


# ***CR 2007/19 - Income tax: Vision Systems Limited: return of capital***

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## Class Ruling

### Income tax: Vision Systems Limited: return of capital

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#### **ⓘ 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 provision(s) 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997; and
- section 118-20 of the ITAA 1997.

All references are to the ITAA 1936 unless otherwise stated.

## Class of entities

3. The class of entities to which this Ruling applies is the Australian resident ordinary shareholders of Vision Systems Limited (Vision) who were registered on the Vision Share Register on the Record Date, being the date for determining entitlement to the return of share capital and who received a distribution under the return of capital described in paragraphs 13 to 23 of this Ruling.

## Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out was carried out in accordance with the scheme described in paragraphs 13 to 23 of this Ruling.

6. If the scheme actually carried out was 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 was not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 14 June 2006 to 30 June 2007. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

9. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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13. 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:

- application for Class Ruling from Pricewaterhouse Coopers (PWC) dated 5 May 2006;
- Vision's company announcement on the Australian Stock Exchange (ASX) dated 28 February 2006; and
- correspondence and emails from PWC from 3 May 2006 to 28 February 2007.

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

14. Vision is an Australian resident public company, which at the time of the payment of the return of capital, was listed on the ASX.

15. Vision is a technology based company which operates globally in high technology markets. Prior to February 2006, the company comprised a number of business segments including:

- the Vision BioSystems business;
- the Invetech business; and
- the Fire and Security (VFS) business.

16. In February 2006, Vision disposed of the VFS business to a non-related party and received cash proceeds of approximately \$248.4 million. Vision made an accounting profit before tax of approximately \$196.5 million. An amount of \$39.5 million, being Vision's historic equity investment in the VFS business, was reasonably regarded as share capital invested in the VFS business.

17. As at 30 June 1990, 95% of Vision's accumulated losses of approximately \$18.06 million was contributed by the VFS business. In response to those losses, on 31 October 1991 Vision forgave approximately \$18.01 million of debt owed by the VFS business to Vision. Effective 31 October 1991, Vision underwent a capital restructure whereby fifteen ordinary Vision shares were consolidated into one ordinary Vision share. The restructure effectively wrote off \$18.01 million of losses in Vision's account against paid up capital.

18. The commercial rationale for the divestment of the VFS business was to unlock shareholder value and provide an optimal platform to support the growth of the Vision BioSystems business and the Invetech business.

19. Following the sale of the VFS business, the Vision Board returned share capital totalling approximately \$73.8 million (equating to 40 cents per fully paid ordinary share on issue) to its shareholders.

20. The Vision Board considered that the purpose in making the return of capital was to achieve the following objectives:

- to return excess capital to shareholders;
- to satisfy the market expectation that a portion of the proceeds received from the disposal of the VFS business is distributed to shareholders;
- to return excess cash to mitigate the adverse impact on Vision's share price which may arise from market perceptions that an over capitalised balance sheet reflects poor capital management and could lead to mistaken investment decisions;
- to retain a portion of the profits for new capital acquisitions in the Biomedical business;

- to retain sufficient profits to maintain Vision's current dividend policy; and
- to retain proceeds from the disposal of the VFS business in order to remain in the Standard & Poor's ASX 200 index.

21. The return of capital was approved by shareholders at the General Meeting of Shareholders held on 14 July 2006. All ordinary shareholders of Vision registered on the Record Date were entitled to the return of capital. The Record Date was 21 July 2006 and the date of payment of the 40 cents was 4 August 2006.

22. The return of capital was sourced from cash proceeds held on deposit from the disposal of the VFS business. The return of capital was debited against Vision's share capital account. There have been no transfers into Vision's share capital account as defined in section 975-300 of the ITAA 1997 from any of Vision's other accounts.

23. Vision maintains a consistent dividend policy of paying unfranked dividends semi-annually. In November 2000, Vision paid a special dividend when it realised a significant profit from an investment.

## **Ruling**

### **Is the return of capital a dividend as defined in subsection 6(1)?**

24. The return of capital is not a dividend as defined in subsection 6(1).

### **The application of sections 45A, 45B and 45C to the return of capital**

25. The Commissioner will not make a determination (under section 45A) that section 45C applies to the return of capital.

26. The Commissioner has made a determination (under section 45B) that section 45C applies to a part of the return of capital. Accordingly, a part of the return of capital (18.5 cents for each Vision share) will be taken to be an unfranked dividend paid out of Vision's profits for income tax purposes under section 45C.

### **Capital gains tax consequences**

27. CGT event G1 happened to a Vision shareholder when the return of capital was paid (section 104-135 of the ITAA 1997).

28. The non-assessable part of the payment for each Vision share, to which CGT event G1 applies, is 21.5 cents (subsection 104-135(1) of the ITAA 1997). The amount of the capital benefit taken to be an unfranked dividend under section 45C of the ITAA 1936 (18.5 cents for each Vision share) is excluded from the non-assessable part of the payment.

29. CGT event C2 happened to a Vision shareholder who received the return of capital and who ceased to own their Vision share after the Record Date but before the payment of the return of capital (section 104-25 of the ITAA 1997).

30. Any capital gain made as a result of CGT event C2 happening to a former Vision shareholder's right to receive the return of capital is reduced by that part of the capital benefit taken to be an unfranked dividend under section 45C of the ITAA 1936 (section 118-20 of the ITAA 1997).

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**Commissioner of Taxation**

14 March 2007

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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.*

### Dividends

31. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from any Australian source (if the shareholder is a non-resident of Australia).

32. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholder. However, later paragraphs in this subsection exclude certain items from being a dividend for tax purposes.

33. Relevantly, paragraph (d) of subsection 6(1) specifically excludes from the definition of 'dividend':

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company

34. The return of capital was debited against Vision's share capital account. There have been no transfers into Vision's share capital account as defined in section 975-300 of the ITAA 1997 from any of Vision's other accounts. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the return of capital would not constitute a dividend under subsection 6(1).

### Anti-avoidance provisions

35. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend that is paid by the company out of profits to the shareholder.

### Streaming of dividends and capital benefit: section 45A

36. Section 45A applies in circumstances where capital benefits are streamed to shareholders (the advantaged shareholders) who would, in the year of income in which the capital benefits are provided, derive a greater capital benefit than the other shareholders (the disadvantaged shareholders) who would receive dividends.



37. Vision has provided all of its ordinary shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)), and the capital benefit was provided to all shareholders in direct proportion to their individual shareholding. As all shareholders benefited equally from the return of capital, there is no indication of 'streaming' of capital benefits to some shareholders and not to other shareholders. Accordingly, section 45A will not apply to the return of capital, and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the return of capital.

## **Schemes to provide capital benefits in substitution for dividends: section 45B**

38. Section 45B applies where certain amounts of a capital nature are provided to shareholders in substitution for dividends.

39. Subsection 45B(2) sets out the conditions under which the Commissioner will make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company;
- under the scheme a person (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit; and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into or carried out the scheme or any part of the scheme for a purpose (other than an incidental purpose) of enabling a taxpayer to obtain a tax benefit.

Each of these conditions is considered below.

40. The return of capital is a 'scheme' within the broad meaning of that term.

41. The phrase 'provided with a capital benefit' is defined at subsection 45B(5). Relevantly, it includes a distribution to a person of share capital. As Vision debited the return of capital against its share capital account, its shareholders were provided with a capital benefit.

42. A shareholder 'obtains' a 'tax benefit', as defined in subsection 45B(9), where:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

by the taxpayer would, apart from the operation of section 45B:

- be less than the amount that would have been payable; or

- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

43. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the share there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the share that a capital gain is made. A capital gain may not arise at all for certain foreign shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a non-resident, subject to dividend withholding tax. Therefore, the shareholder will obtain tax benefits from the return of capital.

### ***Relevant circumstances***

44. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

45. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

46. The purpose which causes section 45B of the ITAA 1936 to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of Vision. The Commissioner cannot at this stage ascertain the purposes of Vision's numerous shareholders, all of whom were eligible to vote on the return of capital under section 256C of the *Corporations Act 2001* and all of whom, if they remained a shareholder in Vision on the Record Date, participated in the return of capital when the proposal was approved. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the proposal.

47. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the return of capital was made to all shareholders of Vision on 4 August 2006 regardless of individual shareholder circumstances, paragraphs 45B(8)(c) to (h) do not incline for or against a conclusion as to the purpose. The circumstances covered by paragraphs 45B(8)(i) to (j) pertaining to the provision of ownership interests and demerger respectively are not relevant. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

48. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or an associate (within the meaning of section 318) of the company. Paragraph 1.35 of the Explanatory Memorandum to the Taxation Laws Amendment (Company Law Review) Bill 1998 states that paragraph 45B(8)(a) seeks to determine:

the extent to which the distribution is attributable to profits of the company or an associate. For example, if a company makes a profit from a transaction, for example the disposal of business assets, and then returns capital to shareholders equal to the amount of the profit, that would suggest that the distribution of capital is a substituted dividend. On the other hand, if a company disposed of a substantial part of its business at a profit and distributed an amount of share capital which could reasonably be regarded as the share capital invested in that part of the business, the distribution of capital would not be seen as a substituted dividend because no amount would be attributable to profits.

49. In February 2006, Vision disposed of the VFS business and generated an accounting profit of \$196.5 million. The return of capital of \$73.8 million was sourced from the cash proceeds held on deposit from that disposal. An amount of \$39.5 million, being Vision's historic equity investment in the VFS business, is reasonably regarded as share capital invested in the VFS business. The paid up share capital of \$18.01 million written off as part of the restructure in 1991 was lost, such that it cannot be replaced by later profits and retain its character as share capital. The \$18.01 million of debt that the VFS business owed to Vision that was forgiven by Vision cannot reasonably be regarded as share capital invested in the VFS business. In these circumstances, a part of the capital benefit is attributable to the profit generated from the disposal of the VFS business.

50. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. Vision maintains a consistent dividend policy of paying unfranked dividends semi-annually, typically around 2 cents per share. The return of capital will not affect the semi-annual payment of dividends. In November 2000, Vision paid a special dividend when it realised a significant profit from an investment. In this case, Vision does not intend to pay a special dividend to return to shareholders any of the profit generated from the disposal of the VFS business. Nor is it intended to change Vision's dividend policy to include any significant portion of the profit in the determination of the current year dividend.

Rather, the company intends to retain the profits to fund future dividends maintaining Vision's current dividend policy. By way of contrast, the company has paid a capital return of approximately \$73.8 million. Having regard to Vision's dividend payout history, it is considered that a part of the return of capital may reasonably be regarded as a substituted dividend.

51. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These matters are by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

52. From Vision's perspective, the commercial rationale to divest the VFS business was to unlock shareholder value and provide an optimal platform for growth of the Vision BioSystems business and the Invetech business. The disposal released capital from the VFS business which Vision has stated is excess to its current needs. The return of excess cash is aimed to mitigate any adverse impact on Vision's share price which may arise from market perceptions of an over capitalised balance sheet. Vision has further argued that a capital return is appropriate given Vision's historical reliance upon equity funding due to the inability of the company to access debt funding from traditional debt providers. In this way, Vision has demonstrated that the scheme, being a return of capital to its shareholders, seeks to return an amount of capital released from the disposal of the VFS business, and accordingly is consistent with part of the capital return being regarded as a genuine return of share capital. However, the timing of the return of capital immediately following the disposal of the VFS business at a profit, Vision's pattern of distributions, Vision's stated intention of not returning any of the profits generated from the disposal of the VFS business as a special dividend and Vision's intention to retain the profits from the sale of the VFS business for new capital acquisitions in the Biomedical business would lend support to a conclusion that the scheme is carried out to enable Vision shareholders to obtain a tax benefit as discussed in paragraph 43 of this Ruling. In this case, the practical implications of the scheme are consistent with it being a distribution of both share capital and profit.

53. Therefore, having regard to the relevant circumstances of the scheme to return capital to Vision's shareholders, as discussed in paragraphs 43 to 51 of this Ruling, it would be concluded that Vision entered into or carried out the scheme for more than an incidental purpose of enabling the shareholders to obtain a tax benefit for the purposes of paragraph 45B(2)(c). Accordingly, the Commissioner has made a determination under subsection 45B(3) that section 45C applies to a part of the return of capital.

## **Deeming dividends to be paid where a determination is made: section 45C**

54. As the Commissioner has made a determination under subsection 45B(3) in relation to the scheme as described, section 45C will apply.

55. Under subsection 45C(1), if the Commissioner makes a determination under subsection 45B(3), the amount of the capital benefit, or the part of the benefit, is taken, for the purposes of the ITAA 1936 and the ITAA 1997, to be an unfranked dividend that is paid by the company to the shareholder or relevant taxpayer at the time that the shareholder is provided with the capital benefit. This equates to 18.5 cents per share of the amount of 40 cents per share that was distributed to shareholders as a return of capital.

56. Under subsection 45C(2), the dividend is taken to have been paid out of profits of the company.

57. Accordingly, 18.5 cents per each Vision share is taken to be an unfranked dividend paid by the company, out of profits of the company, to the shareholder on 4 August 2006, the date the shareholder was provided with the return of capital.

## **CGT event G1: section 104-135 of the ITAA 1997**

58. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of a share they own in a company and some or all of the payment is not a dividend.

59. The amount of the capital benefit that has been taken to be an unfranked dividend (18.5 cents per ordinary share) under section 45C is excluded from the non-assessable part of the payment to the shareholder. Paragraph 1.46 of the Explanatory Memorandum to the Taxation Laws Amendment (Company Law Review) Bill 1998 states that:

Where the amount of the capital benefit is taken to be a dividend as a result of new section 45C, section 160ZL of the Act will not operate to reduce the cost base of the shares by the amount taken to be a dividend.

Section 160ZL is the ITAA 1936 equivalent of CGT event G1 in the ITAA 1997.

60. The amount of the non-assessable part of the payment to shareholders for each Vision share to which CGT event G1 happens is 21.5 cents.

61. The cost base and reduced cost base of each Vision share is reduced (but not below nil) by the non-assessable part of the payment (subsections 104-135(3) and (4) of the ITAA 1997).

62. A Vision shareholder may make a capital gain if the non-assessable part of the payment by the company in relation to each Vision share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

63. If the Vision share was acquired by the shareholder at least 12 months before the date of payment, a capital gain from the CGT event G1 may qualify as a discount capital gain (subsection 115-25(1) of the ITAA 1997) if the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

#### **CGT event C2: section 104-25 of the ITAA 1997**

64. A person who was a registered ordinary shareholder of Vision on the Record Date for the return of capital acquired the right to receive the return of capital on that date. A shareholder continues to have the right to the return of capital even if the shareholder ceases to own the shares before the payment is made. The right is a CGT asset separate from the Vision share.

65. CGT event C2 (section 104-25 of the ITAA 1997) happened when the return of capital was paid and the right to receive that payment ended.

66. A capital gain is made if the capital proceeds for the CGT event happening are more than the cost base of the right. The capital proceeds are the amount of the payment from Vision. As no amount was paid for the right, its cost base is likely to be nil. Therefore, a capital gain equal to the payment of the return of capital will likely arise.

67. A capital gain is reduced, if because of the CGT event that produced the capital gain, an amount was included in the taxpayer's assessable income under a tax provision other than a CGT provision (section 118-20 of the ITAA 1997). The reduction may reduce the capital gain to nil but it cannot produce a capital loss.

68. Any capital gain made as a result of CGT event C2 happening to a former Vision shareholder's right to receive the 40 cents return of capital is reduced by 18.5 cents, being that part of the capital benefit taken to be an unfranked dividend under section 45C.

69. The right to payment from Vision was inherent in the Vision share during the time that it was owned. Therefore, for the purposes of Subdivision 109-A of the ITAA 1997, the right is considered to have been acquired at the time when the Vision share was acquired. Consequently, if the Vision share was originally acquired by the former shareholder at least 12 months before the payment, a capital gain from the CGT event C2, remaining after making the adjustment under section 118-20 of the ITAA 1997, may qualify as a discount capital gain (subsection 112-25(1) of the ITAA 1997) if the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

## **Appendix 2 – Detailed contents list**

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Subject references:*

- capital reduction
- reduction of share capital
- return of share capital
- share capital

### *Legislative references:*

- Copyright Act 1968
- Corporations Act 2001 256C
- ITAA 1936 6(1)
- ITAA 1936 6(4)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
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- ITAA 1936 45B(8)(a)
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- ITAA 1936 318
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- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 118-20
- ITAA 1997 975-300
- TAA 1953
- TAA 1953 Sch 1 357-75(1)

### *Other references:*

- Explanatory Memorandum to the Taxation Laws Amendment (Company Law Review) Bill 1998

### ATO references

NO: 2007/3252

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Return of capital  
Income Tax ~~ Capital Gains Tax ~~ CGT events G1 to G3 - shares  
Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 - end of a CGT asset