

TD 2014/21EC - Compendium



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Ruling Compendium – TD 2014/21

This is a compendium of responses to the issues raised by external parties to Draft Taxation Determination TD 2014/D16 *Income tax: where a right to acquire a beneficial interest in a share is granted subject to shareholder approval, is the right an ‘indeterminate right’ within the meaning of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the Draft Ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	<p>The submission refers to the Note under paragraph 15 of the Draft Determination, that is:</p> <p>Note: where a right is granted subject to shareholder approval on terms providing that if shareholder approval is not obtained the employee will receive an amount of cash as compensation, the right is a right to receive property and would be an indeterminate right within the meaning of section 83A-340 of the ITAA 1997. Where cash compensation is nominal or disproportionately small, it is necessary to consider whether that cash compensation truly relates to the grant or whether the general anti-avoidance provisions in Part IVA of the ITAA 1936 apply. (emphasis added)</p>	<p>The purpose of the Note is to alert readers to the possible application of Part IVA of the ITAA 1936 if a nominal amount of cash was included in the offer merely to lock in an earlier grant date for ESS interests where shareholder approval is required.</p> <p>On the authority of <i>Fowler</i>, the acquisition of ESS interests subject to shareholder approval is the date of shareholder approval. By structuring a Board resolution to include an amount of cash in the alternative, the timing of the grant can be brought forward by the operation of section 83A-340 of the ITAA 1997, as the rights are indeterminate rights. When shareholder approval is given, the date the employee acquires the ESS interests is taken to be the date on which the indeterminate rights (which were not subject to shareholder approval) were acquired. There was no provision for indeterminate rights under Division 13A of the ITAA 1936.</p> <p>The relevance to Division 83A of the ITAA 1997 is that the consequences of the <i>Fowler</i> decision may be avoided by structuring a grant of rights to fall within section 83A-340 of the ITAA 1997.</p>

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Issue No.	Issue raised	ATO Response/Action taken
1 cont.	<p>In our view, an explanation should be provided in the Draft Determination as to why the amount received in cash is relevant for section 83A-340 of the ITAA 1997. We assume the note has been included because Example 2 in the section refers to a provider agreeing to issue either shares or cash 'whichever the provider chooses'. However, shareholder approval is somewhat different to an employer making a completely discretionary choice as to whether shares or cash are received.</p> <p>Following on from the above, it would be very useful if the final determination provided guidance as to when the ATO would regard cash compensation as 'nominal or disproportionately small' such that the arrangement would trigger an ATO investigation under Part IVA of the ITAA 1936.</p>	<p>The wording of the Note has been altered to clarify the reason why, and circumstances under which, Part IVA of the ITAA 1936 might be considered. Since the adequacy of cash compensation could depend on a variety of factors, providing a concise and useful example is problematic. Compensation of a nominal amount, such as \$10, where a grant of options is expected to be worth many thousands of dollars would clearly be inadequate. However, it is considered that such an obvious example would not provide useful guidance. In practice, the application of Part IVA of the ITAA 1936 would be considered where there is real doubt that the compensation amount was genuinely compensatory and the existence of a tax benefit is clear.</p>