TD 2019/13 - Income tax: what is an 'employee share trust'?

Taxation Determination

Income tax: what is an 'employee share trust'?

Relying on this Ruling

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

What this Determination is about

1. An employer company will commonly establish a trust to hold shares or rights to shares for its employees participating in an employee share scheme[1] (ESS). The trustee of that trust will also often administer that scheme for the employer.

2. Certain tax concessions are available to the trustee and beneficiaries of such trusts, and the employer company, but only where the trust meets the definition of an 'employee share trust'.[2]

3. Subsection 130-85(4) provides that an employee share trust, for an ESS, is a trust whose sole activities are:

- obtaining shares or rights in a company[3]
- ensuring that ESS interests[4] in the company that are beneficial interests in those shares or rights are provided under the ESS to employees[5], or to associates of employees, of

[1] Having the meaning given by subsection 83A-10(2) of the *Income Tax Assessment Act 1997*. All legislative references are to this Act unless otherwise indicated. This Determination does not apply to employee remuneration trust arrangements that operate outside of the employee share scheme rules in Division 83A, refer to Taxation Ruling TR 2018/7 *Income tax: employee remuneration trusts*.

[2] The consequences of being an employee share trust are that:
- the trust is disregarded for most capital gains tax (CGT) purposes by treating ESS interests owned by the trustee as being directly owned by the beneficiaries of the trust (section 130-85)
- capital gains and capital losses made by the trust are disregarded for certain CGT events that happen (section 130-90)
- contributions made by the employer company to the trust are exempt from fringe benefits tax under paragraph (ha) of the definition of 'fringe benefit' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*.

[3] Referred to in this Determination as 'the employer company'.

  - the company, or
  - a subsidiary of the company
- other activities that are merely incidental to these activities.

4. This Determination explains the Commissioner's views on the interpretation of subsection 130-85(4).

Ruling

'A trust'

5. An entity may be a trustee for multiple trusts.[6] In examining whether the requirements of subsection 130-85(4) are met, it is the activities of the trustee in relation to a particular trust that must be tested.[7] The trustee is considered separately and independently for each trust of which it is the trustee, and in that capacity.[8]

'Activities'

6. When testing whether a trustee of a trust (in that particular capacity) meets the requirements of subsection 130-85(4), it is necessary to examine the actual activities that the trustee has undertaken. Whilst the relevant trust documents may include powers and/or duties that are broad reaching, the mere existence of those powers or duties in the trust documents does not, of itself, mean that the trustee has breached the requirements to be an employee share trust.

7. Where the trust administers multiple ESS arrangements, it is the trustee's activities in relation to the whole of the trust that are examined.

8. To qualify as an employee share trust, a trustee's activities must be limited to those described in paragraphs 130-85(4)(a), (b) and (c).

'Merely incidental'

9. Paragraph 130-85(4)(c) provides that a trustee can engage in activities that are merely incidental to those described in paragraphs 130-85(4)(a) and (b). The phrase 'merely incidental' takes its ordinary meaning, with further guidance drawn from the context and purpose of the legislation in which it appears.[9] 'Merely incidental' is not defined in the legislation and has not been judicially considered in the context of subsection 130-85(4). *The Macquarie Dictionary* defines 'merely' to mean 'only as specified, and nothing more'.

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[4] As defined in subsection 83A-10(1). Note that subsection 130-85(4) (and, consequently, this Determination) applies to a stapled security in the same way as it applies in relation to a share in a company, if at least one of the ownership interests that are stapled together to form the stapled security is a share in the company (see subsection 83A-335(1) and section 130-97).
[5] Reference in this Determination to employees includes a reference to an individual covered by column 1 of the table in section 83A-325 (see section 130-97).
[6] Subsection 960-100(3).
[7] Subsection 960-100(2).
[8] This is consistent with the text of the provision, and also ensures that if the requirements are not met in relation to a particular trust it does not impact the application of subsection 130-85(4) to any other trust of which the entity is trustee.
[9] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; *The Queen v Khazaal* [2012] HCA 26 at [31], per French CJ.

'Incidental' is defined as 'happening or likely to happen in fortuitous or subordinate conjunction with something else'.[10]

10. Whilst the provisions relating to employee share trusts are concessional in nature, the restriction of those concessions to employee share trusts is an integrity measure and ensures that the concessions are only available to a specific subset of trusts that meet the statutory definition of an employee share trust.[11] As such, the definition is not intended to be construed broadly.

11. Activities are merely incidental under paragraph 130-85(4)(c) if they are a natural incident or consequence[12] of the trust obtaining, holding and providing shares or rights under an ESS. If the activities undertaken by the trustee are not a natural incident or consequence of obtaining, holding and providing shares or rights under an ESS, or if the activity is undertaken for or follows from some other purpose, such activities are not merely incidental.

Examples of activities that are merely incidental

12. Examples of the types of activities that are merely incidental under paragraph 130-85(4)(c) include, but are not limited to, activities that involve:

- the opening and operation of a bank account to facilitate the receipt and payment of money[13]
- bookkeeping, preparing financial, tax and regulatory statements, and other record-keeping and administrative actions necessary to operate the trust and undertake the activities described in paragraphs 130-85(4)(a), (b) and (c)
- the receipt of dividends in respect of shares held by the trustee on behalf of a participating employee and their distribution to the employee
- borrowing money for the purpose of acquiring shares or rights in the employer company, where no security is provided over the trust assets and the interest payable on such a loan is not more than arm's length commercial rates
- the receipt of dividends in respect of unallocated shares and interest from bank accounts and using those funds to
  - acquire additional shares for the purposes of the ESS
  - pay necessary and incidental costs of administering the trust and undertaking the activities described in paragraphs 130-85(4)(a), (b) and (c), for example costs relating to the audit of the trust, fees for professional services provided to the trustee in relation to the trust

[10] Macmillan Publishers Australia, *The Macquarie Dictionary* online, www.macquariedictionary.com.au, viewed 6 August 2019 (the *Macquarie Dictionary*).
[11] Refer to paragraphs 1.14 and 1.215 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009.
[12] This is consistent with the view taken in *Mills v Commissioner of Taxation* [2012] HCA 51 where the High Court accepted a definition of 'incidental' along the lines of that in the *Macquarie Dictionary* in interpreting the phrase in the context of an 'incidental purpose' as referred to in paragraph 177EA(3)(e) of the *Income Tax Assessment Act 1936* (ITAA 1936).
[13] The relevant activity is the establishment of the bank account; the terms agreed between the bank and the trustee (for example, whether the account will earn interest) would not constitute a separate activity.

  - pay interest on loans provided for the acquisition of shares or rights in the employer company, where the interest payable does not exceed arm's length commercial rates
- paying a dividend equivalent payment[14] to a participating employee under the rules of the ESS, where
  - the amount paid is equal to or less than the amount of dividends paid to the trustee (net of tax paid by the trustee on the dividends), in relation to the number of shares being received by the participating employee, during the accumulation period, and
  - the payment is made at or around the time, and because, the shares vest or are transferred to the participating employee (as required by the ESS)
- dealing with shares forfeited under an ESS including the sale of forfeited shares and using the proceeds of sale for activities permitted under subsection 130-85(4)
- the transfer of shares to participating employees, or the sale of shares on behalf of such employees and the transfer to the employee of the net proceeds of the sale of those shares, when required under the rules of the ESS, and
- receiving and immediately distributing shares under a demerger or actions in order to participate in a takeover or restructure covered by section 83A-130.

*Examples of activities that are **not** merely incidental*

13. Examples of the types of activities that are not merely incidental under paragraph 130-85(4)(c) include, but are not limited to, activities that involve:

- providing financial assistance, such as providing a loan to an employee to purchase shares or interests in the employer company
- payment of income or accrued capital from unallocated shares to any beneficiaries[15] (or to employees who do not hold a beneficial interest in the employer company under the trust)
- waiving or relinquishing certain entitlements, such as waiving the right to be paid or credited dividends pursuant to a dividend waiver clause contained in the governing trust documents
- exercising a general discretion to make distributions of income or capital to pay a class of participating employees or other beneficiaries of the trust

[14] The nature of a dividend equivalent payment is explained at paragraph 2 of Taxation Determination TD 2017/26 *Income tax: employee share schemes – when a dividend equivalent payment is assessable to an employee as remuneration*.
[15] This includes making dividend equivalent payments to participants where the amount paid is greater than the dividends paid to the trustee during the accumulation period whilst the shares the payment relates to were unallocated (less the tax paid by the trustee), or where the underlying shares are not transferred.

amounts unrelated to their ESS interests or entitlements under the ESS rules[16]

- borrowing money
  - for a purpose other than purchasing shares or rights in the employer company, or
  - with security provided over any of the trust's assets for the loan, or
  - where the interest payable on the loan is more than arm's length commercial rates
- investing in assets other than shares or rights to shares in the employer company
- engaging in trading activities in relation to shares in the employer company, other than purchasing and selling shares to satisfy obligations under the ESS
- distributing mainly cash payments to participating employees rather than shares or ESS interests under the ESS
- providing additional benefits to participants and/or employees, over and above the delivery of the ESS interests or resulting shares and any dividend equivalent payment that accrues directly from the employee's ESS interest.

Consequence of failing to meet the requirements of an employee share trust

14. Once the trust fails to meet the requirements of an employee share trust in subsection 130-85(4), it will no longer be an employee share trust. That is, the trust cannot regain its status as an employee share trust, as the trust's 'sole activities' will no longer be those outlined in paragraphs 130-85(4)(a), (b) and (c).

Examples

Example 1 – activities that are merely incidental

15. *AusCompany, whose shares are listed on the Australian Securities Exchange, establishes a remuneration scheme which satisfies the definition of an employee share scheme under subsection 83A-10(2). It establishes a trust (AusTrust) to acquire shares in AusCompany and hold those shares to satisfy employees' rights when they are exercised.*

16. *AusCompany makes periodic payments to the trustee of AusTrust to enable it to acquire shares in AusCompany.*[17]

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[16] We note that a trust's failure to satisfy the requirements for an employee share trust on the payment or transfer of trust income and capital to a default beneficiary on the winding up of the trust would have no practical implications, since the trust will cease at that time.

[17] Note that there are additional integrity measures in Division 83A that limit an employer's entitlement to claim deductions for contributions made to an employee share trust.

17. *When employees apply to withdraw the shares from AusTrust, following the vesting of their rights to acquire shares, they may request that the trustee:*

- *transfer the shares to them, or*
- *sell the shares on their behalf and pay them the proceeds net of selling costs.*

18. *Participating employees are entitled, on vesting of the rights, to receive an amount reflecting the dividends the employee beneficiary would have received had the employee owned the shares from the day the employee received their rights. The payment is made by the trustee of AusTrust to the employee at the time of vesting.*

19. *The trustee of AusTrust also has a broad discretion to distribute income from any unallocated shares it holds to any beneficiaries.*

20. *Megan, an employee of AusCompany, receives rights to acquire 100 shares in AusCompany, with a three-year vesting period. The trustee of AusTrust periodically acquires and holds shares in AusCompany in anticipation of the future rights of participating employees under the remuneration scheme.*

21. *In Year 1, AusCompany pays no dividends. In Year 2, AusCompany pays a dividend of $1 per share. The trustee of AusTrust holds 500 unallocated shares at that time, and receives (and pays tax on) $500 in dividends relating to those shares. In Year 3, AusCompany pays another dividend of $1 per share. The trustee of AusTrust still holds 500 unallocated shares and receives (and pays tax on) another $500 in dividends relating to those shares.*

22. *At the end of the three-year vesting period, Megan's rights vest and 100 shares are allocated to her. The trustee of AusTrust also distributes $106 to Megan*[18]*, being an amount equivalent to the dividends she would have received on those 100 shares, if she had owned them from the date she received her rights, less the amount of tax the trustee paid on those dividends ($94).*[19] *No other distributions have been made by the trustee in relation to the income received on the unallocated shares it holds.*

23. *AusTrust is an employee share trust, as all the trust's activities are considered to be a natural incident of the trust acquiring and holding shares for the allocation to participating employees.*

Example 2 – activities not merely incidental – payment of income from unallocated shares

24. *Assume the same facts as in Example 1, except the trustee also distributes $200 relating to the income from unallocated shares it holds to another employee, Simon, in Year 3, under its discretion to distribute income from unallocated shares to any beneficiary.*

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[18] This amount is assessable income in Megan's hands, refer to TD 2017/26.

[19] For the purpose of this example, a tax rate of 47% is assumed for the trustee, being the rate applicable at the date of publication of this Determination pursuant to subsection 12(9) of the *Income Tax Rates Act 1986* plus the Medicare levy (see section 251S of the ITAA 1936).

25. *The distribution of income from unallocated shares is an additional benefit paid to the employee, which is not considered to be merely incidental to obtaining, holding and providing shares to employees. Whilst the mere existence of this discretionary clause does not disqualify AusTrust from being an employee share trust, the activities undertaken by the trustee of AusTrust in exercising that power mean AusTrust will no longer be an employee share trust from Year 3 and for the remainder of the existence of this AusTrust ESS.*

Example 3 – activities not merely incidental – dividend waiver – single trust for multiple ESSs

26. *Following on from Example 1, AusCompany also sets up another trust, ExecTrust, with similar terms to AusTrust. However, ExecTrust's governing documents contain a clause that requires the trustee to waive its right to be paid or credited dividends on unallocated shares, where notice is given by AusCompany. ExecTrust administers three ESS arrangements for AusCompany:*

- *short term incentive plan for its senior executives*
- *long term incentive plan for its senior executives*
- *long term incentive plan for its middle management staff.*

27. *The trustee of ExecTrust is entitled to dividend payments from AusCompany in respect of unallocated shares it holds. At the end of Year 1, AusCompany gives the trustee of ExecTrust a notice requiring the trustee to waive its right to be paid or credited dividends in relation to all its unallocated shares (until the waiver is revoked). The trustee of ExecTrust completes a form confirming it is waiving its right to be paid or credited dividends on its unallocated shares on a standing basis until the waiver is revoked, and forwards the notice to AusCompany.*

28. *ExecTrust ceases to be an employee share trust when the trustee waives its right to be paid or credited dividends on its unallocated shares, as such activities are not considered to be merely incidental to obtaining, holding and providing shares in AusCompany to participating employees. It does not matter whether the trustee of ExecTrust is required to waive its right to be paid or credited dividends, or chooses to do so (that is, if the trust deed gives the trustee a discretion in this regard, or does not contain any clause relating to the waiving of dividends). As ExecTrust is the relevant trust for all three ESS arrangements, all three arrangements are impacted by ExecTrust ceasing to be an employee share trust.*

Date of effect

29. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
6 December 2019

Appendix 1 – Explanation

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.

30. The characterisation of an employee share trust requires an analysis of what the trustee actually does, not only the powers and duties that are prescribed in the relevant trust documents. This follows from the ordinary meaning of 'activity', which the *Macquarie Dictionary* defines as 'the state of action; doing'.[20] Accordingly, not acting, or abstaining from acting, will not cause a breach of subsection 130-85(4), for example not exercising a right to vote or not participating in a rights issue.

31. However, agreeing to act in a certain way, and acting in that way, will cause a breach of subsection 130-85(4) where the activity is not one described in paragraphs 130-85(4)(a), (b) and (c). For example, a trustee relinquishing its right to be paid or credited dividends on unallocated shares, or taking positive action to vote or participate in a rights issue in circumstances where that activity is not considered to be merely incidental to obtaining, holding and providing shares in the employer company to participating employees.

Merely incidental activities

32. Undertaking the activities in paragraphs 130-85(4)(a) and (b) will require a trustee to undertake necessary and incidental activities that are a function of operating the trust, such as opening bank accounts, keeping records and paying certain costs incurred, such as those outlined in paragraph 12 of this Determination.

33. Other activities will be directly related to the obtaining of shares or rights in the employer company, such as receiving contributions from the employer company or borrowing money to fund the purchase of the shares or rights in the employer company, provided no security is offered for the loan and the interest rate payable does not exceed arm's length commercial rates. Providing security for the loan over the trust's assets, or paying interest above commercial rates is not considered to be merely incidental, as it puts the trust's assets at risk and goes beyond what could be considered necessary or incidental.

34. Activities will also be acceptable where they are merely incidental to ensuring ESS interests are provided to employees. The trustee must be able to transfer shares to participating employees (or sell them on their behalf) to fulfil the company's obligations to the employees under the ESS. Similarly, the trustee must also be able to deal with shares forfeited under the ESS. Paying dividends to employees on shares held on their behalf, and dividend equivalent payments (in the circumstances outlined in paragraph 12 of this Determination) are merely incidental because the payments are directly related to the ESS interests held on behalf of the employees at the time they are made. Receiving and immediately distributing shares under a demerger, or to participate in a takeover or restructure covered by section 83A-130, also fall into this category.

[20] The *Macquarie Dictionary*.

Activities that are not merely incidental

Additional benefits provided[21]

35. It is considered that the distribution of capital or income of the trust to a beneficiary, other than related to paragraph 130-85(4)(b), goes beyond an activity that can be regarded as being merely incidental to ensuring the ESS interests are provided to employees. These additional benefits are unrelated to any ESS interest being held by the trust on behalf of the employee. They are benefits (often in the form of remuneration) that have no link to the acquisition of the shares from the company nor the delivery of an ESS interest to the employee. They therefore cannot be regarded as being an activity that is merely incidental to those two purposes.

Waiving dividends on unallocated shares

36. The waiving of dividends on unallocated shares arises from the powers conferred and duties imposed on the trustee by the trust documents and is not a natural incident or consequence of the trustee acquiring and holding shares in the employer company. To be effective, each waiver requires an act to be undertaken by the trustee, being the relinquishment of the right to be paid or credited a dividend. Without such an activity, dividends on the shares would be paid to the trustee. This activity is not one that occurs either as part of, or in subordinate conjunction with, the activities of obtaining shares and ensuring that the beneficial interests in those shares are provided to the employees. It is not a natural incident or consequence of obtaining shares in the employer company, and is undertaken for a purpose other than obtaining shares in the employer company and ensuring ESS interests are passed on to the employees.

Investments and trading activities

37. Investing in assets other than shares or rights to shares in the employer company has no relationship to obtaining, holding and providing shares in the employer company to participating employees. It cannot, therefore, be regarded as being merely incidental to those activities; it is not a natural consequence of those activities and must be undertaken for, or follow from, some other purpose.

38. Similarly, engaging in trading activities other than to satisfy obligations under the ESS is going beyond what is necessary and/or incidental to obtaining, holding and providing shares in the employer company to participating employees. It therefore follows that it must be undertaken for some other purpose.

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[21] For example, dot points 1, 2, 4 and 9 in paragraph 13 of this Determination.

Distributing mainly cash payments to employees rather than shares or ESS interests

39. An ESS is a scheme designed to provide ESS interests in a company to employees. One of the key activities of an employee share trust is to ensure those ESS interests are provided to employees. If the scheme does not actually result in employees receiving ESS interests, but rather delivers mainly cash payments through the trust instead (for example, where the company regularly decides to satisfy employees' rights through cash payments rather than delivery of shares):

- this would not be an activity merely incidental to ensuring ESS interests are provided to employees, but rather related to ensuring they were not so provided
- doubts would be raised as to whether the scheme was, in fact, an ESS. An employee share trust can only arise in relation to an ESS.

40. However this can be contrasted with the situation where the employee becomes entitled to delivery of the share, and requests the trustee to sell the share on their behalf and forward the proceeds of sale to them. In that case, the trustee is acting as the agent for the employee in selling the share and forwarding the proceeds to them, rather than as trustee of the trust.

Appendix 2 – Compliance approach

This Appendix sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow the advice in this Appendix in good faith and consistently with the Ruling section, the Commissioner will administer the law in accordance with this approach.

Activities undertaken prior to 1 January 2020

41. The Commissioner will not apply compliance resources to investigate, for periods prior to 1 January 2020, whether there are activities that may have been undertaken by a trustee administering an ESS that do not satisfy the requirements in subsection 130-85(4).

42. In addition, for periods on or after 1 January 2020, the Commissioner will not apply compliance resources to investigate whether activities undertaken by the trustee prior to 1 January 2020 affect the trust being considered an employee share trust on or after 1 January 2020, provided the trust's sole activities from that date are those described in paragraphs 130-85(4)(a), (b) and (c). Similarly, if the trustee applies for a private ruling covering periods on or after 1 January 2020, the Commissioner will not require those activities undertaken by the trustee prior to 1 January 2020 to be identified in the scheme for the private ruling.

43. Where the Commissioner is asked to amend an assessment, or is asked or required to state a view (for example, in a private ruling or in submissions in a litigation matter), the Commissioner will do so consistently with the views set out in this Determination, subject to paragraph 42 of this Determination.

Private rulings

44. As stated in paragraph 30 of this Determination, the characterisation of an employee share trust requires an analysis of what the trustee actually does, not only the powers and duties that are prescribed in the relevant trust documents.

45. However, in the context of the Commissioner providing advice in the form of a private ruling or class ruling for future periods, the correctness of the ruling may depend on whether or not the trustee will act on the relevant clauses in the trust documents, as the scheme will include the existence of the powers and duties in the trust documents. In these circumstances, the Commissioner can either make an appropriate assumption (or assumptions) or decline to rule.[22] If the Commissioner decides to make an assumption, given the powers and duties are specifically included in the trust documents, the most appropriate assumption will generally be that the power will be exercised or the duty undertaken.

[22] Subsection 357-110(1) of Schedule 1 to the *Taxation Administration Act 1953.*

References

Previous draft:

TD 2019/D8

Related Rulings/Determinations:

TR 2006/10; TD 2017/26; TR 2018/7

Legislative references:

- ITAA 1936 251S
- ITAA 1936 177EA(3)(e)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-130
- ITAA 1997 83A-325
- ITAA 1997 83A-335(1)
- ITAA 1997 130-85
- ITAA 1997 130-85(4)
- ITAA 1997 130-85(4)(a)
- ITAA 1997 130-85(4)(b)
- ITAA 1997 130-85(4)(c)
- ITAA 1997 130-90
- ITAA 1997 130-97
- ITAA 1997 960-100(2)
- ITAA 1997 960-100(3)
- ITRA 1986 12(9)
- TAA 1953
- TAA 1953 Sch 1 357-110(1)
- FBTAA 1986 136(1)

Cases relied on:

- Mills v Commissioner of Taxation [2012] HCA 51 (2012) 247 CLR 108
- Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28
- The Queen v Khazaal [2012] HCA 26 (1998) 194 CLR 355

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009
- The Macquarie Dictionary online

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