

CR 2023/3 - EFTsure Pty Ltd - employee share scheme - minimum holding period and exchange of options



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Status: **legally binding**

Class Ruling

EFTsure Pty Ltd – employee share scheme – minimum holding period and exchange of options

❶ Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for Participants in the EFTsure Pty Ltd Employee Option Plan (Plan) who, as a condition of the disposal of all the issued capital in EFTsure Pty Ltd (EFTsure), redeemed all vested Options and exchanged all unvested Options issued to them under the Plan.
2. Details of this scheme are set out in paragraphs 9 to 31 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if:
 - you are a resident of Australia for tax purposes within the meaning of section 6(1) of the *Income Tax Assessment Act 1936*
 - you were issued Options under the Plan between 1 June 2017 and 28 February 2021 (inclusive)
 - you were entitled to reduce the amount included in your assessable income in accordance with sections 83A-33 and 83A-45 when you were granted the Options under the Plan
 - you remained employed by EFTsure as at 7 December 2021 (Completion Date), and

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- one or both of the following applies
 - you were the holder of vested Options immediately before the Completion Date
 - you were the holder of unvested Options immediately before the Completion Date.

5. This Ruling does not apply to you if you are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 9 to 31 of this Ruling.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Vested Options – minimum holding period

7. To the extent vested Options were disposed of (on the occurrence of the Buy Back) during their minimum holding period of 3 years, pursuant to paragraph 83A-45(5)(a) the Commissioner will allow the minimum holding period in respect of those Options to end at the earlier time of 7 December 2021.

Substitute Options treated as continuation of unvested Options

8. Pursuant to subsection 83A-130(2), the Substitute Options that you received in exchange for the cancellation of your unvested Options issued under the Plan are treated as a continuation of those unvested Options for the purposes of Division 83A.

Scheme

9. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

10. EFTsure was incorporated in Australia on 6 March 2014 and is a resident of Australia for income tax purposes.

11. EFTsure operates an anti-fraud secure payment technology and cybersecurity consultancy business.

12. Vector BidCo Pty Ltd (BidCo) and Vector HoldCo Pty Ltd (HoldCo) were incorporated on 29 November 2021, are residents of Australia for income tax purposes and did not hold any assets or undertake any business activities prior to the Completion Date.

13. HoldCo owns all of the shares in BidCo which was incorporated as a special purpose vehicle to acquire EFTsure.

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14. The majority preference shareholder of HoldCo and the ultimate holding entity of BidCo is Level Equity Growth Partners V, L.P. They are part of a global growth-oriented private equity investment firm which focuses on building and acquiring global technology leaders in software, data services, internet and media sectors.

EFTsure Pty Ltd Employee Option Plan

15. EFTsure established the Plan in or around June 2017, the purpose of which included the provision of an opportunity to selected employees (Eligible Employees) to share in the growth in value of EFTsure and to encourage them to improve the longer-term performance of the company and its returns to shareholders.

16. The Plan was governed by the plan rules of the EFTsure Pty Ltd Employee Option Plan (Plan Rules) and provided for the issue of options to subscribe for fully paid ordinary shares in EFTsure (Options) to be granted to Eligible Employees who accepted an invitation to participate in the Plan (Participants), for no consideration. Subject to the satisfaction of certain performance and vesting criteria, each Option entitled a Participant (or their nominee) to acquire one ordinary share in EFTsure for a pre-determined fixed price (Exercise Price).

17. Each Participant in the Plan was an employee of EFTsure or was treated as an employee of EFTsure for the purposes of Division 83A and was issued Options under the Plan by EFTsure between 1 June 2017 and 28 February 2021 (inclusive).

18. The grant of the Options was intended to qualify for the 'start-up' tax concessions set out in section 83A-33. This Ruling does not consider whether the Options issued under the Plan are ESS interests to which all conditions under sections 83A-33 and 83A-45 apply (except for the 'minimum holding period' condition under subsection 83A-45(4)).

19. As at the Completion Date, EFTsure had a total of 139,339 Options on issue under the Plan, consisting of 115,424 vested and 23,915 unvested Options.

20. The Plan Rules provided that:

- Options issued under the Plan may not be sold, transferred, mortgaged, charged or otherwise dealt with or encumbered without the prior written approval of the Board
- Options, and any Shares acquired as a result of exercising the Options, must be held for a minimum holding period of 3 years commencing on the date the Options are issued, and
- the Exercise Price of all Options issued under the Plan was required to be greater than the market value of an ordinary share in EFTsure at the date those Options were issued.

21. As at the Completion Date and consistent with the requirements of the Plan Rules, no disposals or transfers of Options or Shares acquired under the Plan were allowed during the minimum holding period.

The Share Sale

22. On or around 12 October 2021, BidCo made a non-binding offer to EFTsure in relation to the sale and purchase of all of the issued capital in EFTsure (Share Sale). Prior to the offer, a letter of intent in relation to the Share Sale was exchanged on 26 August 2021 between BidCo and EFTsure. No informal offer was made and no negotiation was had between BidCo or HoldCo and EFTsure prior to February 2021.

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23. Participants were first notified of the then-pending Share Sale on or around 25 November 2021.
24. EFTsure and its owners executed a Share Sale Agreement with BidCo, HoldCo and others in respect of the Share Sale on 7 December 2021.
25. It was a condition of the Share Sale that EFTsure:
- redeem all vested Options on issue under the Plan (Buy Back) for consideration, and
 - cancel all unvested Options on issue under the Plan in exchange for new options to acquire fully paid ordinary shares in HoldCo (Substitute Options), for no consideration.
26. The consideration for the Buy Back was comprised of either, or a combination of, the:
- payment of an amount on the Completion Date of the Share Sale by EFTsure to the Participants, and
 - issue of new fully paid ordinary shares in the capital of EFTsure to the Participants, issued by way of exercise of an equivalent number of the vested Options.
27. The terms of the Substitute Options issued to holders of unvested Options were substantially the same as the terms of the unvested Options at the time of their cancellation, including the same time vesting conditions, disposal restrictions and Exercise Price that previously applied under the Plan Rules. The Participants received one HoldCo option for every one unvested Option held (and then cancelled) at the Completion Date. Each Substitute Option entitles the Substitute Option holder to acquire one fully paid ordinary share in HoldCo. There were no options on issue in HoldCo immediately before the Share Sale.
28. Each Participant entered into an Option Exercise and Cancellation Deed with EFTsure that set out the terms of the Buy Back and entitlement to Substitute Options, as applicable.
29. The market value of an ordinary share in HoldCo and the market value of an ordinary share in EFTsure was \$41.39 as at the Completion Date.
30. The Share Sale, Buy Back, and granting of Substitute Options were part of one arrangement that occurred simultaneously on the Completion Date.
31. At the time of acquiring the Substitute Options the Participants did not hold a beneficial interest in more than 10% of the shares in HoldCo and were not in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of HoldCo.

Commissioner of Taxation

1 February 2023

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Appendix – Explanation

❶ *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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Vested Options – minimum holding period

32. This Ruling applies to you if you were entitled to reduce the amount included in your assessable income in accordance with sections 83A-33 and 83A-45 when you were granted Options under the Plan. As a result of the Commissioner allowing the minimum holding period to end at the earlier time of 7 December 2021, you will continue to be entitled to that reduction.

33. The minimum holding period set out in subsections 83A-45(4) and (5) is the earlier of 3 years from when the Options were acquired or when the Participant ceased employment with EFTsure. However, the Commissioner can allow an earlier period if they are satisfied that:

- EFTsure intended that the requirements as set out in subsection 83A-45(4) would apply to the Options acquired under the Plan during the 3 years after the acquisition of those Options (subparagraph 83A-45(5)(a)(i)), and
- at the earlier time that the Commissioner allows, all membership interests in EFTsure were disposed of under a particular scheme (subparagraph 83A-45(5)(a)(ii)).

34. It was a condition of the Share Sale that all Participants under the Plan dispose of their vested Options (under the Buy Back). This may have resulted in you disposing of Options acquired under the Plan within 3 years and at the same time all other membership interests in EFTsure were disposed of under the Share Sale.

35. There was no disposal or transfer of Options or Shares acquired under the Plan prior to the Completion Date. The Commissioner is satisfied that the Plan Rules prevented Participants from disposing of Options acquired, and any Shares acquired as a result of exercising the Options, until the earlier of the 3-year anniversary of the date the ESS interests were granted or the day after the date they ceased to be employed by EFTsure. The Plan Rules did not provide for an exemption from or non-compliance with this rule.

36. Further, all vested Options were acquired by Participants under the Plan prior to EFTsure having entered into any negotiation with BidCo regarding BidCo's acquisition of EFTsure's issued capital under the Share Sale.

37. Accordingly, the Commissioner is satisfied that the requirements of subparagraphs 83A-45(5)(a)(i) and (ii) are met to the extent vested Options were disposed of during their original minimum holding period of 3 years and will allow the minimum holding period to end at the earlier time of 7 December 2021.

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Substitute Options treated as continuation of unvested Options

38. The object of section 83A-130 is to allow an ESS interest to continue being taxed under Division 83A, where either:

- an arrangement (the 'takeover') is entered into that is intended to result in a company (the 'old company') becoming a 100% subsidiary of another company, or
- there is a change (the 'restructure') in the ownership of an old company and, as a result, ESS interests in the old company can reasonably be regarded as having been replaced, in whole or part, by ESS interests in one or more other companies.

39. Pursuant to subsection 83A-130(2), the Substitute Options (the 'new interests') in HoldCo that you acquired on the Completion Date are treated as a continuation of your unvested Options (the 'old interests') on the basis that:

- the acquisition was in connection with the takeover of EFTsure by BidCo, resulting in EFTsure becoming a 100% subsidiary of BidCo (subparagraph 83A-130(1)(a)(i))
- just before the takeover, you held ESS interests (the unvested Options) in EFTsure that you acquired under an employee share scheme (paragraph 83A-130(1)(b))
- as a result of the takeover, you stopped holding the unvested Options (paragraph 83A-130(2)(a))
- the Substitute Options acquired in connection with the takeover carry substantially the same terms as those applicable to the unvested Options and can reasonably be regarded as matching the unvested Options (paragraph 83A-130(2)(b))
- the Substitute Options relate to ordinary shares in HoldCo (subsection 83A-130(4))
- you remained employed by EFTsure at the time you acquired the Substitute Options (paragraph 83A-130(9)(a)), and
- at the time of acquiring the Substitute Options, you did not hold a beneficial interest in more than 10% of the shares in HoldCo and you were not in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of HoldCo (paragraph 83A-130(9)(b)).

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References

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-33
- ITAA 1997 83A-45
- ITAA 1997 83A-45(4)
- ITAA 1997 83A-45(5)
- ITAA 1997 83A-45(5)(a)
- ITAA 1997 83A-45(5)(a)(i)
- ITAA 1997 83A-45(5)(a)(ii)
- ITAA 1997 83A-130
- ITAA 1997 83A-130(1)(a)(i)
- ITAA 1997 83A-130(1)(b)
- ITAA 1997 83A-130(2)
- ITAA 1997 83A-130(2)(a)
- ITAA 1997 83A-130(2)(b)
- ITAA 1997 83A-130(4)
- ITAA 1997 83A-130(9)(a)
- ITAA 1997 83A-130(9)(b)
- ITAA 1997 Div 230

ATO references

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