



## Class Ruling

### Income tax: Dell Australia Pty Limited Restricted Stock Units

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#### **① This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 83A-340 of the ITAA 1997
- subsection 104-10(1) of the ITAA 1997
- subsection 104-25(1) of the ITAA 1997
- subsection 104-155(1) of the ITAA 1997, and
- subsection 104-155(2) of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997, unless otherwise stated.

## Class of entities

3. The class of entities to which this Ruling applies is employees of Dell Australia Pty Limited who:

- held a restricted stock unit (RSU) acquired on or after 1 July 2009 issued under the *Amended and Restated 2002 Long-Term Incentive Plan* and covered by a *Dell Inc. Stock Unit Agreement* which was amended and restated as a *Dell Inc. Deferred Cash Replacement Agreement*.
- are residents of Australia within the meaning of section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).
- are not temporary residents within the meaning of that expression in subsection 995-1(1).

## Qualifications

4. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 7 to 17 of this Ruling.

5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

## Date of effect

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6. This Ruling applies from 1 January 2013. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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7. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- *Amended and Restated 2002 Long-Term Incentive Plan* (2002 Plan)
- *Dell Inc. Stock Unit Agreement* (RSU Agreement)
- *Dell Inc. Deferred Cash Replacement Agreement* (DCR Agreement)
- *Agreement and Plan of Merger by and among Denali Holding Inc., Denali Intermediate Inc., Denali Acquiror Inc. and Dell Inc.* dated 5 February 2013 (Privatisation Agreement).

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

8. Dell Inc. is a company incorporated in Delaware in the United States of America. Dell Inc. operates a global information technology business through wholly owned subsidiaries. In Australia Dell Inc. operates through Dell Australia Pty Limited.

9. Dell Inc. operates various employee incentive plans worldwide including that established by the 2002 Plan.

10. The 2002 Plan states that it has been established to attract and retain qualified employees, consultants and directors and to motivate them to achieve long-term goals, to provide incentive compensation opportunities to align the participants' interests with those of Dell Inc. and to promote the long-term financial interests of Dell Inc. The 2002 Plan is administered by a Committee of the Board (Article 2.1(a) of the 2002 Plan).

11. The Committee has complete and absolute authority to construe and interpret the 2002 Plan and each Award issued under the 2002 Plan, to establish and amend the rules for the 2002 Plan administration and to make all other determinations that it deems necessary or advisable for the effective administration of the 2002 Plan (Article 2.1(b)(1) of the 2002 Plan).

12. The Committee has complete and absolute authority to select the recipient of an Award, to determine the type of Award, to establish the terms, conditions, performance criteria, restrictions and other provisions of an Award and to amend, modify or suspend an Award (Article 2.1(b)(2) of the 2002 Plan).

13. The Committee has the power to determine that an obligation to make a payment or distribution in relation to an Award may be satisfied through cash payments, the delivery of shares of Stock, the granting of a replacement Award or any combination thereof (Article 4.10 of the 2002 Plan).

14. An RSU is an Award issued under the terms of the 2002 Plan. Each RSU issued under the terms of the 2002 Plan is covered by terms and conditions which are specified in a RSU Agreement. The RSU Agreement states that each RSU represents the right to receive one Share.

15. Dell Inc. became a private company and delisted from the NASDAQ on implementation of the Privatisation Agreement.

16. At the effective time of the privatisation each RSU was cancelled and converted into the right to receive an amount in cash from Dell Inc. (section 2.3(b) of the Privatisation Agreement).

17. As a result of the Privatisation Agreement the holder of each RSU was advised that each RSU Agreement was amended and restated as a DCR Agreement. The DCR Agreement states that each RSU was converted into a right to receive cash of \$13.75 USD but would remain subject to the same time-based vesting as set out in the relevant RSU Agreement.

## Ruling

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### **Division 83A**

18. As a result of the conversion of each RSU to a right to receive only a cash amount each RSU will not be considered an ESS interest under subsection 83A-10(1) and accordingly Division 83A will not apply.

### **Treatment of cash amount**

19. Where a converted RSU is satisfied through the payment of a cash amount the payment will be included in the assessable income of the holder of the RSU in the year in which it is received under section 6-5.

### **Capital gains tax (CGT)**

#### ***CGT event A1***

20. The conversion of each RSU to a right to receive only a cash amount did not result in CGT event A1 happening to each RSU (subsection 104-10(1)).

**CGT event C2**

21. The conversion of each RSU to a right to receive only a cash amount did not cause CGT event C2 to happen (subsection 104-25(1)).

**CGT event H2**

22. The conversion of each RSU to a right to receive only a cash amount did cause CGT event H2 to happen when each RSU was converted (subsections 104-155(1) and (2)).

23. No capital gain was made when CGT event H2 happened.

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**Commissioner of Taxation**

8 October 2014

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## Appendix 1 – Explanation

**❶** *This Appendix 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.*

### Division 83A

24. Section 83A-340 provides that where an employee acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

25. In order for section 83A-340 to apply, the right must be capable of becoming a right to acquire a beneficial interest in a share and in fact become such a right.

26. Section 83A-340 provides examples of rights which later become rights to acquire a beneficial interest in a share:

Example 1: You acquire a right to acquire, at a future time:

- (a) shares with a specified total value, rather than a specified number of shares; or
- (b) an indeterminate number of shares.

Example 2: You acquire a right under which the provider must provide you with either ESS interests or cash, whichever the provider chooses.

27. At the time a holder of a RSU acquires an RSU, it is uncertain, in the event that the RSU vests, whether that RSU will be settled with a share or a cash amount. Therefore, the holder does not yet have a right to acquire a beneficial interest in a share for the purpose of the definition of ESS interest in subsection 83A-10(1).

28. Where a converted RSU is satisfied in cash, section 83A-340 will not apply to the RSU. The RSU will not be considered an ESS interest under subsection 83A-10(1) and Division 83A will not apply to the RSU.

### Treatment of cash amount

29. Subsection 6-5(2) provides that the assessable income of an Australian resident taxpayer includes ordinary income derived directly or indirectly from all sources during the income year. Ordinary income includes salary and wages.

30. Therefore, the holder of a converted RSU which vests and is settled by payment of a cash amount will need to include the cash amount in their assessable income for the year in which the amount is received under subsection 6-5(2).

**CGT*****CGT event A1***

31. The conversion of each RSU to a right to receive only a cash amount did not result in the disposal of a CGT asset. Accordingly, the conversion did not result in CGT event A1 happening to each RSU (subsection 104-10(1)).

***CGT event C2***

32. The conversion of each RSU to a right to receive only a cash amount did not cause the ending of the ownership of an intangible CGT asset. Accordingly, CGT event C2 did not happen when each RSU was converted (subsection 104-25(1)).

***CGT event H2***

33. The conversion of each RSU to a right to receive only a cash amount was an act, transaction or event which occurred in relation to each RSU but did not result in an adjustment to the cost base or reduced cost base of each RSU. Accordingly, CGT event H2 did happen when each RSU was converted (subsections 104-155(1) and (2)).

34. No capital gain was made when CGT event H2 happened as there were no capital proceeds from the conversion of each RSU (subsection 104-155(3) and subsection 116-20(2)) and the market value substitution rule does not apply (section 116-25).

## Appendix 2 – Detailed contents list

35. The following is a detailed contents list for this Ruling:

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- capital gains tax
- CGT event A1-disposal of a CGT asset
- CGT events C1-C3 – end of a CGT asset
- CGT events H1-H2 – special capital receipts
- employee share schemes

### *Legislative references:*

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-340
- ITAA 1997 104-10(1)
- ITAA 1997 104-25(1)
- ITAA 1997 104-155(1)
- ITAA 1997 104-155(2)
- ITAA 1997 104-155(3)
- ITAA 1997 116-20(2)
- ITAA 1997 116-25
- ITAA 1997 995-1
- FBTAA 1986 136(1)(f)

### ATO references

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