


***TD 94/D43 - Income tax: under an employee share acquisition scheme, fully paid shares with restrictions are allotted to a trustee to be held on behalf of an employee. Prior to the removal of the restrictions the employee receives a redundancy package which includes an ex-gratia payment representing the value of shares held by the trustee on the employee's behalf.***

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## Draft Taxation Determination

**Income tax: under an employee share acquisition scheme, fully paid shares with restrictions are allotted to a trustee to be held on behalf of an employee. Prior to the removal of the restrictions the employee receives a redundancy package which includes an ex-gratia payment representing the value of shares held by the trustee on the employee's behalf.**

### How is the ex-gratia payment to be taxed ?

1. The ex-gratia payment is not assessable under section 26AAC as the acquisition of a share, for the purposes of section 26AAC, does not take place (see *Case X43 90 ATC 354*; (1990) 21 ATR 3377). The payment is not assessable under section 25(1) or section 26(e), and constitutes a capital receipt.
2. The payment is considered to be an eligible termination payment and is concessionally taxed as a bona fide redundancy payment in terms of section 27F.

#### Notes:

- (a) The Scheme did not provide for any payment to be made should an employee leave the company's employ prior to the restrictions being lifted. The payment has arisen in consequence of the termination of employment. The termination of employment was a precondition to the payment (*McIntosh v FCT 79 ATC 4325*).
- (b) The taxpayer has not made an election under subsection 26AAC(15A).

#### Example:

*In 1990 shares are allotted to a trustee to be held on behalf of an employee, Wendy, under an employee share acquisition scheme. The shares cannot be transferred to Wendy until three years have elapsed since the time of allotment. The trustee cannot sell the shares, on behalf of Wendy, within this time.*

*In 1992 Wendy is made redundant and, as part of her redundancy package, the employer makes an ex-gratia payment representing the value of the shares held by the trustee on Wendy's behalf.*

*The ex-gratia payment is not assessable under section 26AAC as Wendy did not acquire the shares. The payment, though, is assessable as an eligible termination payment as it was made in consequence of the termination of Wendy's employment. The payment qualifies for concessional treatment as a bona fide redundancy payment under section 27F.*

**Commissioner of Taxation**

5/5/94

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FOI INDEX DETAIL: Reference No.

Related Determinations: TD 92/189

Related Rulings:

Subject Ref: employee share acquisition scheme; eligible termination payments, trustee

Legislative Ref: ITAA 26AAC; ITAA 27A, ITAA 27F

Case Ref: Case X 43 90 ATC 354; (1990) 21 ATR 3377; McIntosh v FCT 79 ATC 4325

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