

# ***CR 2015/6 - Income tax: GDF SUEZ International Employee Share Ownership Plan***



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## Class Ruling

### Income tax: GDF SUEZ International Employee Share Ownership Plan

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#### **① This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Subdivision 83A-C of the ITAA 1997
- section 83A-10 of the ITAA 1997
- subsection 83A-105(3) of the ITAA 1997
- subsection 83A-110(1) of the ITAA 1997
- section 83A-120 of the ITAA 1997
- subsection 83A-120(3) of the ITAA 1997
- subsection 83A-120(4) of the ITAA 1997
- subsection 83A-120(5) of the ITAA 1997, and

- Regulation 83A-315.03 of the *Income Tax Assessment Regulations 1997* (ITAR).

All subsequent legislative references in this ruling are to the ITAA 1997 unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies are the employees of the Australian employing entities of the GDF SUEZ Group who:

- are granted Share Appreciation Rights or Free Share Allocation Rights under the GDF SUEZ International Share Ownership Plan (Plan)
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- are not 'temporary residents' within the meaning of that expression in subsection 995-1(1)
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their securities.

*(Note: Division 230 will generally not apply to individuals, unless they make an election for it to apply to them).*

In this Ruling, a person belonging to this class of entities is referred to as a Participant.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 26 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

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## Date of effect

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7. This Ruling applies from 1 July 2014. However, this Ruling 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 Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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## Scheme

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8. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- the application for a Class Ruling dated 29 July 2014
- Link 2014 GDF SUEZ International Employee Share Ownership Plan dated 25 November 2014 (Plan)
- Link 2014 Plan Rules for the GDF SUEZ Free Share Allocation Plan (Right)
- GDF SUEZ Link 2014 Terms and conditions of the Stock Appreciation Rights dated 23 June 2014 (SAR)
- GDF SUEZ Link 2014 Employee Share Purchase Plan Kit provided to employees including cover letter, booklet, country supplement for Australia, subscription form and revocation form
- GDF SUEZ Annual Report for the financial year ended 31 December 2013, and
- additional correspondence from the applicant in relation to the Class Ruling up to 6 January 2015.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

9. International Power (Australia) Holdings Pty Ltd and Loy Yang Holdings Pty Ltd are for tax purposes the head companies for the following Australian subsidiaries (Australian employing entities of the GDF SUEZ Group):

- Hazelwood Power Partnership
- Hazelwood Power Corporation Pty Limited
- International Power (Australia) Pty Ltd
- International Power (Energy) Pty Limited
- IPM Operation and Maintenance Kwinana Pty Limited
- Gippsland Power Pty Limited
- Latrobe Power Partnership

- IPM Operation and Maintenance Loy Yang Pty Limited
- Pelican Point Power Limited
- Simply Energy Partnership
- I Power Pty Limited
- I Power 2 Pty Limited
- Synergen Power Pty Limited, and
- Canunda Power Pty Ltd.

## **GDF SUEZ LINK 2014**

10. GDF SUEZ S.A. (GDF SUEZ) is a French company whose shares are listed on the Eurolist Paris and Brussels stock exchange.

11. GDF SUEZ is the ultimate holding company of the GDF SUEZ S.A. Group (the Group). The Group is a French-based multinational electric utility group, headquartered in Nanterre, France, and which operates in the fields of electricity generation and distribution, natural gas and renewable energy.

12. The Group currently operates in around 70 countries. It operates in Australia through GDF SUEZ Australian Energy, which is a *Corporations Act 2001* subsidiary of GDF SUEZ.

## **The Plan**

13. The Group intends to implement the Plan, called 'Link 2014', in around 32 jurisdictions including Australia. Employees of the Australian employing entities of the GDF SUEZ Group with three months employment will be able to participate in the Plan.

14. Under the Plan employees will have the opportunity to subscribe for newly issued GDF SUEZ shares at a 20% discount to a specified Reference Price (Subscription Shares). The Subscription Shares will be ordinary shares and will be subject to a mandatory lock-up period of five years.

15. Participants can choose to acquire the Subscription Shares either through the Classic Formula, the Multiple Formula, or both.

## **Classic Formula**

16. A Participant that acquires Subscription Shares under the Classic Formula will also receive a Free Share Allocation Right (Right), which entitles them to acquire Free Shares for no consideration at the end of the five year lock-up period. That is, under the Plan, Free Shares will be delivered to Participants on maturity of the Classic formula on 11 December 2019.

17. The total investment that a Participant is entitled to make under Link 2014 is capped at 25% of his/her gross annual salary for 2014 (2.5% for Participants subscribing during the subscription/revocation period), and the maximum number of Free Shares to which a Participant is entitled is capped at twenty. The Free Shares will be ordinary shares of GDF SUEZ.

18. In order to be eligible to receive the Free Shares, the Participant must satisfy a 'presence condition', which means that:

- they must not have voluntarily resigned from their employment contract between the date that they acquired the Rights and 30 September of 2019, subject to certain exceptions (that is, invalidity or death, which allow early release of Free Shares), and
- on 30 September 2019, the employer company is included in the consolidation scope of the Group.

19. The President and Chief Executive Officer of GDF SUEZ, or any other duly authorised person who reports to the Board of Directors, has the power to exempt an Employee, or a category of Employee, from complying with the 'presence conditions' on the basis of a reasoned decision. The Group companies advise that this power will only be exercised in very exceptional circumstances and not on a routine basis.

20. During the five year period between allocation of the Free Shares and receipt of the Free Shares Participants do not have the ownership of the Free Shares and are not entitled to enjoy the voting rights or financial rights on these shares.

21. The Free Shares shall be held in one of the following ways to be chosen by GDF SUEZ, who will inform the Participants prior to the final allocation of the Free Shares:

- registration of the Free Shares to the credit of an individual registered share account opened in the books of the account holder in charge of administering the Free Shares, or
- delivering the Free Shares to a company mutual fund which is itself invested in GDF SUEZ shares, provided that it is allowed under the applicable legislations.

22. If Free Shares are held in an individual registered share account they cannot be converted into bearer shares.

23. Further, Article 5.4 of the Plan Rules for the Free Share Allocation describes the circumstances in which trading restrictions will apply to an Employee's Free Shares. GDF SUEZ advises that there are serious and enforced consequences for any employee who transfers the Free Shares during a restricted period. Furthermore, as a result of certain custodian arrangements which involve the management of the Free Shares, it is unlikely that the Free Shares would be sold during these restricted periods. Accordingly, even if the Free Shares are delivered to an Employee during one of the restricted periods, the Plan will operate to restrict the Employee from disposing of the beneficial interest in the Free Shares.

## Multiple Formula

24. Under the Multiple Formula the GDF SUEZ Australian companies will grant a Stock Appreciation Right (SAR) to the Participant for each Subscription Share subscribed under the Multiple Formula. The SAR entitles the Participant to a cash payment at the maturity of the Multiple Formula on 11 December 2019, or earlier if an Early Release Case occurs and the employee asks for disposal of their GDF SUEZ shares.

25. The cash payment will be determined according to a formula. Broadly, the amount of the payment can only be determined at the end of the lock-up period (or when the event of early payment occurs) as it is dependent on the performance of the GDF SUEZ share price over the relevant period and the GDF SUEZ share price on the relevant date.

26. There are no circumstances in which the SAR will be settled with GDF SUEZ shares, or rights to acquire a GDF SUEZ share.

## Ruling

### Classic Formula- Where rights are settled with shares

27. The Right is a right to acquire a beneficial interest in Shares, and will be an ESS interest acquired under an employee share scheme (section 83A-10).

28. Rights acquired by Participants under the Plan are at real risk of forfeiture (subsection 83A-105(3)) and where this is the case Subdivision 83A-C will apply.

29. The discount in relation to the Rights will be assessable in the income year in which the earliest ESS deferred taxing point occurs as determined under section 83A-120. The ESS deferred taxing point for the Rights acquired will be the earlier of the following times:

- the first time the Participant can dispose of the Shares after acquisition under the GDF Suez Plan (subsection 83A-120(4)), or
- the time when the employee ceases employment other than in a case of voluntarily resignation (free shares are not delivered if the Participant voluntarily resigns) (subsection 83-120(5)).

30. If a Participant disposes of the Shares acquired within 30 days after the first occurrence of one of the above times, the ESS deferred taxing point will instead be the time of the disposal (subsection 83A-120(3)).

31. The amount to be included in assessable income of the Participant will be the market value of the Shares at the ESS deferred taxing point (subsection 83A-110(1) and Regulation 83A-315.03 of the ITAR).

32. If Free Shares are received by the Participant on 11 December 2019 the market value of the GDF Suez share at this date will be included in the assessable income of the Participant for the income year ended 30 June 2020 (subject to the '30 day' rule in section 83A-120(3)).

33. If Free Shares are received by the Participant when the Participant ceases employment the market value of the Shares at that date will be included in the assessable income of the Participant for the relevant income year.

#### **Multiple Formula- Where rights are settled by cash payment**

34. Where a Participant's SAR is satisfied by a cash payment the cash payment will be included in the assessable income of the Participant in the income year in which it is received under section 6-5.

35. If the cash payment is made at maturity on 11 December 2019, the cash payment will be included in the assessable income of the Participant in the income year ended 30 June 2020.

36. If an early release case occurs and the Participant receives a cash payment before maturity then the cash payment will be included in the assessable income of the Participant for the relevant income year when the payment is received.

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**Commissioner of Taxation**

28 January 2015

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## Appendix 1 – Explanation

**①** *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.*

### **Classic Formula- Where rights are settled with shares**

#### **ESS interest**

37. An ESS interest in a company is defined under subsection 83A-10(1) as either a beneficial interest in a share in the company or a beneficial interest in a right to acquire a beneficial interest in a share in the company.

38. Each Right granted to a Participant under the Classic Formula is a right to acquire a Free Share. As a result, the Rights granted to the Participants are ESS interests for the purposes of subsection 83A-10(1), and are acquired by the Participants at the time the Rights are granted.

39. The Right will be an ESS interest acquired under an employee share scheme under subsection 83A-10(2) as the Rights are granted to the Participant in relation to their employment as an employee of the GDF SUEZ Australian companies.

#### **Division 83A**

40. Subsection 83A-25(1) in Subdivision 83A-B requires that assessable income for the income year in which the ESS interest is acquired includes the discount in relation to the interest. However, Subdivision 83A-B will not apply if Subdivision 83A-C applies.

41. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to an ESS interest is not included in a Participant's assessable income when they acquire the interest. Instead, under section 83A-110 the assessable income of the Participant will include at a later time (the 'ESS deferred taxing point') any gain made in relation to the interest up until the ESS deferred taxing point.

42. The conditions to be satisfied for the interest to be eligible for an ESS deferred taxing point under Subdivision 83A-C are listed at subsection 83A-105(1).

43. The first condition is that Subdivision 83A-B would, but for section 83A-105, have applied to the interest.

44. The second condition is that the interest be an interest in the company that employed the Participant, or a holding company of that company (subsection 83A-35(3)).

45. The third condition is that all interests available under the employee share scheme must relate to ordinary shares (subsection 83A-35(4)).

46. The fourth condition is that:

- the predominant business of the company in which the interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly), and
- the Participant is employed by the company, or if the Participant is not employed by that company, they are employed by a subsidiary of that company, or a holding company of that company, or a subsidiary of the holding company (subsection 83A-35(5)).

47. The fifth condition is that immediately after the interest is acquired the Participant will not hold a beneficial interest in greater than 5% of the shares, or be in a position to control the casting of greater than 5% of the votes that might be cast at a general meeting of the company (subsection 83A-35(9)).

48. The Commissioner accepts that these five conditions are satisfied for Rights acquired by a Participant under the Plan.

### ***Real Risk of forfeiture***

49. In order for the 'real risk of forfeiture' test (subsection 83A-105(3)) to be satisfied in relation to an ESS interest acquired by a Participant under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

50. 'Real risk of forfeiture' in a scheme may include conditions where retention of the ESS interests is subject to performance hurdles and/or a minimum term of employment.

51. In order to be eligible to receive the Free Shares Participants must satisfy a 'presence condition', which means the Participant must remain an employee of the GDF SUEZ Group for five years after the date that they acquired the Rights. Unvested Free Shares may be forfeited if the Employee ceases employment other than in special circumstances (that is, death or disability) before the vesting time.

52. The Plan Rules for the GDF Free Share Allocation provides that the Board has the discretion to exempt an Employee from complying with the Presence Condition on the basis of a reasoned decision. As the discretion is not routinely exercised, the Commissioner does not consider that the availability of the discretion will prevent Rights from being at a real risk of forfeiture.

53. As there is a real risk that Participants will forfeit or lose their Rights other than by disposing of them, subsection 83A-105(3) will apply to Rights granted to them.

54. As a result, Subdivision 83A-C applies to the Rights and Subdivision 83A-B does not apply. The taxation of the discount given to Participants will be deferred until an ESS deferred taxing point occurs.

### ***ESS deferred taxing point***

55. As Subdivision 83A-C applies to the Rights acquired under the Plan, section 83A-120 will apply in determining the ESS deferred taxing point.

56. In respect of the Rights, the ESS deferred taxing point will (subject to the 30 day rule) be the earliest of:

- the first time when the Free Shares acquired on vesting of those Rights are no longer subject to disposal restrictions (including any restriction imposed by the GDF SUEZ securities trading policy) (subsection 83A-120(4)), or
- the time when the Employee ceases employment (subsection 83-120(5)).

57. However, where an Employee disposes of the Free Shares within 30 days of the earlier of the above times, the ESS deferred taxing point will be the date of disposal (subsection 83A-120(3)).

58. For Participants still employed by the GDF SUEZ Australian companies at the end of the acquisition period, the first of the above events to occur will be when GDF SUEZ delivers the Free Shares to the Participant following the end of the acquisition period. Under the Plan this will be on 11 December 2019, so the ESS taxing point will occur in the income year ending 30 June 2020.

59. For Participants who cease employment with the GDF SUEZ Australian companies during the acquisition period, but who retain their Rights, the first of the above events to occur will be when they cease employment. The Participant will include the discount on their Rights in their assessable income for the year in which they ceased employment, subject to the 30 day rule in subsection 83A-120(3).

### ***Amount included in assessable income***

60. In accordance with section 83A-110, the amount to be included in assessable income at the ESS deferred taxing point will be the market value of the ESS interest reduced by the cost base of the interest.

61. Section 83A-315 provides that whenever Division 83A uses the market value of an ESS interest, you must instead use the amount specified in the regulations for the purposes of section 83A-315 if the regulations specify an amount.

62. Subregulation 83A-315.01(1) of the ITAR applies to unlisted rights that must be exercised within ten years of acquisition and therefore applies to the Rights granted to the Participants under the Plan. Under this subregulation, the Participants can choose to value their Rights at either:

- the market value according to its ordinary meaning; or
- the amount determined by the application of the rest of the regulations in Division 83A of the ITAR.

63. Under regulation 83A-315.02 of the ITAR, if a right is not quoted on an approved stock exchange on a particular day, the market value of the right (for the purpose of the regulation) is the greater of:

- the market value (on that day) of the share that may be acquired by exercising the right, less the lowest amount that must be paid to exercise the right; or
- subject to regulation 83A-315.03 of the ITAR, the value determined in accordance with regulations 83A-315.05 to 83A-315.09 of the ITAR.

64. Regulation 83A-315.03 of the ITAR provides that if the lowest amount that must be paid to exercise a right to acquire a beneficial interest in a share is nil, the value of the right on a particular day is the same as the market value of the share on that day.

65. As Participants are not required to pay an exercise price for a Right granted under the Plan, the value of the Right at the ESS deferred taxing point is the same as the market value of a GDF SUEZ share on that day.

66. Therefore, the amount that the Employees need to include in their assessable income will be the market value of the Free Shares (GDF SUEZ shares) determined at the ESS deferred taxing point.

67. If Free Shares are received by the Participant when the Participant ceases employment, the market value of the Shares at that date will be included in the assessable income of the Participant for the relevant income year.

### **Multiple Formula- Where rights are settled by cash payment**

#### ***SAR is not an ESS interest***

68. Each Share Appreciation Right (SAR) granted to a Participant under the Multiple Formula is a right to receive a cash payment. As a Participant's SAR is satisfied in cash, the SARs will not be considered to be ESS interests under subsection 83A-10(1), and therefore Division 83A will not apply.

## ***Amount included in assessable income***

69. Where a Participant's Rights are satisfied in cash the granting of the Rights:

- will be viewed as one of a series of steps in the payment of salary or wages; and
- will not be viewed as a separate benefit to the payment of salary or wages.

70. Subsection 6-5(2) provides that the assessable income of an Australian resident taxpayer includes ordinary income derived directly or indirectly from all sources during the income year. Ordinary income includes salary and wages.

71. Therefore, the Participant will need to include the cash payment in their assessable income for the year in which the cash is received under subsection 6-5(2).

72. If the cash payment is made at maturity on 11 December 2019, the cash payment will be included in the assessable income of the Participant in the income year ended 30 June 2020.

73. Given that the payment is viewed as salary or wages in character, it will not meet the definition of a fringe benefit, as salary and wages are excluded from the definition of fringe benefit (paragraph 136(1)(f) of the *Fringe Benefits Assessment Act 1986*). Accordingly not fringe benefit tax consequences arise.

## **Appendix 2 – Detailed contents list**

74. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- Employee share schemes

*Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 83-120(5)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-35(3)
- ITAA 1997 83A-35(4)
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ATO references

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