

Chapter 6 - Forfeitable Shares

This document should be read in conjunction with section 112, 128, 128E and 897B of the Taxes Consolidation Act 1997

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Introduction

Employers will sometimes award shares to directors and employees as part of a long-term incentive plan, where the award of the shares is dependent on certain performance targets or criteria being met or the employee/ director remaining with the company. Usually long-term incentive schemes will involve an agreement that if the targets are met or the employee/director has remained with the company for the specified period, the employee/director will receive the shares at the time the targets are met or the specified period has ended. Sometimes, however, the employee/director may be given the shares at the outset but the award may be subject to a condition that the employee/director will have to forfeit the shares if the targets are not met or he or she ceases employment with the company.

The income tax treatment of forfeitable shares acquired by employees/ directors is provided for in Section 128E TCA 1997. An income tax charge arises at the time the shares are awarded, but where the shares are in fact forfeited at a later date, any income tax charge imposed on the acquisition of the shares will be reduced accordingly.

6.1 Shares

For this treatment to apply, the shares acquired by the employee/director must:

- be shares in the company in which the employee/ director is employed or in a company that controls (within the meaning of section 432 TCA 1997) that company, and
- be forfeitable shares.

6.2 Forfeitable Shares

Shares are forfeitable shares if there is a bona fide written contract or agreement in place under the terms of which—

- there will be a forfeiture of the shares, if certain circumstances arise or do not arise (e.g. if the employee ceases employment before the expiry of a specified period, or if the employee fails to reach certain performance targets),
- as a result of the forfeiture, the employee/director will cease to have any beneficial interest in the shares, and
- the employee/director will not, on forfeiture of the shares, be entitled to receive, directly or indirectly, consideration in money or money's worth in respect of the shares in excess of the consideration given by the director or the employee for the acquisition of the shares.

Shares are not forfeitable shares by reason only that the shares are unpaid or partly paid shares which may be forfeited for non-payment of calls.

In the case of private companies it is often a requirement under the Constitution or Articles of Association of the company or under a Shareholders Agreement that employees who cease employment with the company must offer their shares for sale. These are not forfeitable shares for the purposes of section 128E.

6.3 Income Tax Charge on Acquisition of Shares

An employee/director may acquire the shares under an employee share award scheme, an employee share purchase plan, or an employee share option scheme. An income tax charge will arise under Schedule E where the employee acquires the shares for less than market value. A charge to income tax may arise in accordance with:

- Section 112 in respect of shares acquired under an employee share award scheme where, for example, the shares are given free of charge to the employee/director, or under an employee share purchase plan where the employee/director can purchase the shares at a discount, or
- Section 128 TCA 1997, where the employee/director acquires the shares on the exercise of a share option.

Section 128E provides that the charge is to be computed by reference to the market value of the shares at the date of acquisition without regard to the risk of forfeiture.

6.4 Forfeiture of Shares

If the shares are forfeited, any income tax charge already imposed in respect of the acquisition of the shares should be reduced to nil and any tax overpaid should be repaid on foot of a claim from the employee/director. The claim must be made within 4 years from the end of the year of assessment in which the forfeiture takes place.

Example

On 1 March 2016, an employer awards 1,000 shares to an employee for €500. Under the terms of the share scheme plan, the shares are subject to forfeiture if the employee ceases employment with the employer before 28 February 2018. The market value of the shares at the date of the award, ignoring the risk of forfeiture, is €1,000. The employee ceases employment with the company on 1 July 2017 and the shares are forfeited. The employer refunds the employee the €500 paid for the shares.

Income Tax charge on acquisition

Market value of the shares ignoring the risk of forfeiture	€1,000
Consideration paid by the employee	(€ 500)
Amount chargeable	€ 500
Tax paid (€500 x 40%)	€ 200

Forfeiture of shares

Revised income tax charge	Nil
Refund due	€200

A claim for a refund of the tax overpaid must be made within 4 years from the end of the year of assessment in which the shares are forfeited i.e. 31 December 2021.

6.5 Capital Gains Tax

Any loss arising on the forfeiture of shares must be restricted to the amount of consideration given by the employee/ director for the shares less any amount subsequently recovered by him or her on the forfeiture.

6.6 Return of Information

With effect from 1 January 2011, PAYE applies to restricted shares acquired by an employee/director.

Employers must report the following information on the Employer's Share Awards return (Form ESA):

- Details of all awards of forfeitable shares in the return year when the shares are awarded.
- Details of any forfeiture of shares in the return year the shares are forfeited. This also includes the forfeiture of shares awarded under a RSU and restricted shares under Section 128D forfeited after the end of the specified period.

The Form ESA must be filed by 31 March following the relevant tax year. The return must be completed offline and then uploaded to Revenue Online Service (ROS). The return contains detailed instructions on how to complete and upload it to ROS.