if partly paid shares are sold by the trustee of a scheme prior to the removal of restrictions, will the lump sum payment received by the employee (representing the excess of the sale price of shares over the unpaid acquisition price) be assessable income under section 26AAC or any other provision of the Income Tax Assessment Act 1936?

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Draft Taxation Determination

Income tax: employee share acquisition scheme: if partly paid shares are sold by the trustee of a scheme prior to the removal of restrictions, will the lump sum payment received by the employee (representing the excess of the sale price of shares over the unpaid acquisition price) be assessable income under section 26AAC or any other provision of the *Income Tax Assessment Act 1936*?

1. Where a share is issued to a trustee of an employee share acquisition scheme subject to conditions that limit the right of the employee to dispose of the share until it has been fully paid, the employee acquires **a right to acquire** the share only. Where the right to acquire the share is subsequently forfeited, prior to the removal of restrictions, an acquisition for the purposes of paragraph 26AAC(15)(b) does not take place (see *Case X43 90 ATC 354*; (1990) 21 ATR 3377). Accordingly, the lump sum payment (being the excess of the sale price of the share over the unpaid acquisition price of the share) received by the employee from the trustee is not assessable income under section 26AAC.

3. Similarly, the payment is not assessable income of the employee under subsection 25(1) or paragraph 26(e) (see *FC of T v. McArdle* 89 ATC 4051; (1988) 19 ATR 1901). However, when the trustee sells a share acquired after 19 September 1985 this will constitute a disposal by the trustee for capital gains tax purposes. Generally, where the participating employee is not under a legal disability, section 97 will deem any capital gain realised by the trustee on the disposal of the share to be included in the assessable income of the employee.

4. The same treatment applies to payments received on surrender of share options and share rights prior to the removal of restrictions.

Example:

In 1989 shares are allotted to a trustee for the benefit of a taxpayer under an employee share acquisition scheme. The issue price is \$1.50 per share with \$0.50 payable on allotment and the balance of \$1.00 payable in two \$0.50 instalments when called. On default in the payment of instalments, the trustee is to sell the shares, apply the proceeds to pay the outstanding instalments and pay any remaining balance to the taxpayer. The rules of the scheme prevent the taxpayer from disposing of any shares until they are fully paid.

In 1992 the taxpayer leaves employment and defaults on payment of instalments. As a result, the trustee disposes of the shares for \$3.00 per share, retains \$1.00 per share and pays the taxpayer \$2.00 per share. Of this \$2.00 per share, \$1.50 represents the excess of the sale price of \$3.00 over the allotment price of \$0.50 and the \$1.00 retained by the trustee and is not assessable to the taxpayer under the income tax provisions but is subject to the capital gains tax provisions.

Commissioner of Taxation

15/08/94

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Subject Ref: acquisition; default on payment of instalments; disposal; employee share acquisition scheme; forfeiture of shares; lump sum receipts.

Legislative Ref: ITAA 25(1); ITAA 26(e); ITAA 26AAC; ITAA Part IIIA

Case Ref: Case X43 90 ATC 354; (1990) 21 ATR 3377; FC of T v. McArdle 89 ATC 4051; (1988) 19 ATR 1901

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