


# ***CR 2008/17 - Income tax: return of capital: Multiplex Acumen Vale Syndicate Limited***

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## Class Ruling

### Income tax: return of capital: Multiplex Acumen Vale Syndicate Limited

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

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

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

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

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Multiplex Acumen Vale Syndicate Limited (MAVSL) who:

- (a) were ordinary shareholders of MAVSL on the record date;
- (b) participated in the scheme of arrangement under which MAVSL paid a distribution to its ordinary shareholders; and
- (c) hold their MAVSL shares on capital account.

## Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 24 of this Ruling.

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

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

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## Date of effect

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8. This Ruling applies from 1 November 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

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

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

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

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

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

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

## Scheme

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13. The following description of the scheme is based on a number of documents provided to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:

- request for a Class Ruling from MAVSL dated 19 October 2007;
- prospectus dated 16 August 2005; and
- correspondence from MAVSL dated 19, 21 and 22 November 2007, 3 and 12 December 2007 and 19 February 2008.

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

14. MAVSL is an Australian incorporated unlisted company. It is a resident of Australia as defined in subsection 6(1) of the ITAA 1936.

15. MAVSL is the head company of a consolidated group which also consists of Multiplex Acumen Vale Landowner Pty Limited (MAVL). MAVSL provides finance to MAVL and also receives dividend income from MAVL.

16. The main activities of MAVL are the sub-division, development and sale of land (Project). The Project commenced in January 2004 and involves the sub-division, development and sale of stages 2 to 6, comprising in excess of 1,500 residential lots, a group housing site, two local neighbourhood shopping centre sites, two retirement village sites, one private school site, one tavern site and one commercial site.

17. In its prospectus dated 16 August 2005, MAVSL outlined its intention to progressively pay franked dividends and return capital to shareholders following the completion of various stages of the Project.

18. As a result of the strong performance of the Project, the first dividend payment of approximately \$3,900,000 was brought forward and paid on 30 January 2007. A second dividend of approximately \$4,200,000 was paid on 27 July 2007 and a third dividend of approximately \$4,200,000 was paid on 26 October 2007.

19. MAVSL paid a distribution of 30 cents per ordinary share on 31 January 2008 (the distribution) to each holder of fully paid ordinary shares as at the record date. Part of the distribution (10 cents per share) was paid as a dividend and the other part of the distribution (20 cents per share) was a return of capital. The distribution was made to all shareholders equally and did not result in any shares being cancelled, there was also no dilution of the shareholdings in MAVSL.

20. The return of capital was debited against MAVSL's untainted share capital account.

## Other matters

21. MAVSL has on issue 30,000,100 ordinary shares (each with an issue price of \$1). The only entries to its share capital account are in respect of the subscriptions for shares (as reduced for capital raising costs). No other amounts have been credited or transferred to the share capital account. As at 30 June 2007 MAVSL's total issued share capital amounted to \$26,331,565.

22. As at January 2007 a total of 399 separate investors held ordinary shares in MAVSL. At this date, MPX DT Pty Limited, a wholly owned subsidiary of Multiplex Development and Opportunity Fund, continued to retain the largest shareholding interest in MAVSL, and currently holds 14,875,000 (49.5%) ordinary shares.

23. Of the remaining shareholders, 218 shareholders (27.5%) are Australian superannuation funds, and 4 shareholders (0.5%) are foreign residents for Australian taxation purposes.

24. As at 31 March 2007 a total of 883 superannuation fund investors held a 49% shareholding interest in the Multiplex Development and Opportunity Fund. Non-resident investors held a 0.8% shareholding interest in the Multiplex Development and Opportunity Fund.

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## Ruling

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### **Distribution not a dividend**

25. The return of capital is not a dividend, as defined in subsection 6(1) of the ITAA 1936.

### **Sections 45A and 45B**

26. The Commissioner will not make a determination under section 45A of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital.

27. The Commissioner will not make a determination under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the return of capital.

### **Capital gains tax**

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

29. CGT event C2 (section 104-25 of the ITAA 1997) happened when MAVSL paid the return of capital to a shareholder in respect of a MAVSL share that they owned at the record date but which they ceased to own before the payment date.

### **Foreign resident shareholders**

30. A foreign resident MAVSL shareholder who is paid a return of capital disregards any capital gain from CGT event G1 happening if the shares in MAVSL are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

31. A foreign resident MAVSL shareholder who is paid a return of capital disregards any capital gain or capital loss from CGT event C2 happening as the right to the payment is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**

5 March 2008

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## Appendix 1 – Explanation

**①** *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 not a dividend**

32. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholder 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).

33. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, this broad definition is limited by later paragraphs in the definition, which expressly excludes certain items from being a dividend for income tax purposes.

34. Relevantly paragraph (d) of the definition within subsection 6(1) of the ITAA 1936 excludes any distribution which is debited against the share capital account of a company. As the return of capital amount has been debited against MAVSL's untainted share capital account then the return of capital is not a dividend as defined in subsection 6(1).

35. Consideration has been given to subsection 6(4) of the ITAA 1936, which provides that paragraph (d) of the definition of dividend does not apply if the return of capital forms part of an arrangement where the company raises share capital from certain shareholders and then makes a return of capital to other shareholders. However, in the scheme described, MAVSL has no plans to undertake a corresponding raising of share capital and therefore subsection 6(4) does not apply to the return of capital.

### **Anti-avoidance provisions**

36. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow 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 received by the shareholders as an unfranked dividend.

### **Section 45A – streaming of dividends and capital benefits**

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

38. Although a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) has been provided to participating shareholders under the return of capital, the circumstances of the MAVSL return of capital indicate that there was no streaming of capital benefits to some shareholders and dividends to other shareholders.

39. Accordingly, section 45A of the ITAA 1936 has no application to the return of capital amount.

### **Section 45B – schemes to provide capital benefits**

40. Section 45B of the ITAA 1936 applies where certain capital payments, including a return of capital, 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, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Each of these conditions is considered below.

### ***Scheme***

41. The return of capital to MAVSL shareholders is a 'scheme' for the purposes of section 45B of the ITAA 1936.

42. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.



43. As MAVSL's return of capital amount has been debited to its share capital account, its shareholders are taken to have been provided with a capital benefit under paragraph 45B(5)(b) of the ITAA 1936.

## ***Tax benefit***

44. A relevant taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) of the ITAA 1936 if:

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

would, apart from the operation of section 45B of the ITAA 1936, be less than the amount that:

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

if the capital benefit instead had been a dividend.

45. The distribution to MAVSL's ordinary shareholders included a return of capital and therefore constitutes a capital benefit. In the event that the relevant distribution represented a dividend rather than a capital benefit, it is likely that the amount of tax payable by MAVSL's shareholders would have been greater than if the distribution had been a capital benefit. Consequently, the receipt of the capital benefit will represent a 'tax benefit'.

46. In the present circumstances, whilst the conditions of paragraphs 45B(2)(a) and (b) of the ITAA 1936 are met, the requisite purpose of enabling the shareholder to obtain a tax benefit by way of a capital distribution is not present. Due to the stronger than expected performance of the Project, MAVSL has returned surplus share capital to its shareholders ahead of its forecast as outlined in its 2005 prospectus.

## ***Relevant circumstances***

47. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8) of the ITAA 1936. Considering these circumstances determines whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (MAVSL) to obtain a tax benefit.

48. This test is objective, based on the facts of each case. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit.

49. Appropriately, it cannot be concluded that either MAVSL or the participating shareholders entered into or carried out the scheme for the purpose of enabling its shareholders to obtain a tax benefit. The relevant circumstances include:

- Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent that the capital benefit is attributable to capital and profits (realised and unrealised) of the company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. The return of capital is not attributable to the profits of MAVSL as most of the profits have been, and will continue to be, returned to its shareholders as franked dividends. This is supported by MAVSL's payment of a dividend in January 2008 which covered most of its profits to December 2007. The history of the dividend payments by MAVSL also does not indicate that the return of capital is being paid in substitution of dividends.
- Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distribution made by a company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. MAVSL paid fully franked dividends in January 2007 and July 2007 which were paid out of profits following the receipt of dividends from MAVL. MAVSL also declared a further dividend of approximately \$4,200,000 in September 2007 which was paid in October 2007. MAVSL has outlined in the syndicate prospectus an intention to progressively pay franked dividends and return capital to shareholders following the completion of the sale of developed lots. Overall the pattern of distributions made by MAVSL does not suggest that the return of capital was made in substitution for a dividend. The 20 cents per share return of capital is the first return of capital that MAVSL has undertaken.
- Paragraph 45B(8)(c) of the ITAA 1936 refers to whether the relevant taxpayer (the shareholder) has capital losses that apart from the scheme would be carried forward for a later income year. At least 98% of the shares on issue have not been transferred since June 2005. Furthermore, at no time since June 2005 have any shares been transferred for less than the issue price of \$1 per share. As a consequence, the return of capital of \$0.20 per share is not likely to result in a capital gain that would affect any capital losses of a relevant taxpayer. This circumstance does not incline for, or against, a conclusion as to purpose.

- Paragraph 45B(8)(d) of the ITAA 1936 refers to whether any of the ownership interests were acquired before 20 September 1985. As MAVSL was incorporated in 2005, all shareholdings are post-CGT shareholdings.
- Paragraph 45B(8)(e) of the ITAA 1936 refers to whether the relevant taxpayer is a non-resident. Non-resident shareholders hold less than a 1% interest in MAVSL and there is no indication that the return of capital is driven to provide capital benefits to this group of shareholders.
- Paragraph 45B(8)(f) of the ITAA 1936 refers to whether the cost base of the shares is not substantially less than the value of the capital benefit. This is probably the case, as the cost base of each MAVSL share is likely to be \$1.
- Paragraph 45B(8)(g) of the ITAA 1936 does not apply as it has been repealed.
- Paragraph 45B(8)(h) of the ITAA 1936 refers to whether the interest held by the shareholder after the distribution of share capital is the same as the interest that would have been if an equivalent dividend had been paid instead. The comparative rights and interests held by the shareholders of MAVSL after the return of capital are the same as those that would have been held, had an equivalent dividend been paid instead of the capital benefit. The return of capital did not reduce the number of shares on issue. The shareholders continue to have the same shareholding and are entitled to the same share of dividends before and after the return of capital.
- Paragraphs 45B(8)(i) and 45B(8)(j) of the ITAA 1936 pertaining to the provision of ownership interests and demerger are not relevant to this scheme.
- Paragraph 45B(8)(k) of the ITAA 1936 requires the Commissioner to consider the matters listed in subparagraphs 177D(b)(i) to (viii) 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. In the present circumstances the return of capital applied to all the ordinary shareholders of MAVSL. Therefore, the form and substance of MAVSL's return of capital does not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

50. Having regard to the relevant circumstances outlined in paragraph 49 of this Ruling it is considered that the scheme as described was not entered into for more than an incidental purpose of enabling a shareholder to obtain a tax benefit. As such, section 45B of the ITAA 1936 will have no application to the return of capital.

51. Accordingly, the Commissioner will not make a determination pursuant to 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.

### **CGT event G1 – section 104-135**

52. CGT event G1 (section 104-135 of the ITAA 1997) happened when MAVSL paid the return of capital in respect of a share that a MAVSL shareholder owned at the record date and continued to own at the payment date as the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997.

53. Where the return of capital (20 cents per share) is not more than the cost base of the MAVSL share at the time of the payment, the cost base and reduced cost base of the share are reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

54. A MAVSL shareholder makes a capital gain if the return of capital is more than the cost base of the MAVSL share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

55. If a MAVSL shareholder makes a capital gain, the cost base and reduced cost base of the share are reduced to nil (subsection 104-135(3) of the ITAA 1997). A MAVSL shareholder can not make a capital loss when CGT event G1 happens.

56. If the MAVSL share to which the payment relates was acquired by a MAVSL shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 will qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

### **CGT event C2 – section 104-25**

57. The right to receive the payment of the return of capital is one of the rights inherent in a MAVSL share at the record date. If, after the record date but before the payment date, a MAVSL shareholder ceases to own some, or all, of their shares in MAVSL, the right to receive the payment in respect of the shares disposed of will be retained by the shareholder and is considered to be a separate CGT asset.

58. CGT event C2 happens when the return of capital is paid and the right to receive that payment ends.

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

60. The cost base of a MAVSL shareholder's right to receive the payment under the scheme is worked out in accordance with Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). As the MAVSL shareholder will have paid nothing for the right, the cost base of the right will be nil. Therefore, the MAVSL shareholder will make a capital gain equal to the amount of the return of capital.

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

62. If the MAVSL share to which the payment relates was originally acquired by a MAVSL shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event C2 happening to the right will qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

## **Foreign resident shareholders**

63. A foreign resident disregards a capital gain or capital loss made from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997, and covers five categories of CGT assets.

64. Broadly, these categories are:

- taxable Australian real property which is held directly;
- indirect Australian real property interests which are not covered by item 5 of the table;
- CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table;
- options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table; and
- CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

65. A foreign resident MAVSL shareholder who receives a payment of the return of capital, and makes a capital gain from CGT event G1 happening to the MAVSL shares, disregards the capital gain if the MAVSL shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

66. A foreign resident MAVSL shareholder who has a right to the payment of the return of capital, and makes a capital gain or capital loss from CGT event C2 happening to that right, disregards the capital gain or capital loss as the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

## Appendix 2 – Detailed contents list

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

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## References

### *Previous draft:*

Previously issued as a draft

### *Subject references:*

- capital gains tax
- dividends
- return of capital on shares

### *Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6(4)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
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- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
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- ITAA 1936 45B(8)(h)
- ITAA 1936 45B(8)(i)
- ITAA 1936 45B(8)(j)
- ITAA 1936 45B(8)(k)
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- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(ii)
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- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
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- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

### ATO references

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