


IT 2516 - Income tax : exclusion from tax for discounts provided under employee share acquisition schemes

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 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in [TR 2006/10](#) provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

TAXATION RULING NO. IT 2516

INCOME TAX : EXCLUSION FROM TAX FOR DISCOUNTS PROVIDED
UNDER EMPLOYEE SHARE ACQUISITION SCHEMES

F.O.I. EMBARGO: May be released

REF N.O. REF: L.89/212-2 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011003	EMPLOYEE SHARE ACQUISITION SCHEMES DISCOUNTS ON EMPLOYEE SHARES EXCLUSION FROM TAX	26AAC(4A)-(4F) 26AAC(18A)-(18E)

PREAMBLE The Taxation Laws Amendment Act (No. 5) 1988 (Act No. 153 of 1988) amended the Income Tax Assessment Act 1936 (the Act) to alter the taxation of discounts on employee shares. The amendments generally exclude from assessment under section 26AAC of the Act up to \$200 of discounts on shares or rights acquired under certain employee share acquisition schemes (ESAS) but reduce the capital gains tax cost base by the amount of discount excluded.

2. The \$200 exclusion is based on a maximum discount of 10 per cent on a maximum share value of \$2000 per year. Discounts in excess of these limits will still qualify for the exclusion, but the excess discount will be subject to tax.

3. The exclusion from tax will be available for shares acquired or rights issued on or after 1 July 1988, although where shares are acquired by the exercise of a right, the right must also be acquired on or after 1 July 1988.

4. To qualify for the exclusion, the following requirements must be satisfied :

- . the shares are acquired or rights are issued under an ESAS that is open on a non-discriminatory basis to all full-time and permanent part-time employees (of a company or company group) with at least twelve months service;
- . any financial assistance provided in respect of the acquisition of shares or rights under an ESAS is available on a non-discriminatory basis;
- . shares have the same voting rights as ordinary shares of the company;
- . the terms of issue require the shares or rights to be held for a minimum of three years, unless an employee ceases employment within the three years; and
- . the employer has not claimed a deduction in respect of

expenditure incurred by the employer in relation to the acquisition of shares or rights under the ESAS.

5. While official approval is not required for a scheme to confer the concession on employees, it is anticipated that most employers will seek advice as to whether or not their schemes satisfy the eligibility requirements. This Ruling provides guidelines for interpreting the new provisions for the purpose of determining whether the employer and the scheme satisfy the eligibility requirements. It does not seek to cover ground already covered in the explanatory memorandum that accompanied the amending Act.

RULING

6. The new provisions are to be interpreted to encourage the establishment of, and participation in, employee share acquisition schemes, but still having regard to the legislative safeguards that are designed to prevent abuse of the tax exclusion. Consequently, it is important that these guidelines are not followed rigidly, but that each case is treated on its particular merits.

Non-discriminatory basis

7. The share discount, and any financial assistance must be available, on equal terms, to all full-time and permanent part-time employees with at least 12 months service. Schemes with any arrangements that do not offer the discount to a particular eligible group or that extend the discount to employees outside the legislative requirements would not be eligible.

8. Generally, a scheme that contains specific terms that satisfy the non-discriminatory requirements would usually be sufficient. However, schemes that allow the terms of offer to be determined at the discretion of directors would need some safeguard that the non-discriminatory requirements are adhered to. A general statement that the requirements of the scheme will be overridden by the legislative requirements where inconsistencies exist, or a reference that the discretion is to be exercised on a non-discriminatory basis, would be considered sufficient.

9. Examples of the interpretation of non-discriminatory requirements are as follows :

Schemes that satisfy non-discriminatory requirements

- . schemes that offer shares to all permanent employees and directors with 12 months service, but exclude non-salaried directors.
- . schemes that offer shares to resident employees only. Schemes may also offer shares to non-resident employees but the offer must be to all resident and non-resident employees.

Schemes that would not satisfy non-discriminatory requirements

- . schemes that offer shares to all employees, regardless of 12 months service, or whether permanent or casual.

- . schemes that offer shares to employees of 2 years service - this discriminates against employees of 1-2 years service.
- . schemes that offer a different number of shares for a different period of service - i.e., 100 shares for 1-9 years, 200 shares for 10-19 years etc.
- . schemes that offer different levels of discount between eligible employees.
- . schemes that offer shares to employees in one company in a company group but not to another company in the same company group. This would apply where there is 50% or more common ownership.

12 months service

10. The 12 month period is measured from the commencement of employment to the date the shares are acquired or rights are issued.

Ordinary shares

11. Shares would be considered to be 'ordinary shares' where they have the same voting rights as ordinary shares offered to the public. Shares that are partly paid would be treated as having the voting rights of an equivalent fully paid share for the purpose of comparison with fully paid shares offered to the public. The 'ordinary share' requirement would usually not apply to private companies as they do not offer shares to the public.

Three year holding requirement

12. It is preferred that schemes require the share certificates to be held by the employer until the end of the three years, or cessation of employment. However, notification in the prospectus that the shares or rights must be held for three years, unless employment terminates, would also be sufficient to satisfy this requirement.

Employer deductions

13. A further consideration is the requirement that a deduction not be allowable to the employer in respect of expenditure incurred in relation to the acquisition of shares or rights under a scheme. This requirement is intended to prevent a double concession arising in respect of the same discount (i.e., a deduction to the employer and a tax exclusion to the employee).

14. Consequently, it will only apply to deny the tax exclusion where an employer can claim a deduction for the discount or an amount representing the discount. It is not intended to deny the tax exclusion where the deduction relates to expenditure incurred in setting up the scheme.

15. The legislative requirement is expressed in wide terms to cover the variety of arrangements that may arise where all or part of a deductible contribution relates to the discount. For example, an employer may make a cash contribution to an ESAS

trust to cover the discount or to finance the whole ESAS. Under both arrangements a deduction in respect of the discount is allowable and the schemes would not entitle the employees to the tax exclusion.

16. However, an arrangement where an employer company makes a non-deductible loan to an ESAS trust to fund discounts to employees would not contravene the requirement.

Stricter requirements

17. Schemes that contain requirements that are stricter than those contained in the new legislation would be acceptable provided the requirements are not discriminatory. However, schemes will not be acceptable if the requirements are less strict than those contained in the new legislation. For example, the legislation requires shares or rights to be held for three years except where employment terminates. A scheme that provides an exception only on the termination of employment as the result of the death of the employee would qualify, but a scheme that provides an exception where an employee suffers financial hardship would not.

18. Further examples are as follows :

Schemes that would be eligible

- . a scheme that requires shares to be held for 4 years.
- . a scheme that only refunds an employee's contribution where employment is terminated because of employee misconduct.

Schemes that would not be eligible

- . schemes that require shares to be held for 2 years.

Subsequent contravention of requirements

19. Under paragraph 26AAC(4A)(d) the Commissioner must be satisfied that the eligibility requirements were met by a scheme at the time the shares or rights were offered. The question has arisen as to how to treat subsequent breaches of the requirements, particularly in circumstances where shares or rights are disposed of within the 3 year period without cessation of employment.

20. Where a scheme claims to satisfy the requirements, but subsequently either fails to enforce the requirements, or alters them, it is considered that the Commissioner may not be satisfied that the legislative requirements were met at the time of the offer. Satisfaction at the time of the offer infers that the scheme will operate, and continue to operate under the requirements. In these circumstances, the tax return of each employee for the year in which the exclusion was claimed may be amended to remove the exclusion and appropriate penalties imposed. This action would be taken to address lax administration rather than isolated instances of default by employees.

21. Examples of such subsequent action include allowing shares

to be disposed of within 3 years where employment has not been terminated, or providing shares that are not 'ordinary shares'.

22. Where a scheme claims to satisfy the requirements, but subsequent events prevent the requirements being imposed, or shares are disposed of outside the legislative requirements, the Commissioner would be satisfied that the requirements were met at the time of the offer. The important considerations here are that disposal must be outside the employee's control, and then be either also outside the scheme's control, or disposal occurs under the scheme as the result of default by the employee.

23. Examples of such action include forced disposal of shares on takeover of the employer company, or sale by the employer when the employee defaults on loan repayment.

COMMISSIONER OF TAXATION
26 January 1989