Employee share incentive schemes

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Introduction

Employee share incentive schemes can be an effective way of offering tax savings to employees in addition to encouraging employee participation and loyalty. Irish tax legislation allows for many types of schemes which facilitate employers in allocating shares, or granting options to buy shares, to employees tax efficiently. Depending on the type of scheme, employees may have to hold the shares for a number of years before they receive the tax benefits. The benefits, together with the conditions and restrictions of the different schemes, are outlined in this booklet.

Why have an employee share scheme?

Employee share schemes are in operation in many Irish companies. In fact they have become best practice for rewarding and retaining employees. In some industry sectors employees expect share participation as part of their total remuneration package.

Employees have always welcomed share schemes as they allow the employee to participate financially, and in some instances tax efficiently, in the growth of their employer's share price.

There is a tax saving of employer PRSI (at 10.75%) for the employer where remuneration is by way of equity participation when compared to cash or other benefits.

In this booklet we consider the following type of schemes:

- Share option schemes
- 'Save As You Earn' share option schemes
- Approved profit sharing schemes
- Restricted share schemes
- Employee share ownership trusts.

Unapproved share option schemes

"With effect from 1 January 2011, USC and employee PRSI apply"

- No employer PRSI
- With effect from 1 January 2011 employee PRSI on exercise (subject to the grandfathering rules for 2011 only, see page 4)
- Can be offered to employees on a selective basis
- Income tax and Universal Social Charge at time of exercise
- Shares acquired on exercise and not disposed of immediately may be subject to capital gains tax on disposal

What is a share option?

A share option is a right given to an employee to buy a share in the company or parent company at some time in the future, at a price fixed on the day the option is granted. Assuming growth in the share price, the employee has the opportunity to buy shares at a price less than market value.

What companies qualify?

All types of companies implement share option schemes. There is nothing to prevent private companies granting share options. However, practical issues such as valuing the shares and providing a ready market following exercise must be addressed.

The provisions of the Companies Act 1990, allow companies, subject to certain conditions and restrictions, to purchase their own shares and this can provide a market for private company shares.

Must all employees be included?

No. In general, share option schemes are delivered to key employees. Options granted under the Revenue approved SAYE scheme must be granted to all employees, resulting in tax favourable treatment (see page 6).

How are schemes structured?

On establishing a scheme, no formal documentation needs to be submitted to the Revenue. The board of the company would normally pass a resolution indicating the establishment of a share option scheme and lay down the overall rules of the scheme. The employee will be provided with an Option Agreement detailing his/her options e.g. the number of shares and option price.

How are options granted?

At such time as it shall choose, the company may notify an eligible employee that he or she is entitled to acquire shares during a specified period. This may or may not be conditional on the achievement of particular targets. The number of shares which the employee may acquire will be at the discretion of the company and will be specified in the Share Option Agreement.

What are the tax consequences for employees?

Income tax and the Universal Social Charge ("USC") are charged on the difference between the option price and the market price when the option is exercised (see over for options capable of lasting more than seven years).

For taxable events (e.g. exercise, release or assignment on or after 1 January 2011, there is an employee PRSI charge (at 4%). This is subject to the rule for 2011 only, that any share based remuneration which is the subject of a written agreement between the employer and employee before 1 January 2011 will not be subject to employee PRSI.

This employee PRSI charge does not arise where the option is exercised, released or assigned in 2011 and where the option was granted prior to 1 January 2011.

For options exercised up to and including 28 March 2003 the employee could elect, on submission of a tax return, to defer the income tax charge arising on exercise where the shares are not disposed of in the year of exercise. The income tax payable may be deferred until the shares acquired are disposed of or for seven years whichever is the earlier.

Prior to 24 November 2010, tax favoured Revenue Approved Share Option Schemes afforded income tax relief on both the grant and exercise of approved options. Approved Share Option Schemes have been abolished with effect from 24 November 2010. No tax favoured approved options can be granted after this date. In addition, post 24 November 2010 approved options exercised will be treated as an unapproved option.

How are income tax and the USC paid?

The income tax due on gains made on exercise of share options (RTSO) must be paid within 30 days after the date of the exercise. The tax due within this 30 day period is calculated at the top rate of tax unless the employee can prove to the Inspector of Taxes that he/she will not be a top rate taxpayer for that year. Tax is payable without demand and failure to comply will lead to interest charges.

The USC at usually the top rate is also payable with RTSO within 30 days of exercise.

Can income tax, USC and employee PRSI liabilities arise at any time other than at exercise?

Income tax, USC and PRSI are not payable until the date of exercise provided the original options were granted for a period of less than seven years. If the exercise period is longer and the option price was at a discount on market value at the date of grant, then an immediate income tax, USC and PRSI charge will arise. Income tax, USC and PRSI will arise at the time of grant on the difference between the option price and market value of the shares at date of grant.

Income tax, USC and PRSI will also arise on any gain released on assesment or release of a share option.

How is the employee PRSI paid?

For exercises prior to 1 July 2012, the employer will be required to collect and remit the employee PRSI liability via payroll witholding. For exercises on or after 1 July 2012 the employee pays the employee PRSI with the RTSO (see page 4) within 30 days of the date of exercise. The employee PRSI due on grant, release or assignment is collected and remitted by the employer.

What about capital gains tax?

Should the shares appreciate in value between the date of exercise and disposal, the gain may be subject to CGT. There is an annual exemption of €1,270 per person. The capital gains tax rate is 33%.

How is CGT paid?

For disposals in 2011 and subsequent years, there are 2 payment dates:

- For disposals between 1 January and 30 November in the tax year - 15 December in the tax year
- For disposals between 1 December and 31 December - 31 January in the following tax year

Are there reporting requirements?

The company: Companies, Irish branches and agencies granting options, including an Irish employer where the options are granted by a non resident parent company, must complete returns of information (Form RSS1) regarding the options. The due date for filing a return is 31 March following the end of the tax year.

The employee: Under the self assessment system an employee must return details of the exercise of options, the option gain and subsequent disposal of the shares on his/her tax return. The due date for which is 31 October annually.

The employee must also submit a Form RTSO 1 within 30 days from the date of exercise of the share option. A payment of Relevant Tax on Share Options at the higher income tax and USC rates and where relevant employee PRSI must also accompany the submission.

Example Options granted over 5,000 shares

Marginal Income Tax rate 40%

USC rate 8% PRSI rate 4%

Price per share	Value €	Gain on exercise	Value €	Gain on disposal	Value €
Options granted at 70c (market value)	3,500	Exercise value	10,000	Sale proceeds	12,500
Options exercised at 200c (market value)	10,000	Option price	3,500	Cost	10,000
Shares sold after 3 years at 250c	12,500	Gain	6,500	Gross gain	2,500
		Tax on exercise		**Tax on disposal**	
		Gross gain	6,500	Gain	2,500
		Income tax @ 40%	2,600	CGT threshold*	1,270
		USC @ 8%	520	Taxable gain	1,230
		PRSI @ 4%	260	CGT @ 33%	406
		Net gain	3,120	Net gain	2,094

*Assumes no other CGT liabilities

‘Save as you earn’ share option schemes

“ if employees do **not** have cash to exercise options or must **sell** shares to pay the tax, ‘SAYE’ offers **tax attractive options** and a way of saving “

- Introduced in Finance Act, 1999
- No income tax, USC or PRSI at date of grant
- No income tax on date of exercise
- No income tax or USC (in general) on savings
- USC and employee PRSI on date of exercise with effect from 1 January 2011 (subject to the grandfathering rules for PRSI in 2011 only)
- No employer PRSI
- All employees who have been employed for a minimum period set by the employer must be eligible to participate on similar terms. This minimum period must not exceed three years. Differentiation by reference to service, salary or similar factors only is allowed
- Regular savings plan
- Up to €500 maximum per month can be saved out of after tax income. The minimum saving is €12 per month
- Share options granted only on the basis of savings
- No obligation to buy shares
- Requires Revenue approval.

What is an SAYE?

On joining a Revenue approved savings-related share option scheme (SAYE), an employee agrees to save a fixed sum out of net pay for a pre-determined period, e.g. three, five or seven years. The employee is granted options on the basis of the amount he/she agrees to save. Schemes must use a qualified savings contract which can give a tax free return on savings.

At the end of the savings period, the individual has the choice to:

- Use the proceeds to buy some or all of the shares covered by the option, *or*
- Take the proceeds as a tax free cash sum, *or*
- Continue to invest the proceeds with the financial institution.

The general aim of an SAYE scheme is to help the employee to exercise options without having to borrow. This tends to result in more employees holding on to their shares rather than selling immediately.

How are schemes structured?

There are two aspects to a scheme: (i) an approved savings-related share option scheme and (ii) a certified contractual savings scheme.

In making shares available to employees when they exercise their options the company can issue shares, acquire shares on the market or establish a trust or subsidiary to acquire and hold shares for scheme purposes. There are legal, financial and tax issues to be addressed in particular where shares are acquired by purchase either by the company, subsidiary or trust.

What companies qualify?

Both public and private companies can establish a scheme. However, the options in a private company must be over shares in a company not under the control of another private company.

Must all employees be included?

Yes. All employees and full-time directors of the company establishing the scheme or group company, who have been employees/directors for a specified period, which must not exceed three years, must be eligible to participate in a scheme on similar terms.

What shares qualify?

The shares over which options will be granted must form part of the ordinary share capital of:

- The grantor, *or*
- A company which has control of the grantor, *or*
- Member of a consortium (subject to conditions).

The shares must be fully paid up, non redeemable and not subject to any restrictions other than restrictions which attach to all shares of the same class. A restriction can be included in the Articles of Association whereby employees or directors on ceasing to be an employee/director must sell their shares.

Scheme shares must be:

- Shares of a class quoted on a recognised stock exchange
- Shares in a company which is not under the control of another company, *or*
- Shares in a company which is under the control of a company, whose shares are quoted on a recognised stock exchange.

Options may be granted at a discount of up to 25% of the market value of the shares.

What are the tax consequences for employees?

Where an employee/director obtains a right to acquire shares under a Revenue approved scheme, no income tax USC or PRSI will be chargeable on grant of the option. No income tax arises on exercise of the option.

For options exercised on or after 1 January 2011, USC will be charged.

For options granted and exercised on or after 1 January 2011, employee PRSI should arise (subject to the grandfathering rules, see page 4).

The amount charged to USC and PRSI is the income tax free option gain on date of exercise. No employee PRSI charge will arise on exercise of the option in 2011 only, where the option was granted prior to 1 January 2011. The employer will be required to remit the USC and employee PRSI liability via payroll withholdings. With effect from 1 July 2012, where the exercise is by a former employee, the option holder must self assess for the USC and PRSI liabilities.

The approved contractual savings scheme has tax benefits as the interest or bonus earned, can be paid free of income tax, DIRT, USC and PRSI.

What about capital gains tax?

Exposure to CGT may arise on the disposal of the shares. The base cost for CGT purposes will be the amount paid i.e. the option price on acquisition. The current rate of CGT is 33%. There is an annual exemption from CGT for gains up to €1,270 per individual.

How is CGT paid?

For disposals in 2011 and subsequent years, there are 2 payment dates:

- For disposals between 1 January and 30 November - 15 December in the tax year
- For disposals between 1 December and 31 December - 31 January in the following tax year.

Does the company get tax relief?

The costs of establishing the scheme are allowed as deductions for corporation tax purposes. However the costs of funding a share acquisition will not be allowed for corporation tax purposes.

Are there reporting requirements?

Example

Employee saves €73.33 per month for 5 years and sells shares in year 5
USC rate 8% PRSI rate 4%

Employee agrees to save €50 p.m.
Market value of shares €4

Option price €3 (25% discount)

Savings plus interest/bonus of €3,300

Employee can purchase 1,100 shares

Market value in year 5 €8

	€
Gain on exercise	5,500
USC @ 8%	440
PRSI @ 4%	220

	€
Sales proceeds	8,800
Less cost	3,300
Chargeable gain	5,500
CGT threshold*	1,270
Taxable gain	4,230
CGT @ 33%	1,396

*Assumes no other CGT liabilities

The company: Companies, Irish branches and agencies granting options, including an Irish employer where the options are granted by a non resident parent company, must complete returns of information (Form SRSO) regarding the options. The due date for filing a return is 31 March following the end of the tax year. Failure to file a return may result in the withdrawal of Revenue approval for the scheme.

The employee: Under the self assessment system an employee must return details of the exercise of options, the option gain and subsequent disposal of the shares on his/her tax return. The due date for which is 31 October annually.

Approved profit sharing schemes

"an APSS is a way of **converting** an otherwise taxable cash **bonus** into **income tax free** shares "

- All employees who have been employed for a minimum period, set by the employer, not exceeding three years must be eligible to participate on similar terms. Differentiation by reference to service, salary or similar factors only is allowed
- Shares must be fully paid up, non redeemable ordinary shares in the company or parent company
- No immediate income tax liability
- No employer PRSI
- For appropriations on or after 1 January 2011, USC and employee PRSI will be levied on the income tax free appropriation (subject to the grandfathering rules for PRSI in 2011 only, see page 4).
- Shares may be sold or taken into own hands after two years, with tax consequences
- Shares may be disposed of after three years, free of income tax, USC and PRSI. Capital gains tax may apply
- No employee may be allocated more than €12,700 worth of shares in any one tax year
- Employee trust must be established
- Requires Revenue approval.

What is an APSS?

Under an Approved Profit Sharing Scheme, the usual arrangement is that employees are given the right to convert a profit sharing bonus into shares in their employing company or its parent.

Under Revenue practice, employees may also apply a percentage of basic gross salary towards the purchase of shares. This is known as 'salary forgone'. The salary forgone element must be a subsidiary part of the overall scheme. The amount forgone cannot exceed 7.5% of basic salary or the amount of the employer funded bonus, whichever is lower. The salary forgone option must be voluntary rather than compulsory.

Also under Revenue practice, it is possible for employees to purchase shares from their own resources i.e. after tax salary. This is known as a 'Contributory Scheme'. The contributory element must be a subsidiary part of the overall scheme with the same 7.5% restriction as stated above.

There is an overall annual limit on the value of shares which can be appropriated free of income tax of €12,700 per employee per tax year. This €12,700 can in certain circumstances in one year only (at earliest year five) be increased to €38,100 where shares are appropriated to the APSS from an Employee Share Ownership Trust (ESOT) (see page 18).

With effect from 1 January 2011, on appropriation, the income tax free appropriation amount is subject to USC and employee PRSI.

Under an APSS shares are held in trust for a minimum of two years. After that time the members may dispose of them but may be subject to income tax. Shares held for three years may be sold free of income tax, USC and PRSI, however CGT may apply.

How do employees benefit?

Employees benefit by receiving a potentially income tax free stake in the company's success through growth in the value of shares. The employer has an opportunity to offer a tax effective incentive linked to profitability/ productivity and to involve the work force in the fortunes of the company.

What companies qualify?

Practically all companies - whether private or public. This applies no matter where the company or its parent is based. For private companies there can be practical difficulties regarding valuation and providing a ready market for the shares. Companies can, subject to restrictions and conditions, buy back their own shares. The scheme itself can also provide a market for the shares.

Must all employees be included?

Yes. All employees, and full-time directors of the company establishing the scheme, who have been employed for a specified period of no more than three years must be allowed to participate on similar terms.

A parent company can, subject to anti-avoidance legislation, establish a scheme without any of its subsidiaries participating. Alternatively, it can establish a group scheme and choose which of its subsidiaries, and thus which employees, are to participate.

Shares may be allocated on the basis of length of service, level of basic salary and attendance. It is also possible, with Revenue agreement, to operate different levels of allocation for different business units within a company based on the relative performance of those units, or by reference to individual performance appraisal.

How are schemes structured?

Participating employees accumulate funds from profit sharing bonuses and, if applicable, a percentage of salary. This fund is passed on by the company to trustees of a trust established for the purposes of the scheme. They in turn acquire and hold shares in the company or parent for the benefit of the employees concerned.

The shares may be acquired on the open market or out of a new issue of shares. Shares held by the trustees of an approved Employee Share Ownership Trust (ESOT) can be transferred to the trustees of an APSS (see page 10).

What is the role of the trustees?

The trustees, who must be Irish resident, are appointed under a trust deed which governs the scheme. They acquire and hold shares on behalf of the employees. Under tax law, these shares must be retained by the trustee for a minimum of two years.

Who owns the shares?

The employees are the beneficial owners - the trustees have legal ownership but merely hold them on behalf of the employees. While shares are in the hands of the trustees, the employee can exercise shareholder rights and is entitled to the dividend stream.

What shares qualify?

The shares which the trustees acquire under an APSS must be:

- Fully paid up
- Non redeemable
- In general, not subject to restrictions. There can, however, be a restriction in respect of the disposal of shares on leaving the company
- If the company has more than one class of shares, the majority of shares in that class must be held by persons other than those who acquired their shares by reason of their employment.

What are the tax consequences for employees?

Each participating employee can have a maximum allocation of shares of €12,700 per tax year. The trustees must retain the shares for at least two years.

There is no income tax charged on appropriation of shares. With effect from 1 January 2011 the income tax free appropriation amount is charged to the USC and employee PRSI (subject to the grandfathering rules, see page 4). This USC and employee PRSI should be withheld by the employer via the PAYE system and remitted to Revenue with the P30 submission for the month of appropriation.

After this two year period, the employee may allow the trustees to continue holding the shares for a further year. As long as the shares have been held in trust for three years, there is no income tax, USC or PRSI liability on the transfer of ownership to the employee at the end of the three year period.

If the shares are subsequently sold or gifted there will be a CGT exposure.

What about capital gains tax?

A potential CGT liability may arise if an employee disposes of his/her shares at a gain. In calculating the gain, the allowable cost is the market value on the date the shares were allocated to the employee. However, CGT will only apply where capital gains realised in the tax year exceed €1,270.

Gains on the APSS shares are aggregated with other gains in the tax year. The current rate of CGT is 33%.

Example	Employee invests €2,000 **Marginal Income Tax rate 40%** **USC rate 8% PRSI rate 4%**
	€
Value on date of appropriation	2,000
Taxable amount	2,000
Income Tax @ 40%	NIL
USC @ 8%	160
PRSI @ 4%	80
Effective Tax rate	12%

Trustees must retain shares for first two years

How is CGT paid?

For disposals in 2011 and subsequent years, there are 2 payment dates:

- For disposals between 1 January and 30 November - 15 December in the tax year
- For disposals between 1 December and 31 December - 31 January in the following tax year.

Does the company get tax relief?

Subject to conditions, the company obtains tax relief for the funds given to the trustees to acquire shares and; the cost of establishing and running the scheme.

How are dividends treated?

The company may pay dividends to the trustees on shares held by them. The trustees in turn allocate the net dividend they receive among the employees in proportion to their individual shareholding.

It is the responsibility of the individual employee to declare details of the dividend and pay the taxes due when making a tax return for the year. Dividends can be liable to foreign withholding taxes and to Irish dividend withholding tax.

Are there reporting requirements?

The Trustee: The trustees must report annually (Form ESS1) to Revenue indicating all share allocations under the scheme and provide information on capital receipts and company reconstructions. The due date for filing the form ESS1 is 31 March following the end of the tax year. They must also keep available complete records of all transactions carried out on behalf of members. The employee must detail acquisitions and disposals of shares and dividends received on his/her annual tax return. Failure to file a return may result in the withdrawal of approval from Revenue for the scheme.

The employee: Under the self assessment system, an employee must return details of the acquisition of the shares and subsequent disposal of the shares on his/her tax return. The due date for which is 31 October annually.

What happens if the company itself is reconstructed?

When a company undergoes a reconstruction (e.g. merger, amalgamation, takeover, reorganisation of capital) and new shares are issued to members in place of those already held under the scheme, the new shares are treated, as far as possible, in the same way as the original shares so that the member's tax liability is not affected by the change. Any sum paid as part of the reconstruction is treated as a capital receipt.

Are there any implications for pension benefits?

Yes. Any monies applied to shares via an APSS are regarded as pensionable by Revenue.

Restricted share schemes

"restricted shares can be a **golden handcuff** in retaining **key** executives "

- Can be offered to employees on a selective basis
- Initial income tax, USC and PRSI liabilities are reduced because of restrictions imposed on disposal of the shares
- The tax abatement depends on the length of the restriction imposed
- No employer PRSI
- With effect from 1 January 2011 employee PRSI is applied on abated tax value (subject to the grandfathering rules for 2011 only, see page 4).
- Shares disposed of are subject to CGT
- Employee obtains shares with imposed restrictions on disposal

What is a restricted share scheme?

Under a restricted share scheme (RSS) a participant is given, acquires at a discount or on exercise of a share option a number of shares in the company or its parent, with restrictions which require that the shares must be retained for a fixed period before they can be sold.

The retention period is commonly called the 'clog' period.

Why have a restricted share scheme?

Typically, a potential discretionary bonus is converted into a shareholding in the employer company or its parent. Thus, it affords an opportunity to reduce the tax and PRSI charge for employees compared to a cash bonus.

These schemes are generally used to target certain levels of executive or specific key individuals within an organisation. A company could use a restricted share scheme to retain such key personnel.

How are schemes structured?

These schemes are very common abroad, particularly in the US. They are becoming more widely used in Ireland and have been given a legislative footing since 20 November 2008.

The scheme is established by the setting up of a trust or other holding mechanism which holds the shares for the duration of the clog period. The employee must agree in writing to abide by the clog period and not to seek to break this clog period. Once the clog period has expired the shares can be disposed of by the employee, subject to capital gains tax (see page 17).

During the clog period, depending on the scheme rules, the employee may or may not have an entitlement to dividends. During the clog period, the shares cannot be pledged as security for loans.

For a share to be treated as a restricted share, certain conditions must be met. Broadly these are:

- There must be a written restriction on assigning, charging, pledging, transferring or disposing of the shares
- Contract must be in place for bona fide purposes
- Shares cannot be assigned, charged, pledged, transferred or disposed of during the restricted period other than on death or certain take over situations
- Shares are held in a trust established by the employer or are held under such other arrangements as the Revenue Commissioner allows

Note: Forfeitable shares

1. Prior to Finance Act (2) 2008, Revenue practice was to also afford the taxation abatement above in cases where shares were forfeitable. Legislation now provides for different tax treatment for "restricted shares" and "forfeitable shares".

2. A share will be regarded as "forfeitable" if certain circumstances arise and as a result the director or employee ceases to have any beneficial interest in the shares and is not entitled to receive consideration for the shares in excess of the amount paid for the shares.

3. On award of the shares subject to forfeiture, the employee or director will be charged to income tax, USC and PRSI on the full market value of the shares on the date of acquisition. If the shares are subsequently forfeited a claim for a refund of the taxes and PRSI paid can be made. Such a refund will only be made within four years from the end of the tax year in which the shares are forfeited.

What are the tax consequences for employees?

In Ireland, under general tax law, employees are liable to income tax, USC and PRSI on the value of any asset passing to them from their employer, to the extent that they have not paid full value for the asset. The Income Tax, USC and PRSI due on award of the restricted shares must be withheld by the employer via the PAYE system and remitted to Revenue with the P30 submission for the month of award.

Finance Act (2) 2008 gives statutory effect to a long standing Revenue practice for directors and employees acquiring shares which were subject to a restriction on sale. Under the new provisions, directors or employees can have the tax charge on the acquisition of the shares reduced by an amount depending on the period of restriction as follows:

Period of retention	Gain abated by (%)
1 year	10%
2 years	20%
3 years	30%
4 years	40%
5 years	50%
5+ years	60%

Example Employee granted 'Restricted Shares' worth €4,000

Marginal Income Tax rate 40%

USC rate 8% PRSI rate 4%

Subscription price	Nil
Market value on subscription	€4,000
Restriction on sale	5 years + 1 month
	€
Market value	4,000
Less price paid	Nil
Gain	4,000
Abatement (60%)	2,400
Net gain	1,600
USC @ 8%	128
PRSI @ 4%	64

What about capital gains tax?

There may be a liability to CGT on disposal of the shares. Depending on whether the shares are provided by way of a market purchase or an issue of shares the base cost of the restricted shares may be the gain for tax purposes i.e. the abated amount or the market value of the shares.

How is CGT paid?

For disposals in 2011 and subsequent years, there are 2 payment dates:

- For disposals between 1 January and 30 November - 15 December in the tax year
- For disposals between 1 December and 31 December - 31 January in the following tax year.

Does the company get tax relief?

The set up and administration costs, and the cost of a share purchase to satisfy an RSS award are allowable as a deduction for corporation tax purposes.

Are there reporting requirements?

The company: Companies, Irish branches and agencies awarding restricted shares must include details of such in their annual corporation tax return i.e. CT1 which is due nine months after the end of the employer's tax year.

Form RSS1 (the annual share scheme return of information) must be completed annually by 31 March of the following tax year.

The employee: Under the self assessment system, an employee must return details of the receipt of the restricted shares and the subsequent disposal of the shares on his/her tax return. The due date for which is 31 October annually.

Employee share ownership trusts

"these trusts are most commonly used to **warehouse** shares for employees collectively on **privatisation** or sale of **'semi-state'** bodies "

- Trust requires Revenue approval
- Trustees must use the money provided by the company for qualifying purposes
- Tax relief for the company for set up costs and contributions to the trust
- Securities and sums (cash amounts) must be offered to all beneficiaries and the transfers made at the same time must be on similar terms
- Securities can be transferred to the trustees of an APSS, or sold by the trustees to repay borrowings free of CGT
- If established in conjunction with an APSS, securities can be distributed to employees in an income tax efficient manner (see page 10)
- No employer PRSI
- USC and employee PRSI charges imposed on APSS with effect from 1 January 2011 (subject to the PRSI grandfathering rules, see page 4 and USC and PRSI exemption page 20) also apply to shares appropriated from an ESOT to an APSS
- Most common in privatisation or sale of 'semi-state' bodies
- Requires Revenue approval.

What is an ESOT?

These schemes were introduced by Finance Act, 1997 and legislation has been amended in nearly every Finance Act since then.

Payments made by a company to an ESOT set up to acquire and distribute securities to its employees are tax deductible. An ESOT is usually established in conjunction with an APSS. The APSS (see page 10) is used to afford the employee beneficiary income tax relief on appropriation of securities up to an annual limit of €12,700.

What companies qualify?

Any company can establish an ESOT as long as it is not under the control of another company. Schemes to date have in general been established in 'semi-state' bodies.

Must all employees qualify?

Yes. All employees and full-time directors of the founding company, or a group company, who have been such for a qualifying period of not more than three years, must be eligible to be beneficiaries under the ESOT.

In general, former employees and directors can only be beneficiaries of an ESOT or participants in a APSS for up to 18 months ("18 months rule") after they cease employment, however, the period of participation can increase up to 15 years ("15 year rule"), where the following conditions are met:

- The person must have been an employee/director of the founding company or group company

  (i) during a qualifying period, *and*

  (ii) on the date the ESOT was established *or*

  (iii) within nine months prior to that date or at any time in the five years beginning with that date

- In the five years (or a lesser period approved by Dáil Eireann) since the ESOT was established, 50% of the securities held by the trustees were pledged as security for borrowings

- The ESOT has not been established for more than 15 years.

How are ESOTs structured?

An ESOT operates by the company passing funds to the trustees who use the funds for qualifying purposes which include acquiring company securities. These securities after a holding period are distributed to employee participants via an APSS. A trust deed and rules are drafted which must gain prior Revenue approval.

What is the role of the trustees?

The trustees are appointed under a trust deed. Unless there is a single corporate trustee, at all relevant times there shall be not less than three trustees all of whom must be Irish resident.

Three alternative forms of trustee are provided for:

- Majority employee representation

- Equal company/employee representation

- Single corporate trustee with a board of directors comprised of company and employee nominated directors and a professional trustee director.

The sums received by the trustees must be expended for qualifying purposes normally within nine months.

Qualifying purposes include the following:

- Acquisition of securities which are shares (including stock) and debentures in the company
- Repayment of borrowings
- Payment of interest on borrowings
- Payment of any sum or shares to a beneficiary, or personal representatives of a deceased beneficiary
- Meeting expenses.

What shares qualify?

The trust deed must provide that securities acquired by the trustees shall be shares in the founding company which form part of the ordinary share capital, are fully paid up, not redeemable and are in general without restrictions. This has been relaxed somewhat whereby the transfer of securities other than ordinary shares to beneficiaries in an ESOT/APSS in the circumstances of certain takeovers may take place in a manner to preserve the tax benefits of the beneficiaries as set out below.

What are the tax consequences for employees?

Payments received out of the ESOT are taxable. Employees will suffer income tax, USC (and possibly PRSI) on payments out of the trust.

However, if shares are distributed to the trustees of an APSS these shares can in turn be distributed to employees income tax free up to €12,700 (€38,100 at earliest in year five, if certain conditions satisfied) in a tax year. The securities must have been held for three years by the trustees of the ESOT/APSS for the income tax relief to apply.

With effect from 1 January 2011, the income tax free appropriation amount is charged to USC. There will be an employee PRSI charge on appropriation (see grandfathering provisions for 2011 only on page 4). There is an exemption from USC and PRSI where the shares were already held in the ESOT before 1 January 2011.

What about capital gains tax?

There is an exposure to CGT where the beneficiary employee disposes of shares acquired through the ESOT either directly or through an APSS. The annual small gains exemption is €1,270. The current rate of CGT is 33%.

How is CGT paid?

For disposals in 2011 and subsequent years there are 2 payment dates:

- For disposals between 1 January and 30 November - 15 December in the tax year
- For disposals between 1 December and 31 December - 31 January in the following tax year.

Does the ESOT pay tax?

Yes. The ESOT can be subject to income taxes, surcharge and CGT, and are subject to the rules of the self assessment system.

However, dividend income can be received free of income tax if used for qualifying purposes within a qualifying period.

There is no CGT payable on transfer of shares to the trustees of an APSS or when the proceeds are used to repay borrowings or make distributions to the personal representatives of deceased beneficiaries.

Does the company get tax relief?

The company obtains tax relief for the costs of setting up an ESOT and for contributions made which are used by the trustees for qualifying purposes within the qualifying period.

Are there reporting requirements?

The trustees: must report annually (Form ESOT1) to Revenue regarding details relating to the trust. The due date for filing a return is 31 March following the end of the tax year. Failure to file a return may result in the withdrawal of Revenue approval for the scheme.

The employee: Under the self assessment system an employee must return details of the acquisition of the shares and subsequent disposal of the shares on his/her tax return. The due date for which is 31 October annually.

Notes

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