


# ***CR 2024/51 - VMware LLC - acquisition by Broadcom Inc. - employee share scheme***

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Status: **legally binding**

## Class Ruling

# VMware LLC – acquisition by Broadcom Inc. – employee share scheme

### **📌 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 employees of VMware Australia Pty Ltd (VMware Australia), a subsidiary of VMware LLC (formerly known as VMware, Inc.), who participated in an employee share scheme to acquire Class A common stock in VMware, Inc. (VMware Inc), which were replaced by rights to acquire common stock in Broadcom Inc. (Broadcom) on 22 November 2023 (Implementation Date), pursuant to the Agreement and Plan of Merger executed on 26 May 2022 between VMware Inc, Broadcom and related entities (Merger).
2. Details of this scheme are set out in paragraphs 14 to 35 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if:
  - immediately prior to the Implementation Date, you:
    - were employed by VMware Australia
    - held unvested restricted stock units over Class A common stock in VMware Inc (VMware RSUs) under the *VMware, Inc. Amended and Restated 2007 Equity and Incentive Plan* (2007 Plan) and in accordance with the *Restricted Stock Unit Agreement For Non-US Participants*, and

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- did not have an ESS deferred taxing point under Subdivision 83A-C occur in relation to your VMware RSUs, and
- on the Implementation Date:
  - your VMware RSUs were replaced with restricted stock units over common stock in Broadcom (Broadcom RSUs)
  - you remained employed by VMware Australia, and
  - you were a ‘resident of Australia’ as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 14 to 35 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 2023 to 30 June 2024.

## **Ruling**

### **ESS interest under an employee share scheme**

7. Your VMware RSUs were ESS interests acquired under an employee share scheme (paragraph 83A-10(1)(b) and subsection 83A-10(2)).

### **Application of Subdivision 83A-C**

8. Subdivision 83A-C applied to your VMware RSU (subsection 83A-105(1)).
9. The taxation of your VMware RSU was deferred to the ESS deferred taxing point (section 83A-110).

### **New ESS interests are a continuation of old interests**

10. The Broadcom RSUs that you received in place of your VMware RSUs are treated as a continuation of your VMware RSUs for the purposes of Division 83A (section 83A-130).

### **No ESS deferred taxing point upon Merger**

11. No ESS deferred taxing point occurred to your VMware RSUs at the Implementation Date (sections 83A-120 and 83A-130).
12. In the income year an ESS deferred taxing point occurs to your replacement Broadcom RSUs, your assessable income includes the market value of the Broadcom common stock acquired upon vesting of the Broadcom RSU at the ESS deferred taxing point, less the cost base of the Broadcom RSU (subsection 83A-110(1)).

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### **Continuation of your employment**

13. After the Merger, your employment with VMware Australia, a subsidiary of Broadcom, is treated as a continuation of your employment in respect of which you acquired your VMware RSUs for the purposes of Division 83A (subsection 83A-130(6)).

### **Scheme**

14. 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.

#### **VMware, Inc.**

15. VMware Inc was incorporated in Delaware in the United States of America on 10 February 1998.

16. VMware Inc was in the business of providing enterprise software for applications of virtualisation technologies and multi-cloud services.

17. Pursuant to the Amended and Restated Certificate of Incorporation of VMware Inc, dated 4 November 2022, VMware Inc was authorised to issue 2 classes of stock designated, respectively, Class A common stock (that is, ordinary share) and preferred stock. Each holder of Class A common stock was entitled to:

- subject to any voting rights that may be granted to preferred stockholders, one vote for each share of Class A common stock
- such dividends and other distributions, in cash stock or property, when and as may be declared by the board of directors of VMware Inc from time to time, equally on a per share basis, and
- subject to the rights of preferred stockholders, the remaining assets and funds of VMware Inc on a pro rata basis upon liquidation, dissolution or winding up.

18. At all relevant times, VMware Inc had only one class of stock on issue, being Class A common stock, which was listed on the New York Stock Exchange.

19. VMware Australia is a company that was incorporated in Australia on 16 November 2006. It is a wholly owned subsidiary of VMware LLC (formerly known as VMware Inc).

#### **VMware, Inc. Amended and Restated 2007 Equity and Incentive Plan**

20. VMware Inc operated the 2007 Plan as part of its remuneration framework.

21. Under the 2007 Plan, employees of VMware Australia were awarded VMware RSUs, subject to the terms and conditions set out in the *Restricted Stock Unit Agreement For Non-US Participants*.

22. The key features of VMware RSUs awarded under the 2007 Plan were:

- they were issued for no consideration
- each VMware RSU would convert to one VMware Inc Class A common stock in accordance with a time-based vesting schedule

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- no exercise price was payable upon the vesting of the VMware RSUs
- VMware RSUs could only be settled in stock
- they could not be sold, transferred, assigned, pledged or hypothecated in any way (whether by operation of law or otherwise) and any attempt to dispose of the VMware RSU would render it null and void, and
- VMware RSUs were subject to a real risk of forfeiture in the event the employee ceased employment for any reasons, other than due to the employee's death or termination by VMware Inc or its subsidiary due to 'disability' (as defined under the applicable long-term disability plan of VMware Inc or its subsidiary).

### **Broadcom Inc.**

23. Broadcom is in the business of designing, developing and supplying semi-conductor and infrastructure software solutions. It was incorporated in Delaware in the United States of America on 17 January 2018.

24. Pursuant to the Amended and Restated Certificate of Incorporation of Broadcom, executed on 2 April 2018, Broadcom is authorised to issue 2 classes of stock designated, respectively, common stock (that is, ordinary share) and preferred stock. Each holder of Broadcom common stock is entitled to:

- one vote for each share of common stock, and
- subject to the rights to Broadcom preferred stockholders
  - dividends when and as declared by the board of directors of Broadcom, and
  - capital upon liquidation, dissolution or winding up.

25. The common stock of Broadcom is listed on the National Association of Securities Dealers Automated Quotations Global Select Market under the code 'AVGO'.

26. Broadcom operates its 2012 Stock Incentive Plan as amended and restated on 5 April 2021 as part of its remuneration framework (Broadcom Plan). Under the Broadcom Plan, Broadcom common stock may be issued pursuant to share right awards or restricted stock units that entitle the recipient to receive the Broadcom common stock underlying those awards or units upon the attainment of designated performance goals, satisfaction of specified service requirements or upon the expiration of a designated time period following the vesting of those awards or units.

### **Merger**

27. Under the Merger:

- Broadcom acquired 100% of VMware Inc's Class A common stock
- the merger consideration received by VMware Inc stockholders was determined by an election process and proration mechanism
- under the election process, VMware Inc stockholders could elect to receive the merger consideration in the form of either cash, stock or a mix of both

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- the proration mechanism occurred after the election process and the mechanism was to ensure that the total merger consideration for the Merger was made of 50% stock and 50% cash
- the cash component of the merger consideration was US\$142.50 per VMware Inc Class A common stock, and
- the stock component of the merger consideration was 0.2520 Broadcom common stock per VMware Inc Class A common stock.

28. On 22 November 2023, Broadcom announced that it had completed its acquisition of VMware Inc and subsequently:

- VMware Inc's stock ceased to be traded on the New York Stock Exchange, and
- VMware Inc converted from a Delaware corporation into VMware LLC, a Delaware limited liability company.

29. Two investment banks determined that the aggregate merger consideration pursuant to the Merger was fair from a financial point of view.

#### **Replacement of VMware restricted stock units**

30. On the Implementation Date, your VMware RSUs were converted to Broadcom RSUs by multiplying the number of VMware RSUs you held by an Equity Award Exchange Ratio.

31. The Equity Award Exchange Ratio (which was determined to be 0.2010) was calculated as 50% of 0.2520, plus 50% of US\$142.50 divided by the volume-weighted average price of Broadcom common stock over the 10 consecutive trading days ending on the second to last trading day prior to closing.

32. The replacement Broadcom RSUs continue to have substantially the same terms and conditions as the VMware RSUs.

#### **Other matters**

33. Section 83A-33 did not apply in relation to your VMware RSUs.

34. You did not hold a beneficial interest of more than 10% of the stock in VMware Inc 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 VMware Inc general meeting.

35. As a result of the replacement of your VMware RSUs for Broadcom RSUs, you did not hold a beneficial interest of more than 10% of the stock in Broadcom 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 Broadcom general meeting.

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**Commissioner of Taxation**

21 August 2024

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## Appendix – Explanation

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**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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### **ESS interest under an employee share scheme**

36. An ESS interest in a company is a beneficial interest in a share in the company, or a beneficial interest in a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

37. A share includes stock (subsection 995-1(1)).

38. Each VMware RSU that was granted to you under the 2007 Plan was a right to acquire a beneficial interest in VMware Inc Class A common stock, which is a share. Therefore, the VMware RSUs were ESS interests (paragraph 83A-10(1)(b)).

39. The 2007 Plan is an employee share scheme as it is a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment (subsection 83A-10(2)).

### **Application of Subdivision 83A-C**

40. Subdivision 83A-C allows the discount in relation to the ESS interest to be included in your assessable income at a later time (that is, at the ESS deferred taxing point) if the conditions in subsection 83A-105(1) are met.

41. Subsection 83A-105(1) provides that Subdivision 83A-C applies, instead of Subdivision 83A-B, to an ESS interest in a company if:

- Subdivision 83A-B would, apart from section 83A-105, apply to the interest
- after applying section 83A-315, there is still a discount given in relation to the interest
- section 83A-33 does not reduce the amount to be included in your assessable income in relation to the interest
- subsections 83A-45(1) to (3) and 83A-45(6) apply to the interest, and
- if the interest is a beneficial interest in a right to acquire a beneficial interest in a share, subsection 83A-105(3) or 83A-105(6) applies to the interest.

42. As all of the relevant conditions in subsection 83A-105(1) are met, Subdivision 83A-C applied to your VMware RSUs.

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43. As a result, the taxation of the VMware RSU you received under the 2007 Plan was deferred to an ESS deferred taxing point (section 83A-110).

#### **New ESS interests treated as continuation of old interests**

44. ESS interests in a new company that are acquired in connection with a takeover or restructure are treated as a continuation of the ESS interests held just before the takeover or restructure for the purposes of Division 83A if certain conditions are satisfied (section 83A-130).

45. Section 83A-130 applied when your VMware RSUs were replaced with Broadcom RSUs because:

- the Merger is a takeover as it resulted in VMware Inc becoming a 100% subsidiary of Broadcom (subparagraph 83A-130(1)(a)(i))
- just before the takeover, you held ESS interests in the form of VMware RSUs (the old interests) that you acquired under an employee share scheme (paragraph 83A-130(1)(b))
- you acquired ESS interests in the form of Broadcom RSUs (the new interests) in connection with the takeover (subsection 83A-130(2))
- as a result of the takeover, you stopped holding the VMware RSUs (paragraph 83A-130(2)(a))
- the Broadcom RSUs were acquired on economically-equivalent terms and can reasonably be regarded as matching the VMware RSUs (paragraph 83A-130(2)(b))
- the Broadcom RSUs relate to ordinary shares in Broadcom (subsection 83A-130(4))
- you were employed by a subsidiary of Broadcom (that is, VMware Australia) at the time you acquired the Broadcom RSUs (paragraphs 83A-130(6)(b) and 83A-130(9)(a)), and
- at the time of acquiring the Broadcom RSUs, you did not hold a legal or beneficial interest in more than 10% of the stock in Broadcom nor were you 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 Broadcom general meeting (paragraph 83A-130(9)(b)).

46. Accordingly, for the purposes of Division 83A, the Broadcom RSUs you acquired in connection with the Merger are treated as a continuation of your VMware RSUs that you held just before the Implementation Date.

#### **No ESS deferred taxing point upon Merger**

47. Where the ESS interest is a right to acquire shares, the ESS deferred taxing point will occur at the time determined by section 83A-120.

48. As section 83A-130 applied to treat your Broadcom RSUs as a continuation of your VMware RSUs for the purposes of Division 83A, no ESS deferred taxing point under section 83A-120 occurred to your VMware RSUs when they were replaced with Broadcom RSUs on the Implementation Date.



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49. However, when an ESS deferred taxing point occurs to your Broadcom RSUs subsequent to the Merger, the amount included as assessable income in the income year the ESS deferred taxing point for the Broadcom RSUs occurs will be the market value of the ESS interest reduced by the cost base of that interest (if any) (subsection 83A-110(1)).

50. Where the ESS interest is a right to acquire a beneficial interest in a share, the market value of the right at the ESS deferred taxing point is the market value of the share at the time (section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

51. As the VMware RSUs were granted for nil consideration, the amount to be included in your assessable income at the ESS deferred taxing point of the Broadcom RSUs is the market value of the Broadcom common stock acquired upon vesting of the Broadcom RSUs at the ESS deferred taxing point (subsections 83A-110(1) and 110-25(2)).

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Status: **not legally binding**

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## References

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### *Legislative references:*

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(b)
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- ITAA 1997 83A-45(1)
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- ITAA 1997 83A-130(4)
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- ITAA 1997 83A-130(6)(b)
- ITAA 1997 83A-130(9)(a)
- ITAA 1997 83A-130(9)(b)
- ITAA 1997 83A-315
- ITAA 1997 110-25(2)
- ITAA 1997 Div 230
- ITAA 1997 995-1(1)
- ITAR (1997 Act) 2021 83A-315.03

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### ATO references

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