

BINDING RULINGS

Public Ruling BR Pub 19/04: Income tax – application of the employee share scheme rules to employer issued crypto-assets provided to an employee

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of ss CE 1(1)(d), CE 2 and CE 7.

The Arrangement to which this Ruling applies

The Arrangement is the provision of crypto-assets by an employer (or another company in the same group) to an employee in connection with their employment in circumstances where:

- the employer (or other group company) is issuing crypto-assets (for example, through an Initial Coin Offering or a Token Generating Event);
- the crypto-asset is a **"share"** as defined in s YA 1 (i.e. it provides an interest in the capital of a company);
- the employee is not required to pay market value for the crypto-assets; and
- the crypto-assets are not provided under an exempt ESS as described in s CW 26C.

The Ruling applies only to employees and does not apply to providers of goods or services or self-employed taxpayers.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The provision of the crypto-assets by the employer (or other group company) to the **employees is an "employee share scheme"** as defined in s CE 7.
- Section CE 2 will apply to determine the value of the taxable benefit received by the employees.
- The amount of the taxable benefit will be the **employees'** employment income under s CE 1(1)(d).

The period or tax year for which this Ruling applies

This Ruling will apply for a period of three years beginning on 1 December 2019.

This Ruling is signed by me on 30 August 2019.

Susan Price
Director, Public Rulings

COMMENTARY ON PUBLIC RULING BR PUB 19/04

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Ruling BR Pub 19/04 (the Ruling).

Legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

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Summary

1. This Ruling is related to BR PUB 19/03 (Income Tax – Employer issued crypto-assets provided to an employee) and considers the income tax treatment of specific types of employer-issued crypto-assets provided to employees. This Ruling covers the situation where a crypto-asset issued by the employer **is a "share"** in the employer (as defined in s YA 1). The commentary briefly discusses the application of the employee share scheme rules to the Arrangement. It also briefly discusses **the definition of a "share"** for tax purposes, and when crypto-assets may satisfy this definition.

Background

2. The crypto-asset industry is still evolving and there is currently no standard **terminology used. The Ruling uses the term "crypto-asset" to cover digital assets** that use cryptography and blockchain technology to regulate their generation and verify transfers.¹ **The Ruling also uses the term "equity token" to cover a specific subset of crypto-asset.**

¹ These are sometimes referred to by other terms including "cryptocurrencies" and "tokens".

3. It is becoming more common for employees (particularly those working in crypto-asset related industries) to receive remuneration in crypto-assets. The Commissioner has been asked to provide guidance on how remuneration paid in crypto-assets is taxed.
4. This Ruling **sets out the Commissioner's view on** the situation where an employee receives crypto-assets issued by their employer or another company in the same group (**referred to together as "the employer" for ease of reference**) that is a **"share"**. This could occur in the context of an Initial Coin Offering, a Security Token Offering, an Initial Exchange Offering, a Token Generating Event or by other means.
5. The purpose of this Ruling and commentary is to raise awareness that a crypto-asset that provides an interest in the capital of a company may be subject to the employee share scheme rules. This Ruling does not provide detailed guidance on applying the employee share scheme rules. . Detailed guidance on applying the rules is provided in *Tax Information Bulletin* Vol 30 No 5 (June 2018):52.

Application of the legislation

When do the employee share scheme rules apply?

6. Section CE 1 sets out when an amount derived by a person in connection with their employment will be their income. Under s CE 1(1)(d), a benefit received by an **employee under an "employee share scheme" is income derived in connection with their employment.**
7. Section CE 7 provides for the **meaning of an "employee share scheme" as follows:**

CE 7 Meaning of employee share scheme

Employee share scheme means—

 - (a) an arrangement with a purpose or effect of issuing or transferring shares in a company (company A) to a person—
 - (i) who will be, is, or has been an employee of company A or of another company that is a member of the same group of companies as company **A, if the arrangement is connected to the person's employment or service:**
 - (ii) who will be, is, or has been a shareholder-employee in relation to company A or in relation to another company that is a member of the same group of companies as company A, **if the arrangement is connected to the person's employment or service:**
 - (iii) who is an associate of a person described in subparagraph (i) or (ii) **(person A), if the arrangement is connected to person A's employment or service; but...**
 - (b) does not include an arrangement that—
 - (i) is an exempt ESS:
 - (ii) requires market value consideration to be paid by a person described in paragraph (a) for the transfer of shares in the company on the share scheme taxing date:
 - (iii) requires a person described in paragraph (a) to put shares, acquired by them for market value consideration, at risk, if the arrangement provides no protection against a fall in the value of the shares and none of the consideration for acquiring the shares is provided to the person under an agreement that it is used for acquiring the shares.
8. Accordingly, an employee share scheme is an arrangement that involves the issue or transfer of shares to an employee (or a person who has been or will be an

employee). The employee share scheme rules may also apply if the shares are issued to an associated person of the employee in connection with **the employee's** employment.

9. The employee share scheme rules do not apply to arrangements that require employees to:
 - **pay market value for the shares on the "share scheme taxing date"** (generally the date on which the employee holds the shares like any other shareholder); or
 - put at risk shares they acquired for market value, where the scheme provides no protection to the person against a fall in the value of the shares.
10. The employee share scheme rules also do not apply to an exempt employee share scheme (referred to in the legislation as an **"exempt ESS"**), which is defined in s CW 26. This is discussed further from [19].
11. Section CE 2 provides that an employee who has acquired shares under an employee share scheme receives a benefit as calculated under that section. In essence, the calculation refers to the difference between the value of the shares and what was paid for them.
12. The timing of the benefit is provided in s CE 7B, which, in brief, is the time at which the shares are held by (or for the benefit of) the employee, where there is no material risk that the ownership may change (for example, if the employee must remain employed for a certain period).
13. Where the crypto-assets are not held by (or for the benefit of) the employee, or there is a risk of a change of ownership of the crypto-assets or that the benefit may be cancelled, the share scheme taxing date will not be satisfied under s CE 7B. *TIB* Vol 30 No 5 (June 2018) contains numerous examples of how the share scheme taxing date is determined. For example, if crypto-assets are held on trust and an employee must remain in employment for 12 months before the crypto-assets are transferred to the employee, the share scheme taxing date is not satisfied until the employee becomes entitled to the crypto-assets.
14. The rules operate to tax any benefit conferred on an employee by the issuance of shares in an employee share scheme in the same way as if the employee had received an equivalent cash payment followed by an acquisition of shares.
15. Section RD 7B provides that an employer may choose whether to withhold and pay an amount of tax relating to the benefit, but it does not have to. If an employer does not choose to withhold and pay tax, the employee will be liable for tax on their employment income under s CE 1(1)(d) if they are a New Zealand resident, or a non-resident who has earned the amount here (s YD 4(4)). This is the case regardless of whether the employer is a resident or non-resident.
16. The employee share scheme rules apply only to employees and do not apply to arrangements that involve issuing shares to other providers of goods or services.

*What is a **"share"** for tax purposes?*

17. As noted above, the employee share scheme rules apply where shares are issued to employees (and the employees do not pay market value for those shares). A **"share" is not specifically defined for the purposes of s CE 7. A "share" is defined broadly in s YA 1 as follows:**

share —

- (a) includes any interest in the capital of a company;
- (b) includes a debenture to which section FA 2 (Recharacterisation of certain debentures) applies;
- (bb) includes a stapled debt security to which section FA 2B(2) (Stapled debt securities) applies;
- (c) includes a unit in a unit trust;
- (d) **includes an investor's interest in** a group investment fund if—
 - (i) the fund is not a designated group investment fund; and
 - (ii) the interest does not result from an investment from a designated source; and
 - (iii) **the investor's interest does not result from an investment made in the fund on or before 22 June 1983, including an amount treated as invested at that date as pre-1983 investments under section HR 3(8) (Definitions for section HR 2: group investment funds):**
- (e) does not include a withdrawable share in a building society, except in the definitions of investment society dividend and withdrawable share;
- (f) [*Repealed*]
- (g) is further defined in section CW 26F (Meaning of share) for the purposes of section CW 26C (Meaning of exempt ESS)

18. The Commissioner considers that the most relevant definition for the purposes of this Ruling is that contained in para (a) above. This **definition includes "any interest in the capital of a company"**. The definition of a "share" also specifically includes many instruments that are not shares under the Companies Act 1993 (CA 1993) such as profit related debentures, stapled debt securities, units in a unit trust, and interests in a group investment fund. These are all types of instruments that exhibit general features of equity.

19. Paragraph (g) above contains a specific definition in the context of employee share schemes. Section CW 26F provides:

CW 26F Meaning of share

For the purposes of section CW 26C, share means, for a company whose shares are made available under an exempt ESS, a fully paid ordinary share that ranks equally with, and has the same designation as, an existing ordinary voting share in the company.

20. This definition is limited to s CW 26C, which relates to an exempt ESS. Accordingly, this specific definition of a share (being one that is a fully paid ordinary share ranking equally with existing ordinary voting shares) is relevant only for determining whether there is an exempt ESS for the specific purposes of s CW 26C. This is because an exempt ESS must be widely offered to almost all employees and provide the same rights to all employees. This narrow definition of a share for these specific purposes would relate to all types of shares (whether in the more traditional sense or any crypto-assets that satisfy the definition in s YA 1).

21. The definition of "exempt ESS" is set out in the Appendix. Whether or not there is an exempt ESS in any particular circumstances is outside the scope of this Ruling.

What does "any interest in the capital of a company" mean?

22. The phrase "any interest in the capital of a company" reflects the common law meaning of a "share" rather than the CA 1993. For income tax purposes, this definition first appeared in the definition of a "shareholder" in the Land and Income Tax Act 1916 and has remained essentially unchanged from its original enactment

(at which time the Companies Act 1903 was in force), despite the companies legislation undergoing significant changes since that time.

23. The *Concise Oxford English Dictionary* (12th ed, 2011) defines an **"interest"** as:
interest ... 4 a share or involvement in an undertaking. a legal concern, title, or right in property...
24. The ordinary meaning of **"any interest"** is broad, and can include a share, legal concern, title, right or claim. The use of the word **"any"** also indicates that the term takes a broad meaning for these purposes.
25. **"Capital"** is also a broad term and a company's capital may generally include assets, the sum of shareholders' contributions to a company, the stock with which a company enters business and accumulated wealth.
26. In *IRC v Woolf* [1962] 1 Ch 35, the English Court of Appeal was considering whether debenture holders were **"members"** of a company, which was defined with reference to whether they had **"an interest in the capital or profits or income"** of the company. Upjohn LJ said at 46 and 47:

The share or interest of a member in the capital of a company has no precise legal signification. In the context it may refer to the share or interest of the member in the issued share capital, or it may refer to his ultimate right to receive a dividend in liquidation after all creditors have been discharged...

...

... Further, the debenture-holder has no interest in the capital of the company. If **"capital"** refers to the share capital, that is obviously so. If it refers to the surplus in a winding-up, the debenture-holder will have been paid off before the surplus can be ascertained.
27. Upton LJ considered there needed to be a right or an expectation to share in a **company's share capital or net capital (being the difference between assets and liabilities)**, even if that were through a liquidation of the company. A creditor does not hold an interest in the capital of a company, but rather holds an interest in its assets. These comments indicate that an **"interest in capital"** is a participating interest, suggesting a participation in the surplus assets on winding up of a company. A contractual debt interest is not sufficient.
28. Similarly, Donovan LJ said at 45:

The word **"capital"**, where it occurs as part of the definition of **"member"**, may mean issued share capital or the net capital, being the difference between assets and liabilities, or it may mean both. ...
29. Accordingly, in *Woolf*, a reference to **"capital" of a company** was taken to mean share capital and net capital (assets less liabilities) and included the right to receive distributions on a winding up, after all creditors have been paid.
30. Earlier case law on the meaning of a **"share"** (for companies law purposes) took a narrower view of capital, referring more specifically to **"share capital"**. For instance, in *Borland's Trustee v Steel Brothers and Co Ltd* [1901] 1 Ch 279 Farwell J stated at 288:

A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second... A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

31. In *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 (HL) Lord Wrenbury stated at 767:
- ... A share is, therefore, a fractional part of the capital. It confers on the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding-up.
32. The concept of a share relating to a fractional part of capital is no longer relevant under the CA 1993, which provides that a share is personal property and provides a bundle of rights (being the rights generally set out in s 36 of the CA 1993, but which may be varied by the constitution or terms of issue of the share).
33. The decision in *Inland Revenue Commissioners v Tring* [1939] 2 All ER 105 (CA) also focused on whether a person held an interest in the capital of the company. The Court of Appeal upheld Macnaghten J's decision in the lower court (*Inland Revenue Commissioners v Tring* [1939] 1 All ER 148). Macnaghten J had stated at 152:
- I think that the words "share or interest in the capital or profits or income of a company" mean just what they say – anybody who has either a share in the capital or profits or income or has any interest in the capital or profits or income. I think the word "capital" there may cover, not only share capital, but also the pecuniary capital of a company, its capital assets.
34. Accordingly, "any interest in the capital of a company" for the purposes of the definition of a "share" in s YA 1 may refer to the person's interest in issued share capital, and a right to a share in the surplus assets on a wind up, and may include rights to other distributions. An interest in a company's capital is an interest in the performance of the company that is of an equity nature (rather than a debt or contractual right to receive payments).
35. In the GST context, the High Court in *CIR v Gulf Harbour Development Ltd* [2004] 2 NZLR 768 (HC) considered whether redeemable preference shares (RPS) were an "equity security" for GST purposes. An "equity security" is similarly defined for GST purposes as a "share in the capital of a body corporate". The RPS provided rights to membership in a club, but excluded voting rights, dividends and a share of surplus assets over and above what the members had put in. The High Court noted that the reference to a "share in the capital of a body corporate" was based on the companies legislation although (at [42] to [43]) noted that the CA 1993 had removed any reference to capital from the share definition, and instead introduced the solvency test. The court concluded:
- [47] It is undeniable that "membership shares" are "redeemable shares" within the meaning of s 68. It is also undeniable that the holder of the redeemable share contributes to "the capital of a body corporate" where, as here, the holder of the redeemable share has an entitlement in the event of liquidation within 75 years to return of the investment. That is in a very real sense "an interest in or right to a share in the capital" despite that fact that after 75 years the company may redeem the share for payment of \$1 and the "share" will be a tiny fraction of the consideration originally paid.
36. The RPS holder contributed to the capital of the company where they had an entitlement in a liquidation (within 75 years) to a return of the investment. Relevantly for the present context, the decision indicates that an instrument that allows the holder to receive a return of the amounts contributed in a liquidation could satisfy the phrase "any interest in the capital of a company".

When could crypto-assets issued by an employer be a share?

37. This Ruling applies to certain types of crypto-assets (which may commonly be described as "equity" tokens) that provide ownership interests in entities. An

equity token is a type of security token representing ownership or an interest in a venture. Equity tokens may provide holders with voting interests and an entitlement to a share in profits of a venture but these may not necessarily be a share unless they provide an interest in the company's capital. **This distinction is important.** The Ruling does not apply to all equity tokens, but only those that provide an interest in the capital of the company that issues them. In addition, the Ruling does not apply to other types of tokens (e.g. other security tokens, intrinsic tokens, asset tokens or utility tokens) unless they contain hybrid features and include interests in the capital of the company. The token issuance could occur as part of an Initial Coin Offering or Token Generating Event undertaken by the employer, or in other circumstances.

38. Crypto-assets that provide an interest in the capital of a company, such as the right to receive a share in the surplus assets on a winding up of the company and potentially other distributions from the company, **will be a "share" for income tax purposes.** To qualify as a share, the interests need to be by way of an equity **interest in the company's performance, and not simply a debt or other contractual right to receive payments.** For completeness, the relevant interest must be in a company, so this would not include any interests in a decentralised autonomous organisation that operates over the blockchain, nor would it include a token that only provides interests in a platform.
39. Given that this will be highly fact specific and will depend on the terms of each particular crypto-asset issued, this Ruling does not rule on when a crypto-asset will **be a "share"**. To determine whether a crypto-asset **is a "share" it will be necessary** to carefully consider the terms and conditions on which the crypto-asset is issued. This commentary can be used as guidance.
40. As an aside, given the broad definition of a "share" for tax purposes, there is often different categorisation of instruments for company law and regulation purposes. Crypto-assets that are **a "share" for tax purposes** may not necessarily **be a "share"** for the purposes of the CA 1993 or an **"equity security" under the Financial Markets Conduct Act 2013 (FMCA 2013).** For example, a profit-related debenture is a **"share" for income tax purposes, a "debt security" for GST purposes, a "debt security" under the FMCA 2013,** and is not a share under the CA 1993. The intention of including various equity instruments as a share for tax purposes is to generally treat instruments that have equity features as being a share if they involve distributions of company profits to the holder (and the holder has essentially borne the economic cost of the tax paid by the company).
41. Accordingly, crypto-assets issued by an employer that provide employees with certain rights such as a right to share in surplus assets on a wind up, will be a **"share" under s YA 1 (even if not a "share" for the purposes of the CA 1993 or an "equity security" under the FMCA 2013).** The issue of such crypto-assets to employees will **be within the definition of an "employee share scheme" in s CE 7,** and subject to s CE 2. If an employee receives crypto-assets from an employer under an employee share scheme and pays less than market value, the difference between the market value and any amount they paid will be employment income under s CE 1(1)(d).
42. Accordingly, the Commissioner considers that the employee share scheme rules will apply in circumstances where an employer issues crypto-assets to employees in connection with their employment, and:
 - the crypto-assets provide an interest in the capital of the company;
 - the employer does not require the employees to pay market value for the crypto-assets; and

- the provision of the crypto-assets is not an exempt ESS.

Examples

43. The following two examples explain the application of the law.

Example 1: Crypto-assets that provide interests in a platform

44. DigitalKeyChain Ltd, a New Zealand incorporated limited liability company, is developing a new blockchain based platform for property sales. DigitalKeyChain Ltd issues its own crypto-asset, D-KEYs, by way of an ICO.
45. DigitalKeyChain Ltd employs five full time employees. As DigitalKeyChain Ltd is unable to pay competitive rates, it proposes to provide each of the full-time employees with D-KEYs issued in the ICO to the value of NZD\$5,000.
46. The D-KEY whitepaper provides that a certain number of D-KEYs are required for users to access the platform and provides holders with voting rights over the operation of the platform.
47. The D-KEYs are not **"shares"** as they do not provide an interest in the capital of DigitalKeyChain Ltd. Accordingly, the employee share scheme rules do not apply. However, other employment income rules are likely to apply to the benefit received by the employees (as set out in BR PUB 19/03: Income Tax – employer issued crypto-assets provided to an employee).

Example 2: Crypto-assets that provide rights on a wind-up

48. Assume that, in addition to the facts set out above, the whitepaper and relevant terms and conditions of issue provide that D-KEY holders will receive (at the discretion of the directors) a right to distributions of DigitalKeyChain Ltd's profits.
49. The whitepaper and relevant terms and conditions also provide D-KEY holders with a right to a share in surplus assets on a liquidation of DigitalKeyChain Ltd after all creditors have been paid. In these circumstances, the D-KEYs are **"shares"** under s YA 1.
50. The employee share scheme rules will apply to the D-KEYs issued to the five employees. The employees did not pay anything for the receipt of the D-Keys, so the full market value will be employment income.

References

Related rulings

BR PUB 19/01: Income tax – salary and wages paid in crypto-assets

BR PUB 19/02: Income tax – bonuses paid in crypto-assets

BR PUB 19/03: Income tax – employer-issued crypto-assets provided to an employee

Subject references

capital of a company

cryptocurrency

crypto-assets

employee

employee share schemes

income tax

share

Legislative references

Companies Act 1993, s 36

Financial Markets Conduct Act 2013

Income Tax Act 2007, ss CE 1(1)(d), CE 2, CE 7, CE 7B, CW 26, CW 26F, RD 7B, YA 1 (definition of “share”)

Case references

Borland’s Trustee v Steel Brothers and Co Ltd [1901] 1 Ch 279

Bradbury v English Sewing Cotton Co Ltd [1923] AC 744

CIR v Gulf Harbour Development Ltd [2004] 2 NZLR 768 (HC)

Inland Revenue Commissioners v Tring [1939] 2 All ER 105

IRC v Woolf [1962] 1 CH 35

Other references

Concise Oxford English Dictionary (12th ed, 2011)

“Employee share schemes”, *Tax Information Bulletin* Vol 30, No 5 (June 2018): 52

Appendix – legislation

Income Tax Act 2007

Section CE 1(1) provides:

CE 1 Amounts derived in connection with employment

Income

- (1) The following amounts derived by a person in connection with their employment or service are income of the person:
 - (a) salary or wages or an allowance, bonus, extra pay, or gratuity;
 - (b) expenditure on account of an employee that is expenditure on account of the person;
 - (bb) the value of accommodation referred to in sections CE 1B to CE 1E;
 - (c) [Repealed]
 - (d) a benefit received under an employee share scheme;
 - (e) **directors' fees:**
 - (f) compensation for loss of employment or service;
 - (g) any other benefit in money.

...

Section CE 2 provides:

CE 2 Benefits under employee share schemes

Benefit

- (1) A person who is an employee share scheme beneficiary described in section CE 7(a)(i) or (ii) receives a benefit for the purposes of section CE 1(1)(d) in relation to shares or related rights under the employee share scheme equal to the positive amount calculated on the share scheme taxing date using the formula—

share value – consideration paid + consideration received – previous income.

Definition of items in formula

- (2) In the formula in subsection (1),—
 - (a) share value is the market value of the shares or related rights owned by an employee share scheme beneficiary on the share scheme taxing date, if the share scheme taxing date is not triggered by a transfer or cancellation of the shares or related rights;
 - (b) consideration paid is the amount of consideration paid or payable by an employee share scheme beneficiary in relation to the transfer of the shares or related rights under the employee share scheme;
 - (c) consideration received is the amount of consideration paid or payable to an employee share scheme beneficiary in relation to a transfer or cancellation of the shares or related rights under the employee share scheme, not including relevant shares or related rights under a replacement employee share scheme;
 - (d) previous income is the total amount of income under section CE 1(1)(d) that the employee share scheme beneficiary has in relation to the shares or related rights before the date that is 6 months after the date of Royal assent for the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018.

Negative amount: deduction

- (3) A negative amount calculated using the formula in subsection (1) is a deduction of the person.

Positive and negative amount: cost of revenue account property

- (4) A positive or negative amount calculated using the formula in subsection (1) is added to the consideration paid by the person for acquiring the shares, for the purposes of section DB 23 (Cost of revenue account property).

Apportionment

- (5) **For the person's benefit under subsection (1), the portion of that benefit calculated using the formula is treated as non-residents' foreign-sourced income—**

benefit before reduction × offshore period ÷ earning period.

Definition of items in formula

- (6) In the formula in subsection (5),—
- (a) benefit before reduction is the amount of the benefit under subsection (1):
 - (b) offshore period is the number of days in the item earning period on which—
 - (i) the person is not resident in New Zealand; and
 - (ii) any services the person performs for the relevant employer give rise to an amount of income that is a foreign-sourced amount:
 - (c) earning period is the period ending with the vesting of shares or relevant rights in the employee share scheme beneficiary and starting with the earlier of—
 - (i) **the first date used to measure the person's right in relation to the vesting of shares or relevant rights:**
 - (ii) the first date that the person has a right in relation to the vesting of shares or relevant rights.

When subsection (8) applies

- (7) Subsection (8) applies when an employer is required to provide employment income information under sections RD 22(3) (Providing employment income information to Commissioner) and 23E to 23H of the Tax Administration Act 1994, as modified by section 23K of that Act, in relation to a benefit received under an employee share scheme.

Deferral of income recognition

- (8) Despite section CE 1(1)(d), the employee share scheme beneficiary is treated as deriving employment income in relation to the benefit on the ESS deferral date.

Meaning of ESS deferral date

- (9) For the purposes of this section and sections RD 6 and RD 7B (which relate to employee share schemes), the ESS deferral date is the 20th day after the share scheme taxing date for the employee share scheme beneficiary.

Section CE 7 provides:

CE 7 Meaning of employee share scheme

Employee share scheme means—

- (a) an arrangement with a purpose or effect of issuing or transferring shares in a company (company A) to a person—
- (i) who will be, is, or has been an employee of company A or of another company that is a member of the same group of companies as company A, if the **arrangement is connected to the person's employment or service:**
 - (ii) who will be, is, or has been a shareholder-employee in relation to company A or in relation to another company that is a member of the same group of companies as company A, if the **arrangement is connected to the person's employment or service:**

- (iii) who is an associate of a person described in subparagraph (i) or (ii) (person **A**), if the arrangement is connected to person A's employment or service; but
- (b) does not include an arrangement that—
 - (i) is an exempt ESS:
 - (ii) requires market value consideration to be paid by a person described in paragraph (a) for the transfer of shares in the company on the share scheme taxing date:
 - (iii) requires a person described in paragraph (a) to put shares, acquired by them for market value consideration, at risk, if the arrangement provides no protection against a fall in the value of the shares and none of the consideration for acquiring the shares is provided to the person under an agreement that it is used for acquiring the shares.

Section CE 7B provides:

CE 7B Meaning of share scheme taxing date

Meaning

- (1) Share scheme taxing date means, in relation to shares or related rights under an employee share scheme, the earlier of the following dates:
 - (a) the first date when the shares are held by or for the benefit of an employee share scheme beneficiary (beneficial ownership) and after which, under the provisions of the scheme, —
 - (i) there is no material risk that beneficial ownership may change or that a right or requirement in relation to the transfer or cancellation of the shares may operate; and
 - (ii) there is no benefit accruing to the employee share scheme beneficiary in relation to a fall in value of the shares; and
 - (iii) there is no material risk that there will be a change in the terms of the shares affecting the value of the shares:
 - (b) the date when the shares or related rights of an employee share scheme beneficiary are cancelled or are transferred to a person who is not associated with a beneficiary described in section CE 7(a)(i) or (ii).

Exclusions

- (2) For the purposes of applying subsection (1), the following requirements and rights are ignored:
 - (a) a right or requirement in relation to transfer by the employee share scheme beneficiary for market value consideration at the time of the transfer:
 - (b) a right or requirement that is not contemplated by the employee share **scheme's provisions**:
 - (c) a right or requirement that, at the time it came into existence, had no material risk of operating or no material commercial significance:
 - (d) a right or requirement in relation to the transfer of shares, if the right or requirement is 1 that also applies to shares not under the employee share scheme.

Section CW 26C provides:

CW 26C Meaning of exempt ESS

Exempt ESS

- (1) Exempt ESS means—
 - (a) a scheme that had the Commissioner's approval under section DC 12 (Loans to employees under share purchase schemes) before that section's repeal by the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018:

- (b) an arrangement of which the Commissioner has been notified under section 63B(1) of the Tax Administration Act 1994, if—
 - (i) the arrangement meets the criteria in subsections (2) to (9) of this section; and
 - (ii) the Commissioner has received all forms due under section 63B(2) and (3) of the Tax Administration Act 1994.

Purchase of shares

- (2) The arrangement must provide that—
 - (a) the shares are available for no more than their market value at the date of purchase or subscription; and
 - (b) the market value of the shares purchased or subscribed for by an employee, or a trustee for an employee, under the arrangement is less than or equal to \$5,000 in a year; and
 - (c) the difference between the market value of the shares purchased or subscribed for by an employee or a trustee and the amount that an employee spends on buying shares under the arrangement is less than or equal to \$2,000 in a year.

Eligibility

- (3) The arrangement must provide that—
 - (a) a full-time permanent employee to whom an offer under the arrangement is made is eligible to participate in the arrangement, on an equal basis with 90% or more of other full-time permanent employees to whom an offer under the arrangement is not subject to foreign security disclosure rules; and
 - (b) if it applies to part-time employees, those employees to whom an offer under the arrangement is made are eligible to participate in the arrangement, on an equal basis with 90% or more of other part-time employees to whom an offer under the arrangement is not subject to foreign security disclosure rules; and
 - (c) if it applies to seasonal workers, those employees to whom an offer under the arrangement is made are eligible to participate in the arrangement, on an equal basis with 90% or more of other seasonal workers to whom an offer under the arrangement is not subject to foreign security disclosure rules; and
 - (d) if it requires that an employee spend a minimum amount on buying shares, it requires no more than \$1,000 to be spent in a year; and
 - (e) if it requires that an employee must have a minimum period of employment or service before the employee is eligible to participate, it requires—
 - (i) no more than 3 years full-time work, for full-time employees; and
 - (ii) no more than an accumulated period that is the equivalent of 3 years full-time work, for other employees.

Payments

- (4) The arrangement must provide that—
 - (a) if it requires that an employee must buy the shares for more than nominal consideration,—
 - (i) a loan for the cost of the shares is available to the employee; or
 - (ii) the employee may pay for or buy the shares in regular instalments of a month or less, and any regular instalments are subject to paragraph (d)(ii); and
 - (b) any loan to an employee to buy shares is free of interest and other charges; and
 - (c) any loan or regular instalments have a maximum term of 60 months and a minimum term of 36 months; and
 - (d) any loan to an employee to buy shares is repayable by regular instalments of a month or less, but—

- (i) **the loan is repayable early in full or in part at the employee's discretion;** and
- (ii) in the case of an employee who is on unpaid or parental leave for more than a month, the regular instalments are suspended while on leave and the term of the loan is extended as appropriate.

Serious hardship

- (5) The arrangement must provide, in the case of serious hardship that results or may result from **an employee's continued participation in the exempt ESS, that, with the employee's agreement,—**
 - (a) any regular instalments and any other terms related to payment by the employee may be varied; or
 - (b) the employee may withdraw from the arrangement, and any shares are bought from the employee for their market value on the day of withdrawal, subject to the repayment of any outstanding loan.

Withdrawal

- (6) The arrangement must provide that the employee may withdraw from the **arrangement on giving 1 month's** notice to the relevant party. Any shares must be bought from the employee for the lesser of their market value on the day of withdrawal and their cost to the employee, subject to the repayment of any outstanding loan.

Period of restriction

- (7) The arrangement must provide that,—
 - (a) if the employee has not acquired the shares for market value, there is a period of restriction during which the shares must not be disposed of and that period of restriction is the shorter of—
 - (i) a period of 3 years starting on the date the employee acquired the shares, or the period of repayment of a loan made to them under the scheme for this purpose, whichever is longer; and
 - (ii) a period starting on the date the employer acquired the shares and ending on the date the employee ends their employment with the company that employs them, or a company in the same group of companies if the employee is transferred; or
 - (b) if the employee has acquired the shares for market value, there is a period of restriction during which the shares must not be disposed of and that period of restriction is no longer than the shorter of—
 - (i) the shortest period in paragraph (a)(i) and (ii); and
 - (ii) any period of restriction provided by the arrangement, if that period finishes on or after the date on which the employee has no further repayment obligations for a loan made to them under the scheme.

End of period of restriction: general rule

- (8) When the period of restriction provided by subsection (7) ends, the arrangement must provide that—
 - (a) the shares are transferred to the employee if the employee is still employed by the relevant company and they have not already been transferred; or
 - (b) if the employee chooses, the shares are purchased for the lesser of—
 - (i) the cost of the shares to the employee;
 - (ii) the market value of the shares on the date the period of restriction ends.

End of period of restriction: certain cases

- (9) **Despite subsection (8), when a period of restriction ends because the employee's employment ends through their death, accident, sickness, redundancy, or retirement at normal retiring age, the arrangement must provide that—**

- (a) the shares are transferred to the former employee if they have not already been transferred, or transferred **to the legal representative of the employee's estate**, as appropriate; or
- (b) if the employee chooses, the shares are purchased for the lesser of—
 - (i) the cost of the shares to the employee;
 - (ii) the market value of the shares on the date the period of restriction ends.

Section CW 26F provides:

CW 26F Meaning of share

For the purposes of section CW 26C, share means, for a company whose shares are made available under an exempt ESS, a fully paid ordinary share that ranks equally with, and has the same designation as, an existing ordinary voting share in the company.

Section RD 7B provides:

RD 7B Treatment of employee share schemes

When this section applies

- (1) This section applies for employees or a former employee in relation to benefits under an employee share scheme, if—
 - (a) an employer has irrevocably chosen to withhold and pay tax for a benefit for an employee under the scheme in accordance with subsection (3); or
 - (b) an employer chooses to withhold and pay tax for a benefit for an employee under the scheme in accordance with subsection (4).

Irrevocable obligation

- (2) An employer who has made an irrevocable election described in subsections (1)(a) and (3) must comply with subsection (4)(a) to (c) for—
 - (a) the relevant benefit and employee under the scheme;
 - (b) benefits offered or provided to the employee in replacement of the relevant benefit.

Irrevocable obligation: form

- (3) For the purposes of subsection (1)(a), an employer has irrevocably chosen to withhold and pay tax for a benefit for an employee, if it is a term of the offer of the benefit, or of the scheme under which the benefit is provided, that the employer must withhold and pay tax under this section.

Withholding and paying

- (4) For the purposes of subsection (1)(b), an employer chooses to withhold and pay tax for some benefits for some employees by—
 - (a) calculating the amounts of tax that must be withheld for the relevant benefits and employees, and paying the amounts to the Commissioner as described in section RD 4(1); and
 - (b) **including the amounts in the employer's employment income information** under subpart 3C of the Tax Administration Act 1994, treating the relevant ESS deferral date as the relevant payday; and
 - (c) making the disclosure referred to in paragraph (b) within the time required under section RD 6(3)(a).

The definition of "share" in s YA 1 is:

share -

- (a) includes any interest in the capital of a company:

- (b) includes a debenture to which section FA 2 (Recharacterisation of certain debentures) applies:
- (bb) includes a stapled debt security to which section FA 2B(2) (Stapled debt securities) applies:
- (c) includes a unit in a unit trust:
- (d) **includes an investor's interest in a group investment fund** if—
 - (i) the fund is not a designated group investment fund; and
 - (ii) the interest does not result from an investment from a designated source; and
 - (iii) **the investor's interest does not result from an investment made in the fund on or before 22 June 1983, including an amount treated as invested at that date as pre-1983 investments under section HR 3(8) (Definitions for section HR 2: group investment funds):**
- (e) does not include a withdrawable share in a building society, except in the definitions of investment society dividend and withdrawable share:
- (f) [*Repealed*]
- (g) is further defined in section CW 26F (Meaning of share) for the purposes of section CW 26C (Meaning of exempt ESS)