

CR 2016/35 - Income tax: eBay Inc. - employee share schemes - separation of PayPal from eBay



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Class Ruling

Income tax: eBay Inc. – employee share schemes – separation of PayPal from eBay

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

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

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 provisions

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

- former Division 13A of the *Income Tax Assessment Act 1936* (ITAA 1936)
- former subsection 139B(3) of the ITAA 1936
- former subsection 139CB(1) of the ITAA 1936
- former section 139E of the ITAA 1936
- Division 83A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997)
- subsection 83A-5(2) of the IT(TP)A 1997;
- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Subdivision 83A-C of the ITAA 1997
- section 83A-10 of the ITAA 1997

- section 83A-110 of the ITAA 1997
- section 83A-120 of the ITAA 1997
- section 83A-340 of the ITAA 1997, and
- section 130-80 of the ITAA 1997.

All legislative references are to the ITAA1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the employees of eBay Inc. and its wholly owned subsidiaries (eBay Group) who:

- are residents of Australia within the meaning of subsection 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);
- participated in the eBay Employee Share Schemes and were granted:
 - (a) restricted stock units (RSUs) under the eBay Inc. 2008 Equity Incentive Award Plan (eBay Incentive Plan) before, on or after 1 July 2009; and/or
 - (b) stock options under the Incentive Plan before, on or after 1 July 2009; and/or
 - (c) ESPP options under the eBay Inc. Employee Stock Purchase Plan (eBay ESPP) (effective 1 November 2012) on or after 1 July 2009;
- at the time of the Separation as described in paragraphs 11 to 15 held those RSUs, stock options and ESPP options which:
 - (a) if acquired before 1 July 2009 – were not covered by an election made under former section 139E of the ITAA 1936 and have not had a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 happen to them before the Separation; and/or
 - (b) if acquired on or after 1 July 2009 – Subdivision 83A-C applies to the rights and did not have an ESS deferred taxing point happen to them before the Separation;

- as a result of the Separation, had each of their RSUs, stock options and ESPP options converted through an adjustment into:
 - (a) a post Separation eBay RSU;
 - (b) a post Separation eBay stock option; and
 - (c) a post Separation eBay ESPP option;
- are not subject to the taxation of financial arrangement rules in Division 230.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them)

In this Ruling, a person belonging to this class of entities is referred to as a Participant.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. 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 8 to 24 of this Ruling.

6. 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

7. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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

8. The following description of the scheme is based on information provided by the applicant.

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

9. eBay Inc. (eBay) is a company incorporated in 1996 and tax resident in the United States of America (US). The shares of eBay common stock are publicly traded on the National Association of Securities Dealers Automated Quotation (NASDAQ) in the US.

10. Prior to the Separation, the eBay group of companies was a global commerce platform and payments leader comprising of three business units: Marketplaces, Payments and Enterprises.

The Separation

11. On 30 September 2014, eBay announced its intention to separate its Payment business into an independent publicly traded company (the Separation).

12. To facilitate the Separation, eBay undertook certain pre-Separation transactions, including:

- eBay incorporated PayPal Holdings, Inc. (PayPal) in January 2015 as its new wholly owned subsidiary for the purpose of owning and operating eBay's Payment business after the Separation. PayPal ultimately became the head company of the PayPal Group.
- On 26 January 2015, eBay board of directors approved the Separation of PayPal.
- eBay and PayPal entered into multiple agreements to effect the Separation.
- eBay transferred all the assets and liabilities associated with eBay's Payment business to PayPal.

13. The Separation of PayPal was effected by way of a pro rata distribution of all of the shares of PayPal common stock to eBay stockholders (the Distribution).

14. The Separation was completed and Distribution made at 11:59pm, New York City time, on 17 July 2015 (Distribution Date).

15. Each eBay stockholder received one share of PayPal common stock for each share of eBay common stock held on 8 July 2015 (Record Date).

Employee share schemes

16. eBay operates the eBay Incentive Plan and eBay ESPP (the eBay Plans) under which Participants are granted RSUs, stock options and/or ESPP options (collectively referred to as 'eBay Awards').

17. RSUs, stock options and ESPP options are ESS interests for the purposes of Division 83A and Subdivision 83A-C applies to those eBay Awards.

18. A portion of RSUs and stock options held by Participants prior to the Separation were acquired before 1 July 2009 (Pre-1 July 2009 RSUs and stock options).

19. Apart from RSUs issued by eBay on 15 July 2015, eBay did not issue any other RSUs, stock options or ESPP options between 1 July 2015 and the time of Separation.

20. The eBay Awards granted to Participants are governed by the rules of the eBay Plans and are subject to the Restricted Stock Unit Award Agreement, Stock Option Agreement or the ESPP Subscription Agreement, as the case required.

21. The rules of the eBay plans provide that, in the event of any changes in the capital structure of eBay certain adjustments may be made to the number and kind of shares subject to outstanding eBay Awards to reflect the transaction and ensure the original rights of the Participants are not adversely affected.

The conversion and adjustment

22. In connection with the Separation, the eBay Awards held by Participants at the time of Separation were mandatorily converted through an adjustment:

- Each unvested RSU was converted into a post Separation eBay RSU
- Each vested and unexercised stock option was converted into a post Separation eBay stock option
- Each unvested stock option was converted into a post Separation eBay stock option, and/or
- Each unexercised ESPP option was converted into a post Separation eBay ESPP option.

(In this Ruling, post Separation eBay RSU, eBay stock option and eBay ESPP option are collectively referred to as 'post Separation eBay Awards')

23. At the time of the Separation, the number of eBay Awards (RSUs, stock options and ESPP options) and the exercise price of stock options and ESPP options were adjusted, in accordance with the rules of the eBay Plans, to retain the intrinsic value of the Participants' original eBay Awards prior to the Separation:

- For stock options and ESPP options:
 - the number of eBay shares of common stock subject to such post Separation eBay option (rounded down to the nearest whole share) is equal to the number of eBay shares subject to the corresponding eBay option immediately prior to the Distribution Date multiplied by the eBay Retained Award Conversion Ratio (being the closing eBay stock value prior to Separation divided by the opening eBay stock value immediately after Separation, i.e. 66.29/26.89); and
 - the per share exercise price of such post Separation eBay Option (rounded up to the nearest cent) is equal to 26.89 (the opening per share price of eBay stock value immediately after Separation) multiplied by the eBay Option Exercise Price Ratio (being the per share exercise price of such eBay option immediately prior to the Distribution Date divided by the closing eBay stock value immediately before Separation i.e. per share price of eBay option before Separation/66.29).
- For RSUs, the number of eBay shares subject to each post Separation eBay RSU (rounded down to the nearest whole share) is equal to the number of eBay shares of common stock subject to the corresponding RSU immediately prior to the Distribution Date multiplied by the eBay Retained Award Conversion Ratio (i.e. 66.29/26.89).

24. The post Separation eBay Awards (eBay RSUs, eBay stock options and eBay ESPP options) continue to be subject to the same terms and conditions after the Separation as were applicable to the respective eBay Award prior to the Separation.

Ruling

No ESS deferred taxing point upon Separation

25. The conversion of an eBay Award (RSUs, stock options and ESPP options) through the adjustment into a post Separation eBay Award under the Separation did not cause:

- a cessation time mentioned in the former subsection 139B(3) of the ITAA 1936 in respect of the Pre-1 July 2009 RSUs and stock options, or
- an ESS deferred taxing point under section 83A-120 in respect of eBay Awards (RSUs, stock options and ESPP options) acquired on or after 1 July 2009.

26. Therefore, the conversion through an adjustment under the Separation did not result in an amount being included in the Participant's assessable income under section 83A-110.

Rights to adjustment

27. Section 83A-340 applies to the right to an adjustment of eBay Awards (RSUs, stock options and ESPP options) as a result of the Separation and Division 83A applies as if that right had always been a right to acquire a beneficial interest in the shares related to such eBay Awards.

CGT consequences

28. Any capital gain or capital loss that results from the conversion through the adjustment of eBay Awards as a result of the Separation is disregarded under subsection 130-80(1).

Commissioner of Taxation

1 June 2016

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.*

No ESS deferred taxing point upon Separation

RSUs and stock options acquired before 1 July 2009

29. Division 83A applies to certain ESS interests acquired before 1 July 2009 pursuant to Subdivision 83A-A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

30. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C (and the rest of Division 83A, to the extent that it relates to that Subdivision) applies in relation to the Pre-1 July 2009 RSUs and stock options acquired by the Participant under the eBay Incentive Plan because:

- former subsection 139B(3) of ITAA 1936 applied in relation to the Pre-1 July 2009 RSUs and stock options and the Participant has not made an election covering those rights under former section 139E of the ITAA 1936 (subparagraph 83A-5(2)(a)(i));
- the RSUs and stock options were acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009 (subparagraph 83A-5(2)(a)(ii)); and
- the cessation time, mentioned in former subsection 139B(3) of the ITAA 1936, for those Pre-1 July 2009 RSUs and stock options did not occur before 1 July 2009 (subparagraph 83A-5(2)(a)(iii)).

31. Where Subdivision 83A-C applies to an ESS interest, an amount will be included in the assessable income of the Participant under subsection 83A-110(1) for the income year in which the ESS deferred taxing point for the ESS interest occurs.

32. The ESS deferred taxing point for rights to acquire shares is usually worked out under section 83A-120. However, because Subdivision 83A-C will apply to the rights acquired before 1 July 2009 by virtue of subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

33. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that the ESS deferred taxing point for a right acquired before 1 July 2009 will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-120(3).

34. Therefore, whether an ESS deferred taxing point arises as a consequence of the Separation depends on whether the cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 results from the Separation.

35. The cessation time for the Pre-1 July 2009 RSUs and stock options under former subsection 139CB(1) of the ITAA 1936 is the earliest of the following:

- when the right is disposed of (paragraph 139CB(1)(a))
- when the Participant's employment in respect of which the right was acquired ceases (paragraph 139CB(1)(b))
- if the right is exercised and there is a restriction preventing the Participant from disposing of the share acquired as a result of the exercise of the right or a condition that could result in the Participant forfeiting ownership of the share, when such restriction or condition ceases to have effect (paragraph 139CB(1)(c))
- if the right is exercised and there is no such restriction or condition, when the right is exercised (paragraph 139CB(1)(d)), or
- the end of the 10 year period starting when the Participant acquired the right (paragraph 139CB(1)(e)).

36. The Separation did not give rise to any of the circumstances in former subsection 139CB(1) of the ITAA 1936 and therefore the Separation did not trigger a cessation time for the Pre-1 July 2009 RSUs and stock options.

37. Consequently, there is no ESS deferred taxing point for the purposes of Subdivision 83A-C for RSUs and stock options acquired before 1 July 2009.

RSUs, stock options and ESPP options acquired on or after 1 July 2009

38. As Subdivision 83A-C applies to the eBay Awards granted under the eBay Plans, section 83A-120 applies to determine the ESS deferred taxing point for the eBay Awards.

39. Subject to subsection 83A-120(3), the ESS deferred taxing point for the RSUs, stock options and ESPP options acquired on or after 1 July 2009 is the earliest of the times specified in subsections 83A-120(4) to (7):

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4))
- when the Participant's employment in respect of which the right was acquired ends (subsection 83A-120(5))

- the end of the seven year period starting when the Participant acquired the right, or fifteen years in the case of a right acquired on or after 1 July 2015 (subsection 83A-120(6))
- in the case of rights acquired before 1 July 2015, when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share (former subsection 83A-120(7)), and
- in the case of rights acquired on or after 1 July 2015, when the right is exercised and there is no real risk of forfeiting the share and no restriction on disposing of the share (subsection 83A-120(7)).

40. Subsection 83A-120(3) provides that if the Participant disposes of the eBay Awards within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal.

41. The Separation did not give rise to any of the circumstances in section 83A-120 and therefore the Separation did not trigger an ESS deferred taxing point for RSUs, stock options and ESPP options acquired on or after 1 July 2009.

Right to adjustment

42. Section 83A-340 provides that where a Participant acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A applies as if the right had always been a right to acquire the beneficial interest in the share.

43. 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 becomes such a right.

44. Under the rules of the eBay Plans, the Participant is entitled to a right to an adjustment of eBay Awards issued to the Participant to ensure that the rights of the Participant are not adversely affected by certain changes to the capital structure of eBay.

45. Upon the Separation taking place, the right to an adjustment resulted in the allocation of additional RSUs, stock options and ESPP options to the Participant.

46. The adjustment was made to preserve the intrinsic value of the original eBay Awards acquired under the eBay Plans prior to the Separation.

47. The adjustment is regarded as a variation of the terms of the original eBay Awards allowed for under the rules of the eBay Plans. The adjustment therefore does not result in a new contract or give rise to disposal of those rights.

48. Accordingly, the right to an adjustment is capable of becoming a right to acquire a beneficial interest in a share of eBay common stock for the purposes of section 83A-340 (subsection 83A-340(1)).

49. Division 83A applies as if the right (being the right to an adjustment to the number of eBay Awards and exercise price of stock options and ESPP options as a result of the Separation) as if it had always been a right to acquire a beneficial interest in the shares of eBay common stock (subsection 83A-340(2)).

50. Therefore, the additional RSUs, stock options and ESPP options allocated to the Participant under the eBay Plans as a result of the Separation are ESS interests acquired by the Participant under an employee share scheme in relation to their employment (subsections 83A-10(1) and (2)) and will continue to be subject to Subdivision 83A-C.

CGT consequences

51. Subsection 130-80(1) applies to disregard any capital gain or capital loss to the extent it results from a CGT event if:

- the CGT event happens in relation to the eBay Awards acquired under the eBay Plans (paragraph 130-80(1)(a))
- the CGT event is not CGT event E4, G1 or K8 (paragraph 130-80(1)(b))
- the CGT event happens on or before the ESS deferred taxing point for the eBay Award (paragraph 130-80(1)(d)(ii), and
- Subsection 130-80(2) does not apply.

52. The conversion of an eBay Award through the adjustment into a post Separation eBay Award did not result in CGT event E4, G1 or K8 happening and subsection 130-80(2) did not apply to the eBay Awards.

53. Accordingly, any capital gain or capital loss made from a CGT event happening to the conversion of an eBay Award through the adjustment into a post Separation eBay Award as a consequence of the Separation is disregarded under subsection 130-80(1).

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1936 Pt III Div 13A
 - ITAA 1936 139B(3)
 - ITAA 1936 Subdiv DA
 - ITAA 1936 139E
 - ITAA 1997 Div 83A
 - ITAA 1997 Subdiv 83A-A
 - ITAA 1997 83A-5(2)
 - ITAA 1997 83A-5(2)(a)(ii)
 - ITAA 1997 83A-5(2)(a)(iii)
 - ITAA 1997 83A-5(4)
 - ITAA 1997 83A-10
 - ITAA 1997 83A-10(1)
 - ITAA 1997 83A-10(2)
 - ITAA 1997 Subdiv 83A-C
 - ITAA 1997 83A-110
 - ITAA 1997 83A-110(1)
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 - ITAA 1997 83A-120(3)
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 - ITAA 1997 83A-120(5)
 - ITAA 1997 83A-120(6)
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