



Employee Share Schemes - July 2010



Employer Reporting for Employee Share Schemes *Finally, some guidance!*

The introduction of the new Employee Share Schemes ("ESS") tax laws which took effect from 1 July 2009 saw a change in the landscape in relation to the taxation implications associated with issuing ESS interests (shares, rights and stapled securities) under an ESS.

The new ESS laws apply to ESS interests that are provided at a discount to employees (including directors and independent contractors) or their associates, on or after 1 July 2009. The new ESS laws also have application to shares and rights that are provided at a discount prior to 1 July 2009 ("transitioned benefits") in certain circumstances, where a cessation event occurs after 1 July 2009.

The Australian Taxation Office ("ATO") has recently released the approved forms in respect of the reporting requirements together with facts sheets to assist employers to understand these obligations.

In a significant change, the new ESS reporting requirements now place the onus on the employer to calculate the discount in respect of ESS interests issued, in order to meet the reporting disclosures. Generally, the discount given on an ESS interest is the market value of that ESS interest less any consideration paid or payable by the employee.

Market value of an ESS interest (other than options) is undefined in the provisions, and accordingly will be determined based on ordinary principles. The ATO has indicated that it will accept any reasonable method for determining the market value of listed shares.

The market value of unlisted options will be based on either the market value under ordinary principles, or as calculated in accordance with the statutory formula provided in the Regulations.

Reporting obligations for employers

Under the new ESS laws, employers providing ESS interests to employees are subject to reporting obligations to both their respective employees and the ATO.

Essentially, reporting obligations will arise should a taxing point occur during the relevant financial year.

Withholding obligations

To the extent that an employee has not provided their TFN or ABN, the employer is required to withhold an amount of PAYG at 46.5% of the discount on the ESS interest for which a taxing point occurred during the financial year.

Reporting to employees

Employers who are subject to reporting obligations under the new ESS laws are required to provide each employee with an 'ESS statement' by 14 July after the end of the financial year. This statement will assist employees in completing their tax return.

Further, if an employer provides ESS interests to an employee through a trust, the employer will be required to provide an ESS statement to all employees that have an interest in a specific number of shares within the trust.

The 'ESS statement' is required to include the following information (but not limited to):

- the discount for ESS interests acquired under a scheme which is taxed upfront (whether eligible for a reduction or otherwise);
- the discount for ESS interests acquired under a deferred scheme and a taxing point arose during the financial year;
- the discount for transitioned benefits where a cessation time occurred during the financial year; and
- the total TFN amount withheld from discounts during the financial year.

An 'ESS statement' must generally be provided even if the discount is nil.

The ATO has also provided limited concessions to enable some employers to provide reduced reporting to the employee and the ATO. This will generally only apply where ESS interests are issued that are eligible for the \$1,000 reduction, or for ESS interests issued under a tax deferred scheme with no taxing point occurring during the 2009-10 financial year.

Reporting to the ATO

Employers are also required to provide an 'ESS annual report' to the ATO by 14 August after the end of the financial year.

The 'ESS annual report' is required to include the following information (but not limited to):

- general information pertaining to the plan (i.e. plan identifier, plan date, date of taxing points and TFN amounts withheld);
- information pertaining to schemes taxed up front (i.e. number of ESS interests issued, whether these interests are eligible for a reduction and the amount of the discount);
- information pertaining to tax deferred schemes (i.e. number of ESS interests issued, amount of the discount in respect of ESS interests where a taxing point arose during the financial year and the amount of the discount in respect of transitioned benefits where a cessation time arose during the financial year).

30-day rule

If an employee disposes of their ESS interest within 30 days of the deferred taxing point, then the date of sale becomes the deferred taxing point for the purposes of the new ESS laws. At the time that you become aware that an employee has disposed of their ESS interest within 30 days of the deferred taxing point, then the 30-day rule must be applied when fulfilling your reporting obligations as an employer. This may have the effect of moving the taxing point to the next financial year (if the taxing point occurred close to year end), changing the amount that would otherwise be considered the discount (to reflect the disposal) or requiring amendment of previously reported information.

As such, this requirement imposes further obligations on the employer in ascertaining how the employee has dealt with their ESS interests, where previously under the former provisions the employer may have had no need to find out such details.

Amendments to reporting

Should an employer subsequently become aware of a material change or omission in information provided to either the employee or the ATO, corrected information must be reported within 30 days of becoming aware of the change.

For more information on any aspect of the above, please contact Michelle Saunders on (08) 6311 6911 or Marissa Bechta on (08) 6311 6933

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