

# ***CR 2014/25 - Income tax: Melbourne IT Ltd - return of capital***



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## Class Ruling

### Income tax: Melbourne IT Ltd – return of capital

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

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

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

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

## What this Ruling is about

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);
  - subsection 44(1) of the 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;
  - Subdivision 115-A of the ITAA 1997; and
  - section 855-10 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies are shareholders in Melbourne IT Ltd (MIT) who:

- were registered on the MIT share register on 5 February 2014 (record date) for determining entitlements to receive the return of capital; and
- held ordinary shares in MIT on capital account.

4. This Ruling does not apply to MIT shareholders for whom gains and losses from the return of capital are subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997.

(**Note:** Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

5. This Ruling does not apply to MIT shareholders where the return of capital is exempt income (within the meaning of section 6-20 of the ITAA 1997) or non-assessable non-exempt income (within the meaning of section 6-23 of the ITAA 1997), in their hands.

6. This Ruling does not consider indirect distributions to partners in a partnership, nor trustees or beneficiaries of a trust.

## Qualifications

7. 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 10 to 32 of this Ruling.

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

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

## Date of effect

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9. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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).

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## Scheme

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10. The following description of the scheme is based on information provided by Ernst & Young (Applicant). The following documents, or relevant parts of them, form part of and are to be read with the description:

- application for class ruling dated 30 August 2013 lodged by the Applicant on behalf of MIT;
- Share and Asset Sale Agreement dated 12 March 2013;
- Market Announcement dated 26 November 2012 (Notification of Strategic Review of MIT);
- Market Announcement dated 12 March 2013 (Sale of Digital Brand Services (DBS) Business);
- Market Announcement dated 21 May 2013 (Announcement of special dividend);
- Notice of General Meeting dated 20 December 2013; and
- MIT 2012 Annual Report.

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

### Background

11. MIT was incorporated in 1996 by the University of Melbourne to assist private sector entities with information technology projects. MIT was the sole provider of domain name registration services in respect of the '.au' domain. MIT listed on the Australian Securities Exchange (ASX) in 1999.

12. MIT is a resident for Australian tax purposes and became the head company of a tax consolidated group from 1 January 2006.

13. Through a series of acquisitions across New Zealand, Europe and Australia, MIT expanded its domain name registration and online brand management services. The acquisitions also expanded MIT's services to include web hosting and digital recording services for justice and public safety venues. During 2008, MIT created the Digital Brand Services (DBS) business through the combination of its existing Corporate Brand Services business with the Digital Brand Management Services (DBMS) division acquired from VeriSign Inc. The DBS business provides online brand protection and consultancy services to global organisations seeking to maximise the value of their online assets.

14. MIT helps organisations of all sizes to successfully do business online with its customers varying from small businesses to listed companies and international government organisations. MIT provides a diverse range of technology services including internet domain name services, critical web hosting, online brand protecting and promotion, video content delivery and managed information technology services.

15. During 2012, a strategic review of the MIT business was undertaken. MIT aimed at unlocking greater shareholder value by realising the intrinsic value of its business. One of the options considered was the possibility of pursuing different ownership alternatives in relation to MIT's business (ASX announcement dated 26 November 2012). The Board believed that this would benefit customers with more focused execution and operations and benefit staff through increased investment specific to the needs of each business division.

16. The strategic review resulted in a decision to divest the DBS business from MIT. An agreement to divest the DBS business was signed on 12 March 2013 with completion also occurring on this date.

## **Sale of business**

17. The DBS business was sold on 12 March 2013 for initial cash consideration of \$152.5 million, with various sales related adjustments which increased the cash consideration to \$163.7 million. The accounting profit on disposal after income tax was approximately \$62.1 million.

18. The net capital gain on disposal of the DBS business was approximately \$27.9 million. The estimated Australian and foreign income taxes payable in respect of the net capital gain are \$8.4 million and \$2.6 million respectively.

19. An amount of 10% of the \$152.5 million initial sale price is held in escrow for 15 months. MIT has settled an outstanding bank debt from the proceeds received.

20. A substantial portion of the cash balance was returned to shareholders by way of a special dividend and return of capital. The special dividend and return of capital reflects the sale of MIT's DBS business and the desire of the directors to return to shareholders excess capital released upon the sale of the DBS business and to optimise the capital structure of MIT.

21. The remaining proceeds from the sale are not intended to be distributed to shareholders and will be retained within the MIT business to be utilised as part of various corporate transactions currently being explored by MIT.

**Special dividend**

22. MIT announced a special dividend as an initial distribution of cash realised from the DBS disposal at its Annual General Meeting on 21 May 2013.

23. The special dividend was paid to all registered shareholders of fully paid ordinary shares as at the record date of 31 July 2013 for the dividend payment. The special dividend of \$0.25 per share was paid on 22 August 2013 from MIT's cash reserves and was partially franked (75%). The amount returned to shareholders by way of the partially franked dividend was approximately \$20.67 million.

**Return of capital**

24. The net proceeds available for distribution to MIT shareholders following the payment of the special dividend was calculated to be \$60.6 million.

25. At MIT's Extraordinary General meeting on 28 January 2014, MIT shareholders approved the distribution of \$45,175,994 of proceeds from the sale of the DBS business to its shareholders by way of a return of capital of 54 cents per share.

26. The return of capital was paid on 19 February 2014 to all MIT ordinary shareholders on the share register as at 5 February 2014.

27. All of the return of capital will be debited to MIT's share capital account.

28. The rights and interests held by MIT shareholders after the return of capital are the same as those that would have been held had an equivalent dividend been paid instead of the return of capital. The return of capital does not alter the original rights and interests of the shareholders.

29. MIT has not previously made any returns of capital to shareholders.

**Capital structure**

30. As at 28 January 2014, MIT had 83,659,248 shares on issue and had issued capital of \$68,809,289. Approximately 8.4% of MIT shares were held by foreign resident shareholders. MIT has not transferred any funds into its share capital account from other accounts and consequently it has an untainted share capital account for tax purposes.

31. The DBS business was created in 2008, and since this time, the net assets of DBS have consistently represented approximately two thirds of MIT's global business on a net asset basis up to 30 December 2012.

## **Dividend policy**

32. MIT has historically paid dividends dependent upon the financial performance of the company for the relevant period. As MIT has historically been profitable, they have paid interim and final dividends to shareholders ranging between 7 cents to 8 cents per share. MIT expects to pay dividends from future earnings in line with underlying further performance.

## **Ruling**

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### **Distribution is not a dividend**

33. The return of capital to MIT shareholders is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

### **Application of sections 45A, 45B, and 45C of the ITAA 1936**

34. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital.

35. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital.

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

36. CGT event G1 (section 104-135 of the ITAA 1997) happened when MIT paid the return of capital to a MIT shareholder in respect of a MIT share that they owned at the record date and continued to own at the payment date.

37. CGT event C2 (section 104-25 of the ITAA 1997) happened when MIT paid the return of capital to a MIT shareholder in respect of a MIT share that they owned at the record date, but did not own at the payment date.

### **Foreign Resident Shareholders**

38. A foreign resident shareholder of MIT who was paid a return of capital disregards any capital gain or capital loss made from CGT event G1 and CGT event C2 happening, if their right to receive the relevant return of capital is not 'taxable Australian property' under section 855-10 of the ITAA 1997.

## **Appendix 1 – Explanation**

**ⓘ** *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.*

### **Distribution is not a dividend**

39. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividend (as defined in subsection 6(1) of the ITAA 1936), paid to shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

40. The definition of 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition excludes a distribution that is debited against an amount standing to the credit of the company's share capital account.

41. MIT will debit the return of capital against its share capital account. In addition, there have been no transfers to MIT's share capital account (within the meaning given in section 975-300 of the ITAA 1997), prior to the return of capital that would have:

- (a) caused the share capital account to become 'tainted' within the meaning of that term in section 197-50 of the ITAA 1997; or
- (b) prevented MIT's share capital account from being a share capital account for the purposes of paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936.

42. Accordingly, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies, and the return of capital is not a dividend assessable to MIT shareholders under subsection 44(1) of the ITAA 1936.

### **Application of sections 45A, 45B and 45C of the ITAA 1936**

#### ***Section 45A of the ITAA 1936: streaming of dividends and capital benefits***

43. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received, or will receive, dividends.



44. Although MIT has provided MIT shareholders with a 'capital benefit', as defined in paragraph 45A(3)(b) of the ITAA 1936, the capital benefit has been provided to all MIT shareholders in direct proportion to their shareholding on the record date. The circumstances of the scheme do not indicate that there is a 'streaming' of capital benefits to advantaged shareholders and of dividends to disadvantaged shareholders.

45. Accordingly, section 45A of the ITAA 1936 does not apply to the return of capital. Therefore, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the capital benefit.

***Sections 45B and 45C of the ITAA 1936: schemes to provide capital benefits in substitution for dividends***

46. Section 45B of the ITAA 1936 is an anti-avoidance provision that allows the Commissioner to make a determination that section 45C of the ITAA 1936 applies to treat all or part of the return of capital amount as an unfranked dividend if certain conditions are satisfied.

47. Section 45B of the ITAA 1936 applies where certain payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme, a taxpayer (the relevant taxpayer), who may, or may not, be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

***Scheme***

48. The term 'scheme' is defined in subsection 995-1(1) of the ITAA 1997 to mean any arrangement, scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. Subsection 45B(10) of the ITAA 1936 provides that a 'scheme' for the purposes of section 45B of the ITAA 1936 has the meaning given in subsection 995-1(1).

49. The return of capital by MIT is a 'scheme' for the purposes of section 45B of the ITAA 1936.

***Capital benefit***

50. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936 and includes a distribution by a company to a person of share capital.

51. As MIT's return of capital will be recorded by means of a debit to MIT's share capital account, MIT shareholders will be taken to have been provided with a capital benefit.

***Tax benefit***

52. A taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if an amount of tax or other amount payable under the ITAA 1936 or ITAA 1997 would, apart from section 45B of the ITAA 1936, be less than the amount that would have been payable or payable at a later time if the capital benefit has instead been an assessable dividend.

53. Ordinarily, a return of capital would be subject to the CGT provisions of the ITAA 1936 or the ITAA 1997. Unless the amount of the distribution exceeds the cost base of the shares, 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 shares that a capital gain arises.

54. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax under section 128B of the ITAA 1936.

55. Therefore, a MIT shareholder will generally obtain a tax benefit from the return of capital.

***Relevant circumstances***

56. Paragraph 45B(2)(c) of the ITAA 1936 sets out an objective purpose test for the Commissioner to consider having regard to the 'relevant circumstances' of the scheme as set out in subsection 45B(8) of the ITAA 1936.

57. Subsection 45B(8) of the ITAA 1936 lists a number of factors in paragraphs 45B(8)(a) to 45B(8)(k) that are relevant circumstances in determining whether a person, or one of the persons, who entered into or carried out a scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

58. In this scheme, the return of capital will be made to all MIT shareholders regardless of individual circumstances. Therefore, the factors within paragraphs 45B(8)(c) to 45B(8)(h) of the ITAA 1936 do not incline for or against a conclusion as to purpose.

59. The factors in paragraphs 45B(8)(i) and 45B(8)(j) of the ITAA 1936 are not relevant to the circumstances of this scheme. Consequently, the relevant factors are those covered in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k) of the ITAA 1936.

60. Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent to which the capital benefit is attributable to realised or unrealised profits of the company and its associates.

61. The sale of DBS business is not normal operations for MIT but a result of a restructure of their business operations. The amount of capital that has been returned is \$45,175,994 which represents approximately 45% of the net proceeds from the sale. The amount is under the purchase price of VeriSign DBMS of \$50 million in 2008 which when combined with the existing Corporate Brand Services business formed the basis for creating the DBS business.

62. MIT operates four businesses to produce its income. While DBS produced approximately 38% of MIT's earnings before income tax in the 2012 year it was not the largest of MIT's income producing assets during that year.

63. The net proceeds from the sale of the DBS business have been apportioned between profit and capital. A special dividend of \$20.6 million was paid to the shareholders in August 2013 and an amount of \$33.8 million was retained by MIT for other business use.

64. Since forming the DBS business, the net assets attributed to that business have consistently represented around 69% to 73% of the net assets of MIT. The amount of the capital reduction reduces the share capital account by 65% in line with percentage of net assets of the company. It is reasonable to consider that the amount returned as capital from the sale proceeds reflects the portion of the MIT's share capital invested in the DBS business.

65. The return of capital made to the shareholders is debited to MIT's share capital account. Under these circumstances, no requisite purpose exists in which the capital benefit is attributable to profit.

66. Accordingly, MIT shareholders will receive a return of capital that is referable to the capital component of the proceeds received by MIT from the disposal of DBS. The return of capital is attributable to capital and not to profits, realised or unrealised, of MIT and its associates.

67. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of MIT or its associates.

68. MIT has been a profitable company that has paid interim and final dividends over the last three years of \$0.07 or \$0.08 per share. MIT paid a special dividend of \$0.25 franked to 75% per share on 22 August 2013 following the sale of DBS reflecting the profit attributable to the disposal of the business. The amount of the capital reduction can be traced to the capital of the company and therefore there is no requisite purpose that the return of capital is a substitute for a dividend.

69. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in paragraphs 177D(2)(a) to 177D(2)(h) of the ITAA 1936. These are matters 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, among other things, the form and substance of the scheme and its financial implications for the parties involved.

70. The manner in which the return of capital has been undertaken is consistent with ordinary returns of capital and reflects normal commercial activities where capital has been released following an asset divestment. The substance of the scheme was exactly the same as its original form. The timing relates to the divestment of the DBS business and was communicated and voted upon by the shareholders. The reasons for the scheme are in line with commercial practices and it is not part of a greater scheme.

71. The return of capital has provided MIT shareholders with a cash asset. The sale of DBS business and renewed focus of MIT's core business aims to make MIT a more profitable operation in general and may result in a higher share price or payment of dividend in the future. Such changes to the financial positions of individual shareholders are wholly commercial and consistent with normal profit-making motives. There are no other consequences under paragraph 177D(2)(g) of the ITAA 1936 for the shareholders to be considered in relation to the return of capital. MIT is a widely held public company and has not considered the personal circumstances of its shareholders or any tax benefits that may result.

72. Although a tax benefit has been provided to the shareholders of MIT, the benefit is merely incidental. Considering all of the factors, it cannot be concluded that MIT, or the MIT shareholders, entered into or carried out the scheme for the purpose of enabling the MIT shareholders to obtain a tax benefit. It is accepted that the purpose of the return of capital was to enable MIT to return to shareholders additional capital that was excessive to its requirements.

73. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the return of capital.

74. As the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 in relation to the scheme as described, section 45C of the ITAA 1936 will not deem any part of the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or ITAA 1997.

## **Capital gains tax consequences**

### ***CGT event G1***

75. CGT event G1 happened when MIT paid the return of capital to a MIT shareholder in respect of a share that they owned at the record date of 5 February 2014 and continued to own at the payment date of 19 February 2014 (section 104-135 of the ITAA 1997).

76. If the return of capital is equal to or less than the cost base of the MIT share at the payment date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

77. A MIT shareholder will make a capital gain if the return of capital is more than the cost base of their MIT shares. The amount of the capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

78. If a MIT shareholder makes a capital gain when CGT event G1 happens, the cost base and reduced cost base of the MIT share is reduced to nil. A MIT shareholder cannot make a capital loss when CGT event G1 happens (subsection 104-135(3) of the ITAA 1997).

79. A capital gain made when CGT event G1 happens will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the MIT share was acquired at least 12 months before the payment of the return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions of Subdivision 115-A are satisfied.

## **CGT event C2**

80. The right to receive the return of capital is one of the rights inherent in a MIT share at the record date. If, after the record date but before the payment date, a MIT shareholder ceased to own a MIT share in respect of which the return of capital was payable, the right to receive the return of capital in respect of that share is retained by the shareholder and is a separate CGT asset.

81. The right to receive the payment (being an intangible CGT asset) ended by the right being discharged or satisfied when the payment was made – CGT event C2 happened when the return of capital was paid on 19 February 2014 (section 104-25 of the ITAA 1997).

82. A MIT shareholder will make a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. A MIT shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

83. In working out the capital gain or capital loss made when CGT event C2 happened, the capital proceeds will be the amount of the return of capital (subsection 116-20(1) of the ITAA 1997).

84. The cost base of a MIT shareholder's right to receive the return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by a MIT shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share, for example, when the MIT shareholder disposes of the share after the record date.

85. Therefore, if the full cost base or reduced cost base of the MIT share has been previously applied in working out a capital gain or capital loss when a CGT event happened to that share, then the right to receive the return of capital is likely to have a nil cost base. As a result, a MIT shareholder will generally make a capital gain equal to the amount of the return of capital.

86. As the right to receive the payment of the return of capital was inherent in the MIT share during the time it was owned, the right is considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997).

87. Accordingly, if the MIT share was acquired at least 12 months before the payment of the return of capital, a capital gain made from the ending of the corresponding right will satisfy the requirements of section 115-25 of the ITAA 1997. Such a capital gain may be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided the other conditions of Subdivision 115-A are satisfied.

### ***Foreign resident shareholders***

88. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

89. Section 855-15 of the ITAA 1997 sets out when a CGT asset is 'taxable Australian property.'

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

90. MIT has advised that at the time CGT events G1 or C2 happens for any foreign resident MIT shareholder who was entitled to the return of capital, a MIT share or right to payment will not be an indirect Australian real property interest (as defined in section 855-25 of the ITAA 1997) as the interest will not pass the principal asset test in section 855-30 of the ITAA 1997 at that time.

91. However, under subsection 855-10(1) of the ITAA 1997 a foreign resident, or the trustee of a foreign trust, cannot disregard a capital gain made from CGT event G1 or CGT event C2 if:

- the MIT share or right to payment was an 'indirect Australian real property interest' not covered by item 5 (item 2 of the table in subsection 855-15 of the ITAA 1997);
- the MIT share or right to payment has been used at any time by the foreign resident MIT shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- the MIT share or right to payment is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

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

92. 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:*

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*Subject references:*

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*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
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- ITAA 1936 177D(2)(d)
- ITAA 1936 177D(2)(e)
- ITAA 1936 177D(2)(f)
- ITAA 1936 177D(2)(g)
- ITAA 1936 177D(2)(h)
- ITAA 1997 6-20
- ITAA 1997 6-23
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

*Other references:*

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## ATO references

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