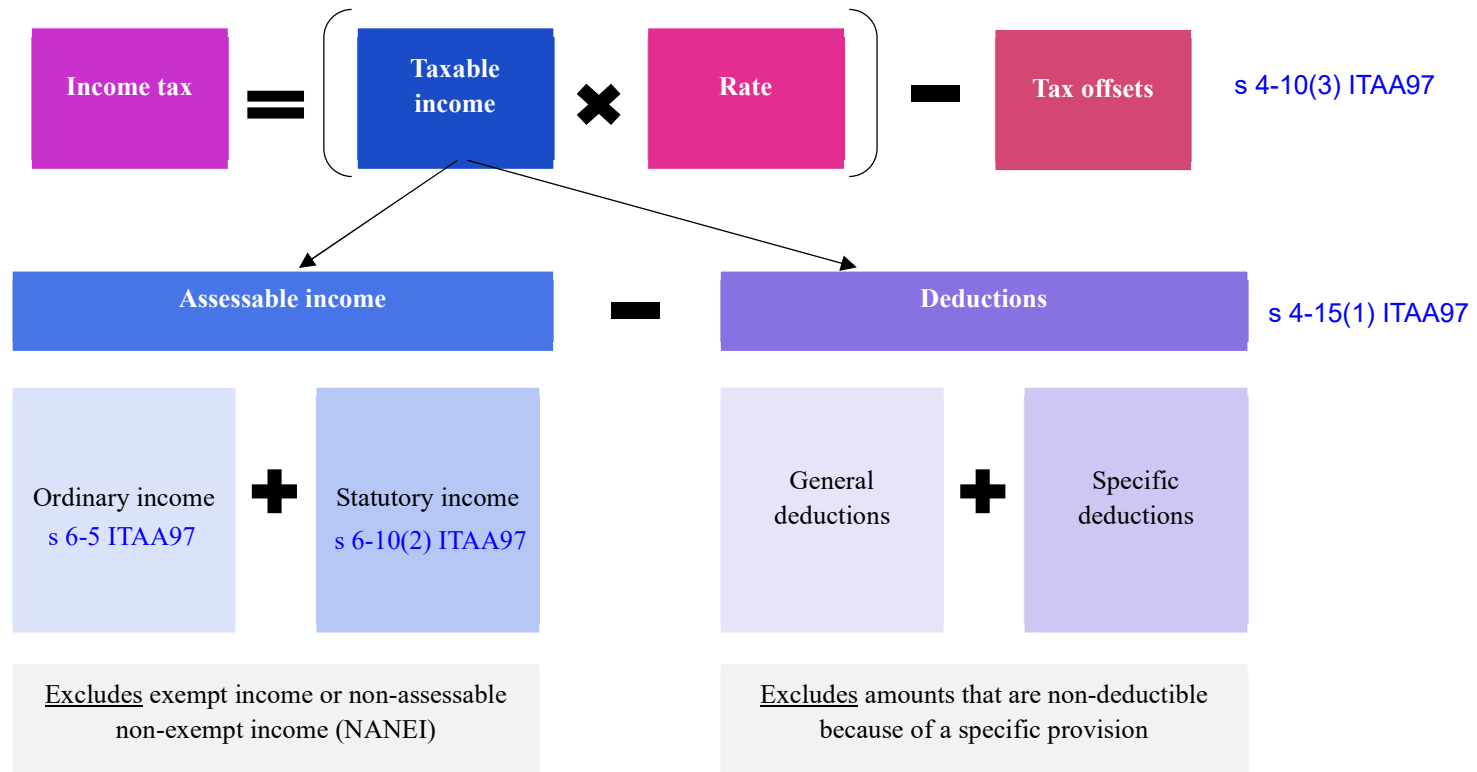


Basic Income Tax Concepts

- Income tax is payable by a broad range of entities including individuals , companies and trustees of superannuation funds (ss 4-1, 9-1 ITAA97).
- Partnerships and trusts generally **do not** pay tax (instead it is the partners or trustees/beneficiaries who pay tax)
- Most entities pay income tax on their 'taxable income' for the 'income year' (s 4-10 ITAA97).
 - For most entities, the income year is the same as the financial year (1 July to 30 June) (s 995-1 ITAA97)
 - For companies, the income year is the previous financial year (s 4-10(2)(a) ITAA97)



1 Calculate assessable income

1.1 Is there ordinary income OTF?

- Income according to ordinary concepts (*ordinary income*) is assessable under s 6-5 ITAA97 (subject to jurisdictional rules).
- Australian residents: taxed on ordinary income they derive from all sources, both in and outside Australia (s 6-5(2) ITAA97)
- Foreign residents: taxed on (s 6-5(3) ITAA97)
 - Ordinary income derived (directly or indirectly) from all Australian sources, and
 - Other ordinary income that specific provisions include in assessable income on another basis.
- Income is considered derived as soon as it is received or applied on your behalf or as directed by you (s 6-5(4))
- The concept is not defined in statute but is determined by common law.
 - E.g. salary/wages, ordinary business receipts, interest, rental income.

1.2 Is there statutory income OTF?

- Amounts that are not ordinary income but are included in assessable income by virtue of certain provisions about assessable income ([see s 10-5 ITAA97](#)), are *statutory income* ([s 6-10\(2\) ITAA97](#)).
- Includes:
 - Net capital gains ([s 102-5 ITAA97](#))
 - Dividends ([s 44\(1\) ITAA36](#))
 - Franking credit gross-up ([s 207-20\(1\)](#))
 - Net income of a partner's interest in a partnership ([s 92\(1\) ITAA36](#))

1.3 Exclude exempt and non-assessable non-exempt income

- **Exempt income:** income made exempt by a provision in ITAA36, ITAA97 or another Cth law
 - *Checklist in Subdiv 11-A ITAA97*
- **NANEI:** income stated to be NANEI by a provision in ITAA36, ITAA97 or another Cth law
 - *Checklist in Subdiv 11-B ITAA97*

2 Calculate deductions**2.1 Are there any general deductions OTF?**

- X can deduct from their assessable income [loss / outgoing] to the extent that it is:
 - incurred in gaining or producing the taxpayer's assessable income; or
 - necessarily incurred in carrying on a business for the purpose of gaining or producing the taxpayer's assessable income ([s 8-1\(1\) ITAA97](#)).
- However, X cannot deduct [loss / outgoing] to the extent that it is: ([s 8-1\(2\) ITAA97](#)):
 - (a) Capital or of a capital nature
 - (b) Of a private or domestic nature
 - (c) Incurred in relation to gaining or producing exempt income or NANEI
 - (d) An ITAA97 provision prevents it being deducted.

2.2 Are there any specific deductions OTF?

- X can deduct particular kinds of losses and outgoings from their assessable income that a provision in ITAA36 or ITAA97 allows them to deduct ([s 8-5 ITAA97](#))
- These include (summary list is in [s 12-5 ITAA97](#)):
 - tax related expenses ([s 25-5 ITAA97](#))
 - a debt (or part of a debt) that you write off as bad (subject to certain conditions) ([s 25-35 ITAA97](#))
 - tax losses ([s 36-15 ITAA97](#))
 - Capital allowances (depreciation)
 - Can deduct an amount equal to the decline in value of a depreciating asset you hold, to the extent it's used for taxable purposes (e.g. earning assessable income) ([s 40-25 ITAA97](#))
 - A depreciating asst is an asset that has a limited effective life and can be reasonably be expected to decline in value (e.g. vehicles, machinery, computers) ([s 40-30 ITAA97](#))
 - Can calculate decline in value using prime cost method or diminishing value method ([s 40-60 ITAA97](#))

Basic Capital Gains Tax Principles

- X's assessable income must include the **net capital gain** for the IY ([s 102-5 ITAA97](#)).

1 Australian or foreign resident?

- **Australian resident:** Since [X] is an Australian resident, they are generally subject to CGT in respect of capital gains and capital losses from CGT events that happen to *any* CGT asset ([s 102-5 ITAA97](#)).
- **Foreign resident:** Since [X] is a foreign resident, capital gains and capital losses from CGT events can be disregarded, unless the CGT asset is 'taxable Australian property' ([s 855-15 ITAA97](#)).

2 Calculate capital gain / loss

2.1 Is there a CGT event? **Full list of CGT events contained in div 104 ITAA97.

- Capital gains and capital losses can only arise as a result of a CGT event. Most CGT events happen in respect of CGT assets.
- A CGT asset is any kind of property including a legal or equitable right ([s 108-5\(1\) ITAA97](#)) – e.g. interests in partnerships, land shares, options, good will.
- **CGT A1** occurred [when X disposed of shares in the company] as they have 'disposed' of a CGT asset ([s 104-10\(1\) ITAA97](#)). Disposal occurs when there is a change of ownership from one entity to another entity ([s 104-10\(2\) ITAA97](#)) (e.g. sale / gift).
- Time of CGT event is when ([s 104-10\(3\) ITAA97](#)):
 - A contract for disposal is entered into; or
 - If no contract – when change of ownership occurs.

2.2 Capital proceeds from the CGT event

- Capital proceeds from a CGT event is the sum of money and/or market value of property that a taxpayer has received, or is entitled to receive, as a result of a CGT event ([s 116-20\(1\) ITAA97](#)).
- Does *not* include any GST charged were the CGT event is also a 'taxable supply'.

2.3 Cost base / Reduced cost base

- The cost base of a CGT asset is used to calculate a capital gain from certain CGT events, while the reduced cost base of a CGT asset is used to calculate a capital loss from certain CGT events.

Elements of cost base / reduced cost base			
#	Description	Cost base provision	Reduced cost base provision
1	Total of the money paid, or required to be paid, and the market value of any property given, or required to be given, in respect of acquiring the asset	s 110-25(2)	s 110-55(1),(2)
2	Incidental costs incurred to acquire the asset or that relate to the CGT event Includes brokerage fee (s 110-35(2)), agency fees, legal costs, transfer costs, stamp duty, advertising costs, valuation costs,	s 110-35	s 110-55(1),(2)

	search fees and borrowing (loan application fee, mortgage discharge, NOT interest) expenses (s 110-35)		
3	Costs of owning the asset (only applies to assets acquired after 20 August 1991 but not personal use assets or collectables) – includes interest on money borrowed to acquire/refinance the asset, costs of maintaining, repairing or insurance the asset, rates / land tax.	s 110-25(4)	N/A
	Amount that is assessable as a result of a balancing adjustment in relation to the asset	N/A	s 110-55(3)
4	Capital expenditure incurred to increase or preserve the asset's value or that relates to installing or moving the asset (except goodwill)	s 110-25(5A)	s 110-55(1),(2)
5	Capital expenditure incurred to establish, preserve or defend taxpayer's title or right to the asset	s 110-25(6)	s 110-55(1),(2)

Indexation of cost base (*NB: reduced cost base elements cannot be indexed*):

- Elements of a cost base, other than the 3rd element, may be indexed for inflation provided:
 - Asset was acquired prior to 11:45 am on 21 September 1999
 - Asset was held for more than 12 months
 - Choice to index has been made
- Indexation cannot be used if X has chosen to use the discount capital gains treatment under div 115.
- Calculated by multiplying the relevant element of the cost base by the 'indexation factor'
 - Indexation factor = index number for the quarter ending 30 Sept 1999 / index number for the quarter in which the expenditure was incurred.

2.4 Subtract capital proceeds from cost base

- **If capital gain:** As capital proceeds of [\$\$] exceed the cost base of [\$\$], X has made a capital gain on the disposal ([s 104-10\(4\) ITAA97](#)).
- **If capital loss:** As capital proceeds of [\$\$] are less than the asset's reduced cost base of [\$\$], X has made a capital loss on the disposal ([s 104-10\(4\) ITAA97](#)).

Note: Capital gains and losses made on CGT assets acquired before 20 September 1985 are disregarded ([s 104-10\(5\)\(a\) ITAA97](#)).

3 Capital gains – capital losses in IY

- [X] must reduce their capital gains by any capital losses before applying the CGT discount (if eligible) ([ss 102-5, 102-10 ITAA97](#)).
- [X] can be strategic and use capital losses against capital gains that are not eligible for the discount (so that the ordering does not reduce the benefit of the discount).

4 Remaining capital gains – net capital losses

- Net capital loss from IY if capital losses for IY > capital gains for IY ([s 102-10\(1\) ITAA97](#)).

Capital Raising Restrictions

Public company

- [s 124 CA](#) gives [company] the power to issue securities. Since [company] is not a proprietary company within the meaning of [s 45A](#), it is a public company ([s 9 CA](#)).
- Therefore, it can generally issue securities to the public so long as it issues the appropriate disclosure documents under Chapter 6D CA and lodge these with ASIC ([ss 705-706, 709-718](#))

Proprietary company

- [s 124 CA](#) gives [company] the power to issue securities. An 'offer of securities' needs disclosure to investors under Chapter 6D CA unless an exception applies ([s 706](#)).
- Since [company] is a proprietary company within the meaning of [s 45A](#), it must not engage in any activity that would require disclosure to investors under Chapter 6D (i.e. issue securities) ([ss 113\(3\), 706 CA](#)), except for the following types of offers:

Unless it is doing any of the below, the proprietary company must convert to a public company and issue appropriate disclosure documents if it wishes to raise capital.

Raising capital without disclosure to investors

Offer to existing SH	[Proprietary company] can issue securities to X despite this activity generally requiring disclosure under Chapter 6D because X is an existing SH of [company] (ss 45A(1)(b), 113(3)(a)(i) CA)
Offer to employee	[Proprietary company] can issue securities to X despite this activity generally requiring disclosure under Chapter 6D of the Corporations Act because X is an employee of [company / subsidiary of company] (s 113(3)(a)(ii) CA). X also does not count towards the 50 SH cap for proprietary companies because she is an employee of [company / subsidiary of company] (ss 45A(1)(a), 113(1) CA).
CSF offer	CA contains a special disclosure regime in Part 6D.3A which [proprietary company] can fall under instead of the standard disclosure regime in Part 6D if it makes a CSF offer (ss 113(3)(b), 703B, 706 CA). CSF shareholders do not count towards the 50 non-employee SH cap for proprietary companies (s 113(2)(c) CA), therefore [company] will remain a proprietary company after the CSF offer.
Offers that fall within s 708 exceptions	Offers that fall within the exceptions in s 708 (s 706 CA)

Small-scale personal offer exception (s 708(1))	<p><i>Step 1:</i> Has a personal offer been made to X?</p> <p>A personal offer is one that may only be accepted by [person to whom it is made] (s 708(2)(a)) and is made to a person who is likely to be interested in the offer, having regard to:</p> <ul style="list-style-type: none"> • Previous contact between [person making offer] and [person receiving offer] (s 708(2)(b)(i)) ; or • Some professional or other connection between [person making offer] and [person receiving offer] (s 708(2)(b)(ii)); or • Statements or actions by [person receiving offer] that indicate they are interest in offers of that kind (s 708(2)(b)(iii)). <p><i>Step 2:</i> Outcome</p> <p>A personal offer does not require disclosure if the offer does not result in more than 20 new investors being issued shares in any 12-month period (s 708(1)(a); (3)(a)) and no more than \$2m being raised in any 12-month period (s 708(1)(b), (3)(b))</p> <p>*There is a way around the \$2m cap is if SH are existing SH – in which case s 113(3) would apply</p> <p>The offer must also be made directly and can't be advertised (s 734(1) CA).</p>
Sophisticated investor exception (s 708(8))	<p><i>Option 1:</i> Offers of securities do NOT require disclosure if:</p> <ul style="list-style-type: none"> • minimum amount payable for the securities is at least \$500k (s 708(8)(a)) or • amount payable for the securities on acceptance by [person to whom offer is made] and the amounts previously paid by [person] for the body's securities of the same class that are held by [person] add up to at least \$500k (s 708(8)(b)); <p>OR</p> <ul style="list-style-type: none"> • it appears from a certificate given by a qualified accountant that [person to whom securities are issued] has net assets of at least \$2.5m (s 708(8)(c)(i); reg 6D.2.03(1)); or • it appears from a certificate given by a qualified accountant that [person to whom securities are issued] has gross income of at least \$250k for each of the last 2 FYs (s 708(8)(c)(ii); reg 6D.2.03(2)) <p><i>Option 2:</i> Disclosure is also generally not required where the offer is made through a financial services licensee (s 708(10)(a)) who is satisfied on reasonable grounds that [person receiving offer] has previous experience in investing in securities that allows them to make an assessment of;</p> <ul style="list-style-type: none"> • merits of offer (s 708(10)(b)(i)); and • value of the securities (s 708(10)(b)(ii)); and • risks involved in accepting offer (s 708(10)(b)(iii)); and • their own information needs (s 708(10)(b)(iv)); and • adequacy of the info given by [person making offer] (s 708(10)(b)(v))

	<p>[Licensee] must give [person receiving offer] before, or at the time when, the offer is made a written statement of [licensee]'s reasons for being satisfied of those matters (s 708(10)(c))</p> <p>[Person receiving offer] must sign a written acknowledgement before, or at the time when, the offer is made that [licensee] has not given them a disclosure document under this Part in relation to the offer (s 708(10)(d))</p>
Professional investor exception (s 708(11))	<p>Offers of securities do NOT require disclosure if they are made to a professional investor (s 708(11)).</p> <p>'Professional investor' is exhaustively defined and includes:</p> <ul style="list-style-type: none"> • A financial services licensee (i.e., entity with an AFSL authorising them to do certain things) (ss 708(11)(a); 9) • Trustee of a super fund that has net assets of at least \$10m (ss 708(11)(a); 9), and • A person who has or controls at least \$10m (s 708(11)(b)) <p>Both ESVCLPs and VCLPs have a minimum CC of \$10m, so will fall under the definition of a 'professional investor'</p>
Associated persons exception (s 708(12))	<p>Offers of securities do NOT require disclosure if they are made to;</p> <ul style="list-style-type: none"> • a senior manager of [company / related body] (s 708(12)(a)), or • their spouse, parent, child, brother or sister (s 708(12)(a)) or • A body corporate controlled by such persons (s 708(12)(b))
Issues for no consideration (s 708(15)-(16))	<ul style="list-style-type: none"> • Offers of securities (other than options) do NOT require disclosure if no consideration is to be provided for the issue or transfer of the securities. • Offers of options do NOT require disclosure if no consideration is to be provided for (a) the issue or transfer of the options AND (b) the underlying securities on the exercise of the options.
Other exceptions	<p>Offers made:</p> <ul style="list-style-type: none"> • to existing holders of securities or debentures (s 708(13)-(14)) • under a compromise or arrangement under Part 5.1 (s 708(17)) • under a deed of company arrangement (s 708(17A)) • as part of a takeover under Chapter 6(s 708(18)) • of debentures of certain bodies (s 708(19)) • by an exempt body (s 708(20)-(21)).

Crowd Source Equity Funding

Does the offer fall within Part 6D.3A?

Part 6D.3A Corporations Act contains a special disclosure regime that can be used for certain offers of securities issued by small unlisted companies instead of the standard disclosure regime in Chapter 6D (**ss 113(3)(b), 703B, 706**). In order to fall within Part 6D.3A, it must involve a 'CSF offer'.

Requirements to be CSF offer	
1.	Offer must be made by [company] for the issue of securities of [company] (s 738G(1)(a))
2.	<p>[Company] must be an eligible CSF company when offer is made (s 738G(1)(b)). A company is an eligible CSF company at a particular time if:</p> <ul style="list-style-type: none"> • It is a [public company limited by shares] (s 738H(1)(a)) OR a [proprietary company that has at least 2 directors (s 738H(1)(a)(i)) and meets all the other requirements (if any) prescribed by the regulations (s 738H(1)(a)(ii))] • Its principal place of business is in Australia (s 738H(1)(b)) • The majority of its directors ordinarily reside in Australia (s 738H(1)(c)) • Complies with the <i>assets and turnover test</i> (s 738H(1)(d)) → The value of consolidated gross assets of [company + all its related parties] under \$25m (s 738H(2)(a)); and consolidated annual revenue of [company + all its related parties] under \$25m (s 738H(2)(b)) • Neither [company nor any related party of company] is a listed corporation (s 738H(1)(e)) • Neither the company nor any related party of the company has a substantial purpose of investing in securities or interests in other entities or schemes (s 738H(1)(f)) <p><i>Related parties</i> = related body corporate and entities that are controlled by a person who controls the company or associates of that person (s 738G(3))</p>
3.	The securities must be fully paid ordinary shares (s 738G(1)(c) CA, r 6D.3A.01 CR)
4.	<p>The offer must comply with the <i>issuer cap</i> (s 738G(1)(d))</p> <p>Maximum amount sought to be raised under the current CSF offer (s 738G(2)(a)) + [Amounts raised under CSF offers made in the last 12 months (s 738G(2)(b))] + [Amounts received in the last 12 months from small scale personal offers under s 708(1) (s 738G(2)(c))] + [Amounts received in the last 12 months from offers made via an AFS licensee under s 708(1) (s 738G(2)(c))]</p> <p>→ must not exceed \$5m in a 12-month period (ss 738G(2)(d))</p> <p>*Note: includes amounts raised by [company and related parties].</p>
5.	[company / related party of company] must not intend that any of the funds sought to be raised by the offer be invested in securities or interests in other entities or schemes (s 738G(1)(e))
6.	Any other requirements specified in the regulations must be satisfied (s 738G(1)(f))

As [insert s 738G requirement] is not satisfied, the offer is not eligible to be made under Part 6D.3A (ss 738B, 738G CA). Therefore, the standard disclosure regime in Part 6D applies (s 706) and [as X is a proprietary company] it cannot make the offer (s 113(3) CA). It is an offence under s 727(4) and (6) for X to issue more than \$Xm of securities without disclosure to investors.

VCLP Regime

	VCLP	ESVCLP	AFOF
<i>Tax benefits</i>	Flow-through tax treatment	Flow-through tax treatment	Flow-through tax treatment
	Income tax exemption for eligible foreign investors on their share of gains made by the partnership from disposal of EVCIs	Income tax exemption for eligible domestic & foreign investors on their share of gains made by the partnership from disposal of EVCIs	Income tax exemption for eligible foreign investors on their share of gains made by the partnership from disposal of EVCIs
		Non-refundable carry forward tax offset of 10% of LPs' contribution to eligible investments (offset is reduced to the extent an investor's contribution is not invested)	
	GPs' interests held on capital rather than revenue account	GPs' interests held on capital rather than revenue account	GPs' interests held on capital rather than revenue account
<i>Eligibility criteria</i>	Minimum \$10m committed capital	Minimum \$10m and maximum \$200m committed capital	No minimum capital requirement (GP must advise that the partnership has sufficient capital to begin investment)
	No maximum investment by one partner	Maximum investment by one partner = 30% of committed capital	
	Maximum investment in one entity = 30% of committed capital	Maximum investment in one entity = 30% of committed capital	Maximum investment in one entity = 30% of committed capital
	Eligible investments (investee company value) must be less than \$250m in total assets	Eligible investments (investee company value) must be less than \$50m in total assets	

Early Stage Investors Tax Incentive

- Contained in Subdiv 360-A ITAA97
- Designed to encourage 'angel investment' in small, innovative, unlisted Australian start-up companies with high-growth potential (ESICs) – so does not involve a fund.
- Provides a front-end incentive of a 20% non-refundable tax offset, as well as a back-end incentive of a CGT exemption for 10 years.
- To assist the ATO administer the tax incentives, ESICs are required to comply with third party reporting rules contained in the Taxable Payments Reporting System ('TPRS') in sub-div 396-B of sch 1 TAA

Step 1 – Is [investor] entitled to a tax offset for [IY]?

[Investor] is entitled to a tax offset for [IY] if:

- It is none of the following:
 - A trust or a partnership (**s 360-15(1)(a)(i)) ITAA97**)
 - BUT beneficiaries, trustees of a trust / partners in a partnership are entitled to respective shares of the tax offset that the trustee or partnership would have been entitled to receive if it was an individual (s 360-15(2); s 360-15(3) ITAA97).
 - An ESVCLP (**s 360-15(1)(a)(ia)**)
 - **above flow-through rule does not apply to partners of an ESVCLP.
 - A widely held company or a 100% subsidiary of a widely held company (**s 360-15(1)(a)(ii))**; and
- [Company] issues [investor] with shares in [company] (**s 360-15(1)(b)**); and [fresh equity only]
- **s 360-40(1)** (re ESICs) apply to [company] immediately after that time [see step 2] (**s 360-15(1)(c)**); and
- Neither [investor] nor [company] are affiliates of each other at that time (**s 360-15(1)(d)**); and [founder of [company] can't benefit from offset]
- The issue of shares is not an acquisition of ESS interests (**s 360-15(1)(e)**); and
- Immediately after the issue of shares, [investor] does not hold equity interests in [company / entity connected with company] that carry the right to:
 - receive more than 30% of income/capital distributions OR
 - exercise / control the exercise of more than 30% of the total voting power (**s 360-15(1)(f)**)

Employee Share Schemes

1 Determine whether div 83A applies

Identify the ESS interest

- Div 83A ITAA97 applies to *ESS interests* acquired under an ESS at a *discount* (**s 83A-20(1)**).
- Here, the relevant ESS interest is:
 - A beneficial interest in a share in [company] (**s 83A-10(1)(a)**)
 - A beneficial interest in a right to acquire a beneficial interest in a share in [company] (**s 83A-10(1)(b)**)

Identify the ESS

- Here, [name the scheme] is a scheme under which ESS interests in [company] are provided to employees or their associates (including past or prospective employees) of:
 - [Company] (**s 83A-10(2)(a)**); or
 - [Subsidiaries of company] (**s 83A-10(2)(b)**)
- Associate = defined widely in accordance with s 318 ITAA36 and covers employee's relatives (**s 995-1 ITAA97**)

2 Identify applicable issues re taxation of ESS interests OTF

- **Exercise of a right:** To prevent duplication, subdiv 83A-B does NOT apply to a share acquired as a result of the exercise of a right under an ESS (**s 83A-20(2)**)
- **Employee share trusts:** Where [employee] has an interest in an employee share trust that holds [shares / rights], [employee] is deemed to have a beneficial interest in the relevant number of [shares / rights] that correspond to their interest in the trust (**ss 83A-320, 130-85 ITAA97**)
 - Means that the rules in div 83A will apply to [employee] as if they were absolutely entitled to the relevant [shares / rights]
- **Stapled securities:** Div 83A ITAA97 applies to stapled securities in the same way as it applies to shares in a company if at least one of the ownership interests is a share in the company (**s 83A-355 ITAA97**)
- **FBT:** ESS interests do NOT constitute fringe benefits (**s 136(1)(h) FBTA**) = no FBT issues
- **Benefits provided to associates:** An ESS interest provided to [employee's associate] is treated as if it was acquired by [employee] → [employee] will include the discount in their assessable income (**ss 83A-305, 130-85(3)**). When [associate] later dispose of the shares, any CG or CL arising from the CGT event will be made by [associate] (**s 130-85(3)**)
- **Interaction of div 83A with the CGT regime:** Capital gains and capital losses arising from CGT events relating to an ESS interest are generally disregarded to the extent that they happen at or before the relevant taxing point (**s 130-80(1) ITAA97**). However, subsequent dealings in ESS interest are subject to ordinary CGT treatment e.g. where a share acquired by [employee] under an ESS is disposed of, [employee] may make a gain or loss that falls within CGT provisions.