



## EMPLOYEE SHARE PLANS – WILL I BE ABLE TO DEFER MY TAXING POINT

The draft legislation for the new employee share scheme rules is moving closer to being completed. The draft transitional rules have also been released.

The new rules will apply to shares or rights that are issued after 1 July 2009. However, where tax has been deferred in relation to shares or rights that were acquired prior to 1 July 2009, the new rules will apply (except in relation to the determining the tax time and refunds).

To recap, taxation will be upfront unless the conditions for deferral are satisfied. This will depend on the terms of the scheme itself.

Deferral has been limited to schemes where there is a 'real risk' of forfeiture. The latest explanatory material provides multiple examples in relation to what constitutes a real risk of forfeiture.

Some examples where you may be eligible for deferral (i.e. because there is a real risk of forfeiture) include:

- Employee share scheme (**ESS**) arrangements with your employer where you will receive shares in your employer company if you are still employed in 3 years time;
- ESS arrangement with your employer where you will receive shares in your employer company in one year, if the employer's market share has increased in 12 months time;
- ESS arrangements with your employer where you will receive shares if you are still employed in 3 years time or where you leave within 3 years for reasons beyond your control (e.g. redundancy or sickness); and
- certain salary sacrifice schemes offering no more than \$5,000 worth of shares.

Some examples where you are unlikely to be eligible for deferral (i.e. because there is no real risk of forfeiture) include:

- ESS arrangement with your employer, where you will receive shares in your employer company in three years, unless you are dismissed for fraud or gross misconduct;
- ESS arrangement with your employer, where your shares are forfeited if the company's value falls by 95 per cent during the next 12 months or your shares are forfeited if you request they be forfeited;
- ESS arrangement with your employer, where the shares are subject to forfeiture within the first few months of employment if the employee leaves but where the shares cannot be sold for the first 5 years of employment; and
- ESS arrangements with your employer where you will receive shares in 3 years time if you are still employed or if you retire (provided you are of retirement age and are leaving the workforce).

If the deferral conditions are satisfied, the deferred taxing point will be the earliest point at which:

- for shares – the ending of risk of forfeiture and restrictions on disposal;
- for rights – the ending of the risk of forfeiture and restrictions on exercise or disposal of the option and disposal of the underlying share acquired on exercise;
- cessation of employment; or
- 7 years.



For these purposes, a restriction on disposal must be a genuine restriction. Genuine restrictions might include:

- Certain contractual conditions of the employee share scheme that prevent disposal of shares; and
- Circumstances where disposal would constitute a criminal offence (eg a breach of the insider trading rules).

There will not be a genuine restriction on disposal merely if a company's internal share trading policy prevents disposal for a certain period.

#### **WARNING**

Careful attention should be paid to the transitional rules.

*Did you acquire shares prior to 1 July 2009?*

Yes

*Did you pay tax upfront?*

No

*Do the new rules apply to you?*

Yes – in some respects they do! Most people think that if they acquired shares or rights prior to 1 July 2009 they don't have to consider the new rules but this is not the case.

Note: The new rules will not apply to such shares for the purposes of determining the tax time or refunds.

If you would like further information or require assistance in relation to the above please do not hesitate in contacting our office on 02 9555 1309.

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