


CR 2011/27 - Income tax: restructure of Spark Infrastructure

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Class Ruling

Income tax: restructure of Spark Infrastructure

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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, 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 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:

- Division 6C of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 11A of the ITAA 1936;
- section 26BB of the ITAA 1936;
- Division 104 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 104-10 of the ITAA 1997;
- Section 104-25 of the ITAA 1997;
- Section 109-10 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-45(3) of the ITAA 1997;

- subsection 110-55(6) of the ITAA 1997;
- subsection 112-25(4) of the ITAA 1997;
- Section 118-20 of the ITAA 1997;
- Section 124-1045 of the ITAA 1997;
- subsection 124-1055(1) of the ITAA 1997;
- Section 855-10 of the ITAA 1997.

All subsequent references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is Spark Infrastructure (Spark) securityholders (Securityholders) who as at 29 December 2010 (the Record Date):

- (a) held their Spark securities (Securities) on capital account;
- (b) were not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their Securities; and
- (c) were not foreign residents that carried on a business in Australia at or through a permanent establishment in Australia (within the meaning of section 23AH of the ITAA 1936); or whose Securities were covered under subsection 104-165(3).

4. The TOFA rules in Division 230 will generally not apply to a Securityholder in respect of their Securities if the Securityholder is:

- an individual;
- a superannuation entity, managed investment scheme or an entity substantially similar to a managed investment scheme under foreign law with assets of less than \$100 million;
- an authorised deposit-taking institution, securitisation vehicle or other financial sector entity with an aggregated turnover of less than \$20 million; or
- another entity with an aggregated turnover of less than \$100 million, financial assets of less than \$100 million and assets of less than \$300 million,

unless they have made an election for the TOFA rules to apply to them.

Qualifications

5. At the time Spark Infrastructure RE Limited (Spark RE) pays interest on the loan notes (Loan Notes) issued by Spark Infrastructure Trust (Spark Trust) to a person, Spark RE will not know nor will it have reasonable grounds to suspect that the person is an associate of Spark RE within the meaning of subsection 128FA(8) of the ITAA 1936.

6. At no time will there be any arrangement to the effect that Spark Trust would be deemed not to be a public unit trust under subsections 102G(3) or (6) of the ITAA 1936 (for the purpose of section 128FA of ITAA 1936).

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

8. 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 12 to 40 of this Ruling.

9. 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.

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Date of effect

11. This Ruling applies from 31 December 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 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

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

13. Spark consists of the following entities:

- Spark Trust, an Australian unit trust that is an Australian Securities and Investments Commission (ASIC) registered managed investment scheme. Spark Trust is a trust whose trustee, Spark RE, is not assessed and liable to pay tax under Division 6B or 6C of the ITAA 1936;
- Spark Infrastructure Holdings No. 1 Limited (Spark Holdings 1), a company incorporated in Australia;
- Spark Infrastructure Holdings No. 2 Limited (Spark Holdings 2), a company incorporated in Australia; and
- Spark Infrastructure Holdings International Limited (Spark International), a company incorporated in the Bahamas. Spark International is a dormant company and does not have any assets.

14. The Securities are listed on the Australian Securities Exchange (ASX) and traded as stapled securities.

15. Each Security comprises:

- a Loan Note;
- a unit in Spark Trust;
- an ordinary share in Spark Holdings 1;
- an ordinary share in Spark Holdings 2; and
- a CHESS Depository Interest (CDI) in Spark International.

16. The key terms of the Loan Notes are:

- a face value of \$1.25 and a 100-year non-amortising term;
- a right to interest payable half-yearly in March and September in respect of the preceding interest period based on their face value;
- an interest rate of 10.85% per annum;
- a right to repayment of principal on maturity in 2105;
- by a notice to the Securityholders, the payment of interest may be deferred until the next interest payment date in certain circumstances; and
- they are unsecured notes and subordinated to all secured and unsecured creditors of Spark Trust for all amounts.

17. In order to trade on the ASX with existing Securities, the Loan Notes must be issued at their face value.

18. On 26 February 2010, Spark commenced a Strategic Review to consider its capital structure, ownership structure and future funding needs. The Strategic Review followed measures undertaken by the Board in 2009, including a reduction in distributions and activation of a distribution reinvestment plan.

19. On completion of the Strategic Review, Spark announced a Repositioning on 22 September 2010 to prepare and position itself to take advantage of future growth opportunities. The Repositioning was designed to achieve the following objectives:

- strengthen Spark's balance sheet and increase Spark's financial flexibility to fund growth capital expenditure requirements of the Asset Companies;
- realign Spark's Loan Note interest obligations with cashflows expected to be available from the Asset Companies; and
- simplify Spark's ownership and stapled security structure.

20. The Repositioning had two key elements:

- a \$295 million accelerated non-renounceable Entitlement Offer; and
- a Restructure – simplification of Spark's ownership and stapled security structure and a reduction in the face value of Loan Notes held by Securityholders.

21. Under the Entitlement Offer, new Securities were issued at a discount offer price of \$1.00. The new Securities rank equally in all respects with existing Securities and are listed on the ASX. The Loan Notes forming part of the new Securities were issued on the same terms as existing Loan Notes.

22. As at 29 October 2010, when the final allotment under the Entitlement Offer was completed, there were 1,326,734,264 Securities on issue.

23. The Restructure was effected by, among other things:

- (a) an extraordinary general meeting (EGM) of members of Spark International. Spark International CDI holders were asked to approve:
 - amendments to the constituent documents of Spark International to facilitate the redemption of the Spark International ordinary shares;

- the variation to the rights to the Spark International ordinary shares caused by the insertion of the terms on which those shares may be redeemed; and
 - the redemption of the ordinary shares on those terms and the cancellation of the related CDIs;
- (b) two member schemes of arrangement under Part 5.1 of the *Corporations Act 2001* (Corporations Act) in respect of Spark Holdings 1 and Spark Holdings 2, referred to as the 'Spark Holdings 1 Member Scheme' and the 'Spark Holdings 2 Member Scheme', respectively, (hereafter, collectively referred to as the 'Member Schemes'); and
- (c) a Court supervised creditors' scheme of arrangement under subsection 411(1) of the Corporations Act between Spark RE and the holders of Loan Notes. It is hereafter referred to as the 'Note Scheme'.

24. Participation in the Note Scheme was open to all eligible Securityholders at the Record Date. The details of the Note Scheme were provided in the Explanatory Memorandum for Securityholders. The Note Scheme's implementation required the passing of a resolution by a 75% majority at the Note Scheme Meeting.

25. The Note Scheme and the Member Schemes were interdependent in that none of them would proceed unless all of them were approved. The Note Scheme and the Member Schemes are jointly referred to hereafter as 'Schemes'.

26. The steps to implement the Restructure were as follows:

20 December 2010

Existing Securities in the quintuple structure were last traded on the ASX.

21 December 2010

'Restructured Spark securities' in the dual stapled structure were first traded on ASX on a deferred settlement basis. Settlement did not take place until 12 January 2011.

The 'Restructured Spark securities' consisted of two components – a Loan Note and a unit in Spark Trust, which had 100% of the ownership interests in Spark Holdings 1, Spark Holdings 2 and Spark International.

30 December 2010 to 31 December 2010

- (a) Spark International CDIs
- (i) Spark International ordinary shares were redeemed and the related CDIs cancelled;
 - (ii) no cash was paid to Securityholders in connection with the redemption; and

- (iii) simultaneous with the redemption of its existing ordinary shares, Spark International issued one new ordinary share to Spark Trust, so that Spark Trust has all the ownership interests in Spark International.
- (b) Note Scheme
 - (i) Spark Trust repaid \$0.60 of the principal amount outstanding on each Loan Note on the condition that the proceeds would be applied to the issue of additional Spark Trust units;
 - (ii) the face value of each Loan Note was reduced from \$1.25 to \$0.65;
 - (iii) interest calculations to be based on the reduced face value of \$0.65 at 10.85% per annum thereafter;
 - (iv) Securityholders subscribed for new Spark Trust units at the application price of 0.1 cent. The number of Spark Trust units issued per Loan Note by Spark Trust was 600; and
 - (v) the Loan Note repayment and the subscription price were legally set-off. No cash was payable to the Securityholders and the Securityholders had no entitlement to claim a cash payment from Spark Trust.
- (c) Spark Holdings 1 Member Scheme
 - (i) Spark Trust acquired all Spark Holdings 1 ordinary shares so that Spark Trust has all the ownership interests in Spark Holdings 1; and
 - (ii) in return, Securityholders were issued one new Spark Trust unit for each Spark Holdings 1 ordinary share held.
- (d) Spark Holdings 2 Member Scheme
 - (i) Spark Trust acquired all Spark Holdings 2 ordinary shares so that Spark Trust has all the ownership interests in Spark Holdings 2; and
 - (ii) in return, Securityholders were issued one new Spark Trust unit for each Spark Holdings 2 ordinary share held.
- (e) Consolidation of Spark Trust units
 - (i) on completion of the Note Scheme and the Member Schemes, Spark Trust undertook a consolidation such that the number of Spark Trust units that a Securityholder holds is the same as the number of Loan Notes held by that Securityholder at that time; and

- (ii) the consolidation ratio was determined by Spark and depended on the total number of additional Spark Trust units issued to each Securityholder under the Schemes.
- (f) Spark Trust then restapled the consolidated units and Loan Notes at the ratio of 1 for 1.

6 January 2011

CHESS holding statements were issued to Securityholders notifying of the change from the quintuple stapled securities to dual stapled securities.

- 27. The application price for the new Spark Trust units issued under each of the Schemes was 0.1 cent per Spark Trust unit.
- 28. Spark Holdings 1, Spark Holdings 2 and Spark International were removed from the official list of the ASX.
- 29. On completion of the Restructure, an ownership interest in a Security consists of a Loan Note and a unit in Spark Trust. Spark Trust has all the ownership interests in Spark Holdings 1, Spark Holdings 2 and Spark International.

Other matters

The Loan Notes

- 30. The Loan Notes, the subject of this ruling, are the Loan Notes issued by Spark RE under the initial public offer (IPO), the distribution reinvestment plan and the Entitlement Offer.
- 31. At the time of each issue of the Loan Notes, whether as a result of the IPO, the distribution reinvestment plan or the Entitlement Offer, Spark RE did not know or have reasonable grounds to suspect, that the Loan Notes were being, or would be, acquired either directly or indirectly by an 'associate' of Spark RE (within the meaning of subsection 128F(9) of the ITAA 1936).
- 32. The Loan Notes issued under the IPO, were issued as a result of being offered for issue to over 100 persons (being the public) whom it was reasonable for Spark RE to regard as likely to be interested in acquiring debentures.
- 33. The Loan Notes issued under the distribution reinvestment plan and the Entitlement Offer were issued as a result of being offered for issue to over 100 persons whom it was reasonable for Spark RE to have regarded as having acquired debentures in the past.
- 34. At IPO in 2005, the Spark Securities were issued at \$1.80.

Manager's special share

35. The Manager held a special share in each of Spark Holdings 1, Spark Holdings 2 and Spark International. The special share entitled the holder to appoint one less than half of the maximum number of directors on the relevant Boards. As part of the Restructure, the special share held by the Manager in each of Spark Holdings 1, Spark Holdings 2 and Spark International was transferred to Spark Trust.

Foreign Sale Facility

36. Restrictions in certain foreign countries make it impractical or unlawful to offer or receive Spark Trust units in those countries. Securityholders whose addresses were shown in the Register on the Record Date as being in those countries or who Spark subsequently determined were resident in a jurisdiction in respect of which the issue to them of Spark Trust units under the Schemes was prohibited or unduly onerous or impractical were unable to participate and are referred to as Ineligible Overseas Securityholders.

37. Under the Restructure, the entire holdings of Securities held by Ineligible Overseas Securityholders were transferred to the Sale Agent, Deutsche Bank AG, as nominee under the Foreign Sale Facility.

38. Deutsche Bank AG participated in the Schemes in respect of those ineligible Securities (that is, the principal amount of the Loan Notes was partly repaid, and the Spark Holdings 1 ordinary shares and Spark Holdings 2 ordinary shares were transferred to Spark Trust, in exchange for the issue of additional Spark Trust units to Deutsche Bank AG as nominee).

39. Deutsche Bank AG sold the Spark securities (then comprising Spark Trust units and Loan Notes) it held and the net proceeds from the sale were remitted to the Ineligible Overseas Securityholders.

40. Each Ineligible Overseas Securityholder received the net proceeds of sale which was an amount equal to the average price at which Deutsche Bank AG sold the Securities multiplied by the corresponding number of ineligible Securities that were held by them as at the Record Date less applicable brokerage and other costs, taxes and charges.

Ruling**The Note Scheme*****Partial repayment of Loan Notes in exchange for additional units***

41. The Note Scheme did not result in the disposal of a traditional security (the Loan Note) for the purposes of subsection 26BB(2) of the ITAA 1936.

Capital Gains Tax

42. The Note Scheme did not give rise to a CGT event for Securityholders under Division 104.

Cost base and reduced cost base of Loan Notes

43. The cost base and reduced cost base of each Loan Note is reduced by the recoupment amount of \$0.60, under subsections 110-45(3) and 110-55(6), respectively.

Cost base of additional Spark Trust units received

44. The cost base of each additional Spark Trust unit is the payment made to acquire it (paragraph 110-25(2)(a)), which is the application price of 0.1 cent.

Acquisition date of additional Spark Trust units

45. The additional units received by the Securityholder under the Note Scheme have the Scheme Implementation Date as the acquisition date (section 109-10).

46. The Commissioner considers that the following fraction is the proportion of Spark Trust units that are taken to have been acquired on Scheme Implementation Date:

$$\frac{600}{603}$$

Cancellation of Spark International CDIs

47. CGT event C2 under section 104-25 happened when CDIs in Spark International were cancelled.

Member Schemes

48. CGT event A1 under section 104-10 happened when Securityholders disposed of the shares they held in Spark Holdings 1 and Spark Holdings 2 under the Member Schemes.

Subdivision 124-Q rollover

49. CGT roll-over will be available to Australian resident Securityholders as the requirements under sections 124-1045 and 124-1050 have been met.

50. Accordingly, the capital gain or loss they made as a consequence of the simplification of the Spark ownership structure will be disregarded under subsection 124-1055(1). The cost base of their Spark Trust units received under the Member Schemes equals the sum of the cost base of their Spark Holdings 1 and Spark Holdings 2 shares under subsection 124-1055(2).

Tax consequences for foreign resident Securityholders

Capital gain or loss

51. For foreign resident Securityholders, any gain or loss they make as a consequence of the simplification of the Spark ownership structure will be disregarded under section 855-10 as the CDIs in Spark International and the shares in Spark Holdings 1 and Spark Holdings 2 are not 'taxable Australian property'.

Cost base of Spark Trust units in exchange for shares

52. The foreign resident Securityholder's cost base in the Spark Trust units received under the Member Schemes is equal to the market value of the Spark Holdings 1 and Spark Holdings 2 shares at the time of their disposal (paragraph 110-25(2)(b)).

Consolidation of Spark Trust Units

CGT event on consolidation

53. The consolidation of Spark Trust units did not give rise to a CGT event for Securityholders under Division 104.

Cost base and reduced cost base of Spark Trust units after consolidation

54. A Securityholder's cost base and reduced cost base in the Spark Trust units that are consolidated is equal to the sum of the respective cost base and reduced cost base of their units that were consolidated (paragraph 112-25(4)(b)).

Post scheme implementation Disposals (including disposal under Foreign Sale Facility)

Withholding tax on interest in respect of Loan Notes

55. Non resident Securityholders will not be liable to withholding tax under Division 11A of the ITAA 1936 on interest paid on the Loan Notes that were issued under the IPO, the distribution reinvestment plan and the Entitlement Offer.

Future Disposal of Securities

56. CGT event A1 happens when there is a disposal of a Security under section 104-10. The capital proceeds are to be apportioned between the Spark Trust unit and the Loan Note.

Future Disposal of Spark Trust units

57. A Securityholder makes a capital gain if the capital proceeds received on the disposal of the unit exceed the unit's cost base. A Securityholder makes a capital loss if capital proceeds are less than the unit's reduced cost base.

Future Disposal of Loan Notes

58. Any gain or loss on disposal of the Loan Notes is assessable or deductible under section 26BB or section 70B of the ITAA 1936, respectively. Any capital gain on the disposal of the Loan Note is reduced to the extent an amount is included in the Securityholder's assessable income under section 26BB (section 118-20).

59. The acquisition cost of a Loan Note is reduced by the repayment of \$0.60 under the Note Scheme when determining the gain or loss on disposal.

Commissioner of Taxation

9 March 2011

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.*

The Note Scheme

Partial repayment of Loan Notes in exchange for additional units

60. The stapled Loan Note is a CGT asset under section 108-5 and comes within the definition of a 'traditional security' in subsection 26BB(1) of the ITAA 1936. This is because the stapled Loan Note is a 'security' held by a Securityholder that was acquired after May 1989, does not have an 'eligible return' and is not trading stock of the Securityholder.

61. A 'security' takes its meaning from subsection 159GP(1) of the ITAA 1936 and is widely defined to include, amongst other things, notes and contracts under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

62. Under subsection 26BB(2) of the ITAA 1936, where a taxpayer disposes of a traditional security or a traditional security is redeemed, the amount of any gain on the disposal or redemption is included in the assessable income of the taxpayer in the year of income in which the disposal or redemption takes place.

63. Subsection 26BB(1) of the ITAA 1936 provides that 'dispose', in relation to a security, means "sell, transfer, assign or dispose of in any way the security or the right to receive payment of the amount or amounts payable under the security".

64. In this case, Spark Trust did not redeem, cancel or re-issue the Loan Notes at a lower rate; nor did the partial repayment of the Loan Notes result in the Securityholders selling, transferring or assigning the Loan Notes or disposing of the right to receive amounts payable under the Loan Notes. Accordingly, the Note Scheme did not result in the disposal of the Loan Notes for the purposes of subsection 26BB (2) of the ITAA 1936.

Capital Gains Tax

65. The Loan Notes are CGT assets under section 108-5. You can make a capital gain or capital loss only if a CGT event happens (section 102-20). The CGT events that may happen to the Loan Notes under the Note Scheme are discussed below.

66. CGT event A1 happens if a taxpayer disposes of a CGT asset (section 104-10). A taxpayer disposes of a CGT asset if a change of ownership occurs from the taxpayer to another entity, whether because of some act or event or by operation of law. The Note Scheme will not constitute, involve or require a disposal of any Loan Notes by the Securityholders.

67. CGT event C2 happens, to the extent that it is relevant to the Note Scheme, if the Loan Notes end by their being redeemed or cancelled or being released, discharged or satisfied (Section 104-25). In this case, Spark Trust will not redeem, cancel, discharge or extinguish the Loan Notes under the Note Scheme.

68. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that a taxpayer owns, and it does not result in an adjustment being made to the asset's cost base or reduced cost base (section 104-155).

69. The partial repayment is an act, transaction or event that occurred in relation to the Loan Notes, and results in an adjustment being made to a Loan Note's cost base or reduced cost base under subsections 110-45(3) and 110-55(6), respectively (see paragraphs 71 to 75 of this Class Ruling).

70. Accordingly, no CGT event under Division 104 happened as a result of the partial repayment of \$0.60.

Cost base and reduced cost base of Loan Notes

71. Subsection 110-45(3) provides that expenditure does not form part of any element of the cost base of a CGT asset to the extent of any amounts a taxpayer has received as 'recoupment' of it, except so far as the amount is included in the taxpayer's assessable income. Subsection 110-55(6) similarly provides that expenditure does not form part of the reduced cost base of a CGT asset to the extent of any amounts a taxpayer receives as 'recoupment' of it, except to the extent that the amounts are included in the taxpayer's assessable income.

72. Under subsection 995-1(1), 'recoupment' has the meaning given by section 20-25. Under subsection 20-25(1), recoupment of an outgoing (such as expenditure) includes any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery, however described.

73. The partial repayment of \$0.60 of the principal of a Loan Note is a recoupment, refund or recovery of the expenditure previously incurred to acquire the Loan Note. Therefore, it is a 'recoupment' within the meaning of section 20-25.

74. No part of the repayment is included in the assessable income of a Securityholder. Therefore, the repayment amount is a recoupment of expenditure in relation to a Loan Note for the purposes of subsections 110-45(3) and 110-55(6).

75. Accordingly, the cost base and reduced cost base of each Loan Note is reduced by the recoupment amount of \$0.60, under subsections 110-45(3) and 110-55(6), respectively.

Cost base of additional Spark Trust units received

76. Under paragraph 110-25(2)(a), the first element of the cost base and reduced cost base of a CGT asset includes the money paid, or required to be paid, in acquiring it.

77. Under the Note Scheme, the repayment of \$0.60 was applied to pay for the additional Spark Trust units subscribed for by the Securityholder. The amount owing by the Securityholders in respect of the additional Spark Trust units subscribed for each Loan Note held was then legally set-off against the repayment of \$0.60 owing by Spark Trust. The set-off amount of \$0.60 is the consideration a Securityholder paid for the 600 additional Spark Trust units received for each Loan Note held.

78. The cost base of each additional Spark Trust unit is the payment made to acquire it (paragraph 110-25(2)(a)), being the subscription price of 0.1 cent.

79. The market value substitution rule under section 112-20, by which the first element of the cost base and reduced cost base of the additional Spark Trust units acquired under the Note Scheme is substituted by their market value at the time of issue, does not apply in this case.

80. One of the requirements for section 112-20 to apply is that a taxpayer did not deal at arm's length with the other entity in connection with the acquisition.

81. In this case, the Commissioner considers that the parties to the Note Scheme dealt with each other at arm's length. The factors relevant to this finding are:

- the Note Scheme was a Court supervised creditors' scheme of arrangement under subsection 411(1) of the Corporations Act between Spark RE and the holders of Loan Notes;
- details of the Note Scheme were provided in the Explanatory Memorandum for Securityholders to make an informed decision;
- the implementation of the Note Scheme required the passing of a resolution by a 75% majority at the Note Scheme Meeting; and
- participation in the Note Scheme was open to all eligible Securityholders at the Record Date of 29 December 2010.

82. The approach of treating the repayment of \$0.60 as the consideration paid for the additional Spark Trust units reflects the substance of the transaction:

- the face value of the Loan Notes was reduced from \$1.25 to \$0.65; and
- the interest on the Loan Notes will be calculated on the basis of the reduced face value of \$0.65.

Acquisition date of additional Spark Trust units

83. Subsection 109-5(1) provides that a CGT asset is acquired when it commences to be owned by the taxpayer. Accordingly, the additional units received by the Securityholder under the Note Scheme have the Scheme Implementation Date, 31 December 2010, as the acquisition date.

84. On Scheme Implementation Date, the Spark Trust units forming each Security held by a Securityholder had the following sources and acquisition dates:

Number of units	Source	Acquisition date
1	A component of the original Security acquired	Acquisition date of original Security
1	In exchange for Spark Holdings 1 share (Sparking Holdings 1 Scheme)	Acquisition date of original Security (roll-over)
1	In exchange for Spark Holdings 2 share (Sparking Holdings 2 Scheme)	Acquisition date of original Security (roll-over)
600	Additional units acquired under Note Scheme	Scheme Implementation Date

85. On Scheme Implementation Date, each Security consisted of a total of 603 Spark Trust units, out of which 600 Spark Trust units were received under the Note Scheme. These units are taken to have been acquired on Scheme Implementation Date under subsection 109-5(1).

86. Accordingly, the following fraction is the proportion of Spark Trust units that will be treated as having been acquired on Scheme Implementation Date:

$$\frac{600}{603}$$

Cancellation of Spark International CDIs

87. Under paragraph 104-25(1)(a), CGT event C2 happens when a taxpayer's ownership of an intangible CGT asset ends by the asset being redeemed or cancelled. Paragraph 104-25(2)(b) further provides that if there is no contract, the time of CGT event C2 is when the asset ends.

88. In this case, the CDIs were not cancelled under a contract. Accordingly, CGT event C2 happened when each Securityholder's CDIs in Spark International were cancelled on Scheme Implementation Date.

89. A capital gain arises where the capital proceeds exceed an asset's cost base. A capital loss arises where the reduced cost base exceeds the capital proceeds (subsection 104-25(3)). In this case, no capital gains or losses arise as the CDIs have been allocated nil cost base (since Spark International is a dormant company and does not have any assets) and the Securityholders did not receive any capital proceeds on the cancellation of the CDIs.

Member Schemes

90. Under subsection 104-10(1), CGT event A1 happens if a change of ownership occurs from a taxpayer to another entity, whether because of some act or event or by operation of law. Subsection 104-10(3) further provides if there is no contract, the time of the event is when the change of ownership occurs.

91. The Securityholders disposed of their shares in Spark Holdings 1 and Spark Holdings 2 to Spark Trust under the Member Schemes. As the shares were not disposed of under a contract, CGT event A1 happened when Spark Trust became the owner of the shares in Spark Holdings 1 and Spark Holdings 2 on Scheme Implementation Date.

Subdivision 124-Q roll-over

92. Subdivision 124-Q provides for a CGT roll-over where a taxpayer owns ownership interests that are stapled and, as a result of a scheme of reorganisation, the taxpayer retains their ownership interests in a trust and stops owning the remaining ownership interests and receive nothing other than additional ownership interests in the trust. The requirements needed to be satisfied for the rollover to apply are outlined under sections 124-1045 and 124-1050.

93. The Securityholders owned ownership interests in Spark Trust, Spark Holdings 1, Spark Holdings 2 and Spark International; and those interests were stapled together to form a stapled security (paragraph 124-1045(1)(a)).

94. Spark Trust is a trust, whose trustee, Spark RE, is not assessed and liable to pay tax under Division 6B or 6C of Part III of the ITAA 1936 (paragraph 124-1045(1)(b)).

95. Under the Restructure, all the exchanging members, being the Securityholders, retained their ownership interests in Spark Trust, stopped being the owner of the remaining ownership interests that formed the stapled securities, and received nothing other than additional ownership interests in Spark Trust; the ineligible foreign resident Securityholders are taken not to be exchanging members for the purposes of Subdivision 124-Q, with the use of the Foreign Sale Facility, due to the operation of subsection 124-1065(2); (subparagraph 124-1045(1)(d)(ii)).

96. Under the Restructure, Spark Trust became the owner of all the ownership interests in Spark Holdings 1, Spark Holdings 2 and Spark International (subparagraph 124-1045(1)(e)(ii)).

97. Just after the Restructure was completed, each Securityholder owned a percentage of the ownership interests in Spark Trust that reasonably equated to the percentage of the ownership interests that the member owned in the stapled entities, as the Securityholders retained their ownership interests in Spark Trust and the additional Trust units issued under the Spark Holdings 1 and Spark Holdings 2 schemes would be in proportion to the Securityholders' holding (subsection 124-1050(1)).

98. Just after the completion time, each Securityholder had the same, or as nearly as practicable the same, proportionate market value of ownership interests in Spark Trust as the member had in Spark just before the Restructure (subsection 124-1050(2)).

99. Accordingly, CGT roll-over is available to the Australian resident Securityholders as all the relevant requirements under sections 124-1045 and 124-1050 are met.

100. A capital gain or loss that a Securityholder makes under the Restructure is disregarded under subsection 124-1055(1).

101. The cost base of Spark Trust units received under the Member Schemes equals the sum of the cost base in the Spark Holdings 1 and Spark Holdings 2 shares they held immediately before the Restructure (subsection 124-1055(2)).

Tax consequences for foreign resident Securityholders

Capital gain or loss

102. Under section 855-10, a foreign resident disregards a capital gain or loss from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property'.

103. The CDIs in Spark International and the shares in Spark Holdings 1 and Spark Holdings 2 were not 'taxable Australian property' for the following reasons:

- they were not taxable Australian real property (item 1 in the table to section 855-15); and
- at the time the Schemes were implemented, each component of a Security was not an indirect Australian real property interest (item 2 in the table to section 855-15).

104. Accordingly, any gain or loss the foreign resident Securityholders make as a consequence of the simplification of the Spark ownership structure is disregarded under section 855-10.

Cost base of Spark Trust units in exchange for shares

105. A foreign resident Securityholder's cost base in the Spark Trust units received under the Member Schemes equals the market value of the Spark Holdings 1 and Spark Holdings 2 shares at the time of their disposal under paragraph 110-25(2)(b).

Consolidation of Spark Trust Units

CGT event on consolidation

106. Under paragraph 112-25(4)(a), if two or more CGT assets (the original assets) are merged into a single asset (a new asset), and you are the beneficial owner of the original assets and the new asset, the merger is not a CGT event.

107. Under the Restructure, Spark Trust consolidated its units into a smaller number such that the number of Spark Trust units held by a Securityholder was the same as the number of Loan Notes held by the same Securityholder at that time. The consolidation, therefore, did not result in any changes in the beneficial ownership of the Spark Trust units.

108. Accordingly, the consolidation of the Spark Trust units did not result in a CGT event happening to Securityholders.

Cost base and reduced cost base of Spark Trust units after consolidation

109. Paragraph 112-25(4)(b) provides that where there is a merging of two or more CGT assets into a single asset and you are the beneficial owner of the original assets and the new asset, each element of the cost base and reduced cost base of the new asset (at the time of merging) is the sum of the corresponding elements of each original asset.

110. Accordingly, as a result of the consolidation, the cost base and reduced cost base of the consolidated Spark Trust units is the sum of the cost base and reduced cost base of each unit forming the consolidated unit.

Post scheme implementation Disposals (including disposal under Foreign Sale Facility)

Withholding tax on interest in respect of Loan Notes

111. Withholding tax is not payable under Division 11A of the ITAA 1936 in respect of interest paid on certain publicly offered unit trust debentures or debt interests which meet the requirements of section 128FA of the ITAA 1936 (subsection 128FA(3) and subparagraph 128B(3)(h)(iv) of the ITAA 1936).

112. Section 128FA of the ITAA 1936 applies to interest paid by the trustee of an 'eligible unit trust' in respect of a 'debenture' issued by a trustee if the issue of the debenture satisfies the 'public offer test'.

113. Subsection 128FA(8) of the ITAA 1936 defines an 'eligible unit trust' as including a 'public unit trust' and provides that 'public unit trust' has the same meaning as in section 102G of the ITAA 1936. Therefore, as Spark Trust is a unit trust, the units in which are listed for quotation on the ASX, Spark Trust will be an eligible unit trust (paragraph 102G(1)(a) of the ITAA 1936). This is subject to the qualification set out in paragraph 6 that Spark Trust is not deemed not to be a public unit trust under subsections 102G(3) or (6) of the ITAA 1936 (for the purposes of section 128FA of the ITAA 1936).

114. Furthermore, as the Loan Notes issued by Spark RE satisfy paragraph (a) of the definition of 'debenture' in subsection 128FA(8) of the ITAA 1936, the Loan Notes will constitute a debenture issued by the trustee of an 'eligible unit trust'.

115. The 'public offer test' is satisfied if the issue resulted from the debenture being offered for issue to at least 100 persons whom it was reasonable for the trustee of the eligible unit trust to have regarded as either having acquired debentures in the past or being likely to be interested in acquiring debentures (subsection 128FA(6) and paragraph 128F(3)(b) of the ITAA 1936).

116. The issue of Loan Notes that resulted from the IPO, the distribution reinvestment plan and the Entitlement Offer satisfied the public offer test because:

- the IPO was offered to over 100 persons (being the public) whom it was reasonable for Spark RE to regard as likely to be interested in acquiring the Loan Notes; and
- the distribution reinvestment plan and the Entitlement Offer were each offered to over 100 persons whom it was reasonable for Spark RE to have regarded as having acquired debentures in the past.

117. Further, at the time of each issue of Loan Notes (the IPO, distribution reinvestment plan and the Entitlement Offer), Spark RE did not know or did not have reasonable grounds to suspect that the Loan Notes were being, or would be, acquired either directly or indirectly by an associate of Spark RE (subsection 128F(5) of the ITAA 1936).

118. Therefore, section 128FA of the ITAA 1936 will apply to interest paid on the Loan Notes. This is subject to the qualification set out in paragraph 5 of this Class Ruling, that at the time that Spark RE pays interest on the Loan Notes, it will not know, nor will it have reasonable grounds to suspect, that the person receiving the interest is an associate of Spark RE within the meaning of subsection 128FA(8) of the ITAA 1936.

119. Accordingly, non-resident Securityholders will not be liable to Australian withholding tax in respect of interest paid on the Loan Notes that were issued under the IPO, the distribution reinvestment plan and the Entitlement Offer.

120. Furthermore, for non-resident Securityholders (who do not derive the interest in carrying on business in Australia at or through a permanent establishment in Australia) the interest will not be assessable income and will not be exempt income pursuant to section 128D of the ITAA 1936.

Future Disposal of Securities

121. Under subsection 104-10(1), CGT event A1 happens when a taxpayer disposes of a CGT asset. Accordingly, CGT event A1 will happen on the future disposal of the Securities.

122. After the Scheme Implementation Date, a Security is a dual stapled security consisting of a Loan Note and a unit, each of which is a separate CGT asset under section 108-5. Accordingly, the capital gain or loss has to be considered separately in respect of the Loan Note and the Spark Trust unit on disposal of the Security.

Future disposal of Spark Trust units

123. A Securityholder makes a capital gain from the disposal if the capital proceeds from the disposal exceed the cost base of the units, or a capital loss if the proceeds are less than the reduced cost base (subsection 104-10(4)).

Future Disposal of Loan Notes

124. The Loan Notes are traditional securities as defined in subsection 26BB(1) of the ITAA 1936.

125. Subsection 26BB(2) of the ITAA 1936 provides that the amount of any gain on the disposal of traditional securities shall be included in the assessable income of the taxpayer in the year of income in which the disposal takes place. Where a loss is made on the disposal, the loss is allowable as a deduction under subsection 70B(2) of the ITAA 1936.

126. The amount of the capital gain in respect of a disposal of the Loan Note is reduced to the extent that any amount is included in a Securityholder's assessable income under section 26BB of the ITAA 1936.

127. Sections 26BB and 70B of the ITAA 1936 are silent about how to calculate the amount of any gain or loss on disposal of traditional securities. Ordinarily, the calculation requires a comparison to be made between the cost of acquiring the securities and the proceeds received on the disposal or redemption. This approach is explained in paragraph 11 of the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 3) 1989 which introduced section 26BB of the ITAA 1936:

The gain is the difference between acquisition cost and the consideration received on disposal of the security. The subsection also applies to any gains arising from the partial redemption of securities. In such cases the gain will be calculated on a proportional basis.

128. In *Burrill v. FCT* 96 ATC 4629 the Full Court of the Federal Court said, at p 4632:

It is a fundamental principle of Australian income tax law that rights to receive money and obligations to pay money are taken into account in calculating income and outgoings, gains and losses, at their nominal value.

129. In *FC of T v. The Myer Emporium Ltd* 87 ATC 4363, at pp. 4370-4371; (1986-1987) 163 CLR 199, at pp. 216-217 the High Court said:

The accounting basis which has been employed in calculating profits and losses for the purposes of the Act is historical cost ... not economic equivalence ...

130. Accordingly, when a Securityholder disposes of a Security, the \$0.60 reduction in the face value of the Loan Note under the Note Scheme will be taken into account in determining the acquisition cost of the Loan Note for the purposes of calculating whether the Securityholder has made a gain or a loss on the disposal of the Loan Note.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 96/14; TR 2006/10

Subject references:

- CGT event A1 – disposal of a CGT asset
- CGT events C1-C3 – end of a CGT asset
- CGT events H1-H2 – special capital receipts
- CGT cost base
- market value cost base
- traditional securities

Legislative references:

- ITAA 1936 Div 6B
- ITAA 1936 Div 6C
- ITAA 1936 Div 11A
- ITAA 1936 23AH
- ITAA 1936 26BB
- ITAA 1936 26BB(1)
- ITAA 1936 26BB(2)
- ITAA 1936 70B
- ITAA 1936 70B(2)
- ITAA 1936 102G
- ITAA 1936 102G(1)(a)
- ITAA 1936 102G(3)
- ITAA 1936 102G(6)
- ITAA 1936 128B(3)(h)(iv)
- ITAA 1936 128D
- ITAA 1936 128F(3)(b)
- ITAA 1936 128F(5)
- ITAA 1936 128F(9)
- ITAA 1936 128FA
- ITAA 1936 128FA(3)
- ITAA 1936 128FA(6)
- ITAA 1936 128FA(8)
- ITAA 1936 159GP(1)
- ITAA 1997 20-25
- ITAA 1997 20-25(1)
- ITAA 1997 102-20
- ITAA 1997 Div 104
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(a)

- ITAA 1997 104-25(2)(b)
- ITAA 1997 104-25(3)
- ITAA 1997 104-155
- ITAA 1997 104-165(3)
- ITAA 1997 108-5
- ITAA 1997 109-5(1)
- ITAA 1997 109-10
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(a)
- ITAA 1997 110-25(2)(b)
- ITAA 1997 110-45(3)
- ITAA 1997 110-55(6)
- ITAA 1997 112-20
- ITAA 1997 112-25(4)
- ITAA 1997 112-25(4)(a)
- ITAA 1997 112-25(4)(b)
- ITAA 1997 118-20
- ITAA 1997 Subdiv 124-Q
- ITAA 1997 124-1045
- ITAA 1997 124-1045(1)(a)
- ITAA 1997 124-1045(1)(b)
- ITAA 1997 124-1045(1)(d)(ii)
- ITAA 1997 124-1045(1)(e)(ii)
- ITAA 1997 124-1050
- ITAA 1997 124-1050(1)
- ITAA 1997 124-1050(2)
- ITAA 1997 124-1055(1)
- ITAA 1997 124-1055(2)
- ITAA 1997 124-1065(2)
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 995-1(1)
- Corporations Act 2001
- Corporations Act 2001 411(1)
- Corporations Act 2001 Pt 5.1
- TAA 1953
- Copyright Act 1968

Case references:

- *Burrill v. FCT* (1996) 67 FCR 519; 96 ATC 4629; (1996) 33 ATR 133
- *FC of T v. The Myer Emporium Ltd* (1987) 163 CLR 199; 87 ATC 4363; (1987) 18 ATR 693

Other references:

- Explanatory Memorandum to Taxation Laws Amendment Bill (No. 3) 1989

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ATO references

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