

# ***PR 2015/1 - Income tax: tax consequences of investing in Instreet Masti***



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## Product Ruling

### Income tax: tax consequences of investing in Instreet Masti

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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.

### No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

### Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section apply to the defined class of entities who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling the scheme is referred to as Instreet Masti, offered by Instreet Structured Investment Pty Ltd (the Issuer).
3. This Product Ruling does not address:
  - the tax consequences of borrowing funds to pay amounts owed by an Investor under the scheme
  - the tax consequences of paying any advisor fees
  - the tax consequences of a transfer of an Investor's rights and obligations under the Terms
  - the tax consequences of:
    - an Investor Insolvency
    - an exercise of the Annual Walk Away Option
    - an Early Maturity
    - an Issuer Buy-Back, and
    - an Adjustment Event
  - the tax consequences upon enforcement of the Security Deed by the Security Trustee on behalf of the Investors
  - the tax consequences of taking delivery of, holding and disposing of the Final Assets
  - the tax consequences associated with the holding of a Beneficial Interest
  - whether the scheme constitutes a deferred purchase agreement, and
  - whether the scheme constitutes a financial arrangement for the purposes of Division 230 (Taxation of financial arrangements).

### Class of entities

4. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. In this Product Ruling, those entities that can rely on the Ruling section are referred to as Investors.

5. The class of entities who can rely on the Ruling section of this Product Ruling consists of those entities whose rights and obligations under the Terms will commence on a relevant Commencement Date, being a Commencement Date on or between 14 January 2015 and 30 June 2017, and at the time of entering into the scheme have a purpose of:

- staying in the scheme until it is completed (that is, being a party to the Terms until their term expires), and
- deriving assessable income from the scheme that exceeds the deductible expenditure that they incur in respect of it.

6. The class of entities who can rely on the Ruling section of this Product Ruling does **not** include entities:

- that are non-residents for Australian taxation purposes
- whose rights and obligations under the Terms commence other than on a relevant Commencement Date (see paragraph 5 of this Product Ruling)
- that intend to terminate their involvement in the scheme prior to its completion
- that do not intend to derive assessable income from the scheme that exceeds the deductible expenditure that they incur in respect of it
- that participate in the scheme through offers made other than through the Instreet Masti Master Product Disclosure Statement (Master PDS) and an Instreet Masti Term Sheet Product Disclosure Statement (Term Sheet PDS); or that enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way
- that trade in financial instruments or securities and are treated for taxation purposes as trading in the Units and/or the Final Assets, carrying on a business of investing in the Units and/or the Final Assets, or holding the Units and/or the Final Assets as trading stock or as revenue assets, or
- that are subject to Division 230 in respect of this scheme.

### ***Superannuation Industry (Supervision) Act 1993***

7. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of SISA.

## Qualifications

8. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 20 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

## Date of effect

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10. This Product Ruling applies prospectively from 14 January 2015, the date it is published. It applies only to the specified class of entities that enter into the scheme on a relevant Commencement Date (see paragraph 5 of this Product Ruling). This Product Ruling provides advice to the specified class of entities for the income years up to 30 June 2017, being its period of application. Where relevant, this Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into on a relevant Commencement Date.

11. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

## Changes in the law

12. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

13. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

## Note to promoters and advisers

14. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

## Ruling

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15. Subject to paragraph 3 and the assumptions in paragraph 20 of this Ruling:

- (a) The Fixed Coupon(s) and any Final Coupon received by the Investor in respect of their Units under the Instreet Masti are income according to ordinary concepts and assessable income of the Investor under section 6-5 in the income year in which the Coupon(s) are credited or received.
- (b) The Finance Cost Payments incurred by the Investor in respect of their Units under the Instreet Masti are deductible under section 8-1. This deduction is allowable in the income year incurred, subject to the application of paragraph 15(d) of this Product Ruling.
- (c) Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to deny deductibility of the Finance Cost Payments incurred by the Investor in respect of their Units under the Instreet Masti and allowable as a deduction under section 8-1 of the ITAA 1997.
- (d) Section 82KZMF of the ITAA 1936 will apply to set the amount and timing of deductions for any prepaid Finance Cost Payments incurred by the Investor in respect of their Units under the Instreet Masti that are allowable as a deduction under section 8-1 of the ITAA 1997.
- (e) The Investor's legally enforceable rights in respect of their Units under the Instreet Masti are, in their totality, a CGT asset under subsection 108-5(1).
- (f) The Investor's ownership of the contractual rights in respect of their Units under the Instreet Masti comes to an end by reasons of those rights being discharged or satisfied upon either payment of the Final Value and any Final Coupon to the Investor (under a cash settlement), or delivery of the Final Assets and payment of any Final Coupon to the Investor (under a physical settlement). A CGT event C2 happens under section 104-25 at this time.
- (g) The Investor's capital proceeds under section 116-20 will be equal to the Final Value received on (or shortly after) the Settlement Date where they are subject to a cash settlement, and the market value of the Final Assets received on (or shortly after) the Settlement Date where they elect to physically settle.

- (h) The cost base or reduced cost base of the Investor's contractual rights in respect of their Units under the Instreet Masti includes the Total Purchase Price (subsections 110-25(2) and 110-55(2)).
- (i) The Investor's Units under the Instreet Masti are not 'securities' as defined in subsection 159GP(1) of the ITAA 1936.
- (j) Provided the scheme ruled on is entered into and carried out as described in this Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to an Investor in respect of an investment in Units offered under the Instreet Masti.

## Scheme

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16. The scheme that is the subject of this Ruling is identified and described in the following documents:

- application for a Product Ruling as constituted by documents and information received on 4 July 2014 and 23 July 2014
- draft Instreet Masti Master Product Disclosure Statement, received on 23 July 2014, and
- draft Instreet Masti Term Sheet Product Disclosure Statement, received on 23 July 2014.

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

17. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor, or any associate of an Investor, will be a party to, which are a part of the scheme. Unless otherwise defined, capitalised terms in this Product Ruling take their meaning as per the Master PDS referred to in paragraph 16 of this Ruling.

18. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

**Overview**

19. The details of the Instreet Masti are summarised as follows:
- (a) An offer to participate in the Instreet Masti will be made to prospective Investors by way of the Master PDS and a supplementary Term Sheet PDS. Each investment will be governed by the general terms in the Master PDS and specific terms in the Term Sheet PDS (the Terms).
  - (b) On acceptance of an Investor's Application and receipt by the Issuer of the fees payable by the Investor by the Offer Closing Date, the Issuer will issue Units to the Investor on or prior to the Commencement Date at which point their respective rights and obligations under the Terms will commence. The Investor also receives, on the Commencement Date, a beneficial interest in a Portion of the Final Assets (Beneficial Interest). That Beneficial Interest forms part of the Units issued to the Investor.
  - (c) The Minimum Investment for which an Application will be accepted by the Issuer is 25,000 Units in a particular Series, at a price of \$1.00 per Unit, with increments of 20,000 Units thereafter (as amended in any Term Sheet PDS from time to time).
  - (d) The Investor's obligation to pay the Total Purchase Price in respect of the issued Units may be deferred on an annual basis until the Maturity Date. In consideration for this deferral, the Investor must prepay the following Finance Cost Payments annually to the Issuer:
    - (i) the first year's Finance Cost Payment by the first Finance Cost Payment Date (also the Offer Closing Date), and
    - (ii) the Finance Cost Payment for each subsequent Period on or before each corresponding Finance Cost Payment Date.
  - (e) The Units (and the payment by the Investor of the Finance Cost Payments as required) entitle the Investor to:
    - (i) one or more Fixed Coupons, calculated as a percentage of the Purchase Price per Unit and payable annually by the Issuer on the relevant Coupon Payment Date(s), and
    - (ii) a Final Coupon (if any), uncapped and conditional on the positive performance of the Reference Index over the Investment Term (subject to averaging and any foreign exchange risk) in excess of the Fixed Coupon(s) already paid.



- (f) The Reference Index is a volatility target overlay of the Underlying Index. The performance of the Reference Index will be affected by the level of exposure that the Units have to the Underlying Index, a level determined by the Participation Rate. The Participation Rate operates by varying the exposure that the Units will have to the Underlying Index according to the observed volatility of the Underlying Index. The higher the volatility of the Underlying Index, the lower the Participation Rate and vice versa. Throughout the Investment Term, the Participation Rates will vary and will range from a minimum of 0% to a maximum of 150%, depending on the volatility of the Underlying Index over the previous 100 Calculation Dates.
- (g) Investors may elect for a Fixed Coupon payable in respect of a Period to be set-off against a Finance Cost Payment due in respect of the immediately following Period, and only pay the difference (if any) on the respective Finance Cost Payment Date.
- (h) Where the Investor pays the Total Purchase Price on the Maturity Date as required, they will be entitled to receipt of the Final Value (plus the proceeds of sale of the Investor's Beneficial Interest). The Final Value per Unit, like the Purchase Price per Unit, will be \$1.00.
- (i) Unless the Investor validly elects physical settlement to apply in accordance with paragraph 19(j) of this Product Ruling, the Issuer will pay the Final Value, plus any Final Coupon, on the Settlement Date (or as soon as possible thereafter).
- (j) Physical settlement of the Units will apply where the Investor has:
  - (i) returned to the Issuer at least 10 Business Days prior to the Maturity Date a validly completed Notice of Maturity which clearly specifies an election to physically settle their Units, and
  - (ii) paid the Total Purchase Price in full before the Maturity Date.

Where the Investor validly elects physical settlement, they will receive Final Assets with a value equal to the Final Value. The Issuer (or its nominee) will arrange for the Final Assets, plus the payment of any Final Coupon, to be transferred to the Investor on the Settlement Date (or as soon as possible thereafter).

- (k) Unless substituted by the Issuer in accordance with the Terms, the Final Assets will be a basket comprised of equal proportions (by value) of ordinary shares in each of the following companies:
  - (i) BHP Billiton Limited
  - (ii) Commonwealth Bank of Australia

- (iii) Wesfarmers Limited
  - (iv) Westpac Banking Corporation, and
  - (v) Woolworths Limited.
- (l) Upon cash settlement in accordance with paragraph 19(i) or physical settlement in accordance with paragraph 19(j) of this Product Ruling, the Issuer's obligations to the Investor under the Terms will be satisfied and discharged.
- (m) The features of each Series will be described in a Term Sheet PDS which includes:
  - (i) the Underlying Index
  - (ii) the Reference Index
  - (iii) the Finance Cost Payments (as a percentage of the Purchase Price per Unit)
  - (iv) the Fixed Coupon(s) (as a percentage of the Purchase Price per Unit)
  - (v) whether the Final Coupon will be subject to any foreign exchange risk, and
  - (vi) the Investment Term, ranging between 2 and 5 years.
- (n) The Underlying Index to which the Investor's Units will provide exposure over the Investment Term will be any one or more of the following:
  - (i) the S&P/ASX 200 Index, the S&P 500 Index, the Euro Stoxx 50 Index or any other equities index
  - (ii) any exchange traded fund, or
  - (iii) any other basket of equities or exchange traded funds.

### **Assumptions**

20. This Ruling is made on the basis of the following assumptions:
- (a) the Investor is an Australian resident for taxation purposes
  - (b) the Investor is not a trader in financial instruments or securities and is not treated for taxation purposes as trading in the Units and/or the Final Assets, carrying on a business of investing in the Units and/or the Final Assets, or holding the Units and/or the Final Assets as trading stock or as revenue assets
  - (c) the Investor is:
    - (i) an individual, or

- (ii) a superannuation entity, a managed investment scheme or an entity substantially similar to a managed investment scheme under foreign law with assets of less than \$100 million, or
  - (iii) an ADI, a securitisation vehicle or other financial sector entity with an aggregated turnover of less than \$20 million, or
  - (iv) 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, and
- has not made an election under section 230-455 to have Division 230 apply to their financial arrangements
- (d) the dominant purpose of the Investor in entering into the scheme is to derive assessable income from the scheme that exceeds the deductible expenditure that they incur in respect of it
  - (e) the Investor will, at the time of entering into the scheme, have a purpose of staying in the scheme until it is completed, and will not terminate their involvement in the scheme prior to the Maturity Date
  - (f) each Finance Cost Payment incurred by the Investor in respect of their Units under the Instreet Masti will not constitute 'excluded expenditure' as defined in subsection 82KZL(1) of the ITAA 1936
  - (g) an Investor that is a complying superannuation fund is not prevented from investing in the scheme by any particular terms of its trust deed, and is not in breach of any stated investment strategy
  - (h) the scheme will be executed in the manner described in the Scheme section of this Ruling and the scheme documentation mentioned in paragraph 16 of this Ruling, and
  - (i) all dealings between the Investor and the Issuer will be at arm's length.

## **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.*

### **Coupons assessable as ordinary income under section 6-5**

21. Section 6-5 includes income according to ordinary concepts (ordinary income) in assessable income. Whether or not a particular amount is income according to ordinary concepts depends on the nature and character of the receipt in the hands of the taxpayer.

22. The Coupons receivable by the Investor are a product of their investment in Units under the Instreet Masti, received fully and finally, periodically and may be relied upon to offset any Finance Cost Payments. Accordingly, the Fixed Coupon(s) and any Final Coupon paid or credited by the Issuer to the Investor are ordinary income, assessable under section 6-5 in the income year in which they are paid or credited to the Investor.

### **Deductibility of Finance Cost Payments under section 8-1**

23. A loss or outgoing is deductible under section 8-1 if its essential character is that of expenditure that has a sufficient connection with the operations or activities which more directly gain or produce a taxpayer's assessable income, provided that the expenditure is not of a capital, private or domestic nature.

24. The Finance Cost Payments incurred by the Investor in respect of their Units under the Instreet Masti have a sufficient connection with the gaining of assessable income (being the Fixed Coupon(s) and any Final Coupon) to be deductible under section 8-1 and are deductible in full on the basis that the Investor's purpose of investing in the Units is to derive a return from these assessable amounts in excess of their expenditure.

### **Section 82KL**

25. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits' (as defined in section 82KH of the ITAA 1936). Insufficient additional benefits will be provided to trigger the application of section 82KL. Section 82KL will not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

**Sections 82KZME and 82KZMF – prepaid expenditure and ‘tax shelter’ style arrangements**

26. The rules in sections 82KZME and 82KZMF of the ITAA 1936 apply, subject to the exceptions in section 82KZME, where expenditure is incurred in relation to a ‘tax shelter’ style arrangement for the doing of a thing under an agreement that is not to be wholly done within the expenditure year, and where certain requirements for that agreement are met.

27. A Finance Cost Payment incurred in respect of Units under the Instreet Masti is made in return for the deferral of the payment of the Total Purchase Price until the subsequent Period (or in the case of the final Finance Cost Payment, until the Maturity Date) and is to be taken, for the purposes of Subdivision H of Division 3 of Part III of the ITAA 1936, to be expenditure incurred under an agreement in return for the doing of a thing under the agreement for the Period to which the Finance Cost Payment relates.<sup>1</sup>

28. For the purposes of section 82KZME of the ITAA 1936, ‘agreements’ are broadly defined to include an entire scheme of which a contract may form part. Under subsection 82KZME(4) of the ITAA 1936, the relevant agreement is all the contractual arrangements and activities associated with participation in the Instreet Masti.

29. Section 82KZMF of the ITAA 1936 will have application and apportion over the relevant Period each prepaid Finance Cost Payment incurred by the Investor which is allowable as a deduction under section 8-1 of the ITAA 1997 where the relevant Finance Cost Payment for the expenditure year is incurred on a date other than 1 July; is not excluded expenditure; and the Investor’s allowable deduction in respect of that Finance Cost Payment for the expenditure year exceeds their assessable Coupon in that same year. Each of the other requirements for the agreement under subsection 82KZME(3) of the ITAA 1936 are met and none of the other exceptions contained in subsections 82KZME(5), (6), (8) or (9) of the ITAA 1936 apply to exclude Finance Cost Payments incurred from the operation of section 82KZMF of the ITAA 1936.

30. For each of the two years of income during which part of the Period for the Finance Cost Payment occurs, the Investor can deduct an amount using the following formula set out in paragraph 82KZMF(1)(b) of the ITAA 1936:

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

<sup>1</sup> Unless the Finance Cost Payment is incurred on 1 July of an income year, the Period to which the Finance Cost Payment relates will end in the year of income after the one in which the Finance Cost Payment was incurred.

**Application of the CGT provisions to Units under the Instreet Masti**

31. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property. The rights of an Investor in respect of their Units under the Instreet Masti are legally enforceable rights and therefore, in their totality, a CGT asset according to the definition in subsection 108-5(1).

32. Where the Final Coupon (if any) is paid to the Investor, together with either a payment of the Final Value (under a cash settlement) or delivery of the Final Assets (under a physical settlement), the Investor's ownership of the contractual rights in respect of their Units under the Instreet Masti is discharged or satisfied. This discharge or satisfaction of the contractual rights gives rise to CGT event C2 (paragraph 104-25(1)(b)).

33. The Investor will make a capital gain from this CGT event if the capital proceeds from the ending of the Investor's ownership of the asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

34. The Investor's capital proceeds from the CGT event will be equal to the Final Value or market value of the Final Assets, as applicable, received on (or shortly after) the Settlement Date (section 116-20).

35. The cost base or reduced cost base of the Investor's rights in respect of their Units under the Instreet Masti includes, as its first element, the Total Purchase Price (subsections 110-25(2) and 110-55(2)).

**Subsection 159GP(1) – a Unit is not a 'security'**

36. Under subsection 159GP(1) of the ITAA 1936, a 'security' means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) a deposit at bank or other financial institution;
- (c) a secured or unsecured loan; or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

37. The Units issued under the Instreet Masti are not considered to have sufficient debt like obligations to be a contract to which paragraph (d) of the definition of security in subsection 159GP(1) of the ITAA 1936 applies, nor does it fall within paragraphs (a), (b) or (c) of that definition. Therefore, such Units do not meet the definition of security under subsection 159GP(1) of the ITAA 1936.

## **Part IVA – anti-avoidance**

38. Provided that the scheme ruled on is entered into and carried out as disclosed in this Ruling, it is accepted that the scheme is an ordinary commercial transaction and Part IVA of the ITAA 1936 will not apply.

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

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- capital gains tax
- financial products
- prepaid expenses
- product rulings
- public rulings
- securities
- taxation administration

- ITAA 1936 82KZME(6)
- ITAA 1936 82KZME(8)
- ITAA 1936 82KZME(9)
- ITAA 1936 82KZMF
- ITAA 1936 82KZMF(1)(b)
- ITAA 1936 159GP(1)
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(b)
- ITAA 1997 104-25(3)
- ITAA 1997 108-5(1)
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 116-20
- ITAA 1997 Div 230
- ITAA 1997 230-455
- SISA 1993
- TAA 1953

*Legislative references:*

- ITAA 1936 82KH
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
- ITAA 1936 82KZME(3)
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(5)

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ATO references

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