


# ***CR 2011/55 - Income tax: proposed return of capital: Village Roadshow Limited***

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## Class Ruling

### Income tax: proposed return of capital: Village Roadshow Limited

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Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>9</b>
<b>Ruling</b>	<b>37</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b>Explanation</b>	<b>44</b>
<b>Appendix 2:</b>	
<b>Detailed contents list</b>	<b>85</b>

#### **ⓘ 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

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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. This Ruling relates to the application of the following provisions:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (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;

All legislative references are to the ITAA 1936 unless otherwise indicated.

## **Class of entities**

3. The class of entities to which this Ruling applies is the ordinary shareholders of Village Roadshow Limited (VRL) who:
- (a) are registered on the VRL share register on the Record Date, being the date for determining entitlement under the proposed return of share capital;
  - (b) hold their ordinary shares on capital account; and
  - (c) are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their VRL shares.

(Note – Division 230 will generally not apply to individuals unless they have made an election for it to apply to them.)

## **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 9 to 36 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 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description::

- Application for Class Ruling from Ernst & Young on behalf of VRL dated 21 April 2011;
- Information received from Ernst & Young on behalf of VRL on 6 May 2011 and 11 May 2011;
- VRL's Half-Year Report – 31 December 2010; and
- VRL's Annual Report 2010.

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

### Overview

10. VRL is an Australian resident, listed public company.

11. VRL recently disposed of two predominantly Australian businesses as part of a re-focus on its core business and also to manage its debt position and maximise shareholder value.

12. In December 2010 VRL agreed to sell its attractions businesses comprising the Sydney Attractions Group and Auckland Aquarium.

13. On 28 March 2011 VRL accepted an offer from Southern Cross Media for its 52.52% stake in Austereo Group Limited (AEO).

14. The AEO disposal generated net cash proceeds of approximately \$375 million. Of this amount, VRL has set aside approximately \$130 million to reinvest in various projects and approximately \$54 million in anticipation of tax payable in respect of the 30 June 2011 income year.

15. VRL's consolidated reserves and retained earnings as at 31 December 2010 were \$296.1 million. After adjustment for the after-tax profit realised on the AEO sale and the payment of dividends in April 2011, the total consolidated reserves and retained earnings are approximately \$415.8 million.

16. VRL intends to return some of the proceeds of the AEO disposal to its shareholders. Of the anticipated \$191 million of proceeds available for distribution, VRL proposes to return \$151 million to its ordinary shareholders by way of a \$1 distribution per share.

## **Background to the acquisition of AEO**

17. VRL has a long history of involvement in the radio business.

18. In 1993 VRL acquired the Triple M network of radio stations from Hoyts Media Limited largely in exchange for assuming various debts of that business.

19. In 1994 VRL acquired an interest of 14.1% in Austereo Limited and then undertook a merger of the Triple M business into Austereo Limited whereby in exchange VRL received shares which increased its Austereo Limited shareholding to 42.2%.

20. VRL used approximately \$30 million of its 1994 share capital raising of \$144 million to acquire more shares in Austereo Limited, representing 11.2%, thereby giving VRL a controlling stake of 53.4% in Austereo Limited.

21. In 1997 VRL raised \$119 million which was used in its entirety to buy out the minority shareholders of Austereo Limited.

22. In 2001 AEO was subject to an initial public offering, having acquired the Austereo Limited radio networks from VRL. VRL retained a 57.7% shareholding in AEO.

23. A partial sell-down of AEO shares in 2006 resulted in VRL owning approximately 52.52% of AEO. VRL's remaining investment in AEO (sourced variously from share capital and previous capital raisings) was attributed the consolidated book value amount of \$170 million.

24. The remaining 52.52% shareholding in AEO has been sold to Southern Cross Media.

## **Capital structure**

25. In August 2010 VRL simplified its capital structure by effectively converting each of its preference shares to ordinary shares and by undertaking a share buyback of 35 million shares.

26. After these events, the share capital of VRL was made up of 151,439,777 ordinary shares and VRL had a paid up share capital account value of \$249.4 million.

27. Village Roadshow Corporation Pty Ltd and associates own 51.4% of VRL's ordinary shares.

### **Distribution to shareholders**

28. VRL proposes to return \$151 million to shareholders by way of a \$1 distribution per share. The proposed distribution will comprise a capital component and a dividend component.

29. The capital component will be \$0.20 per ordinary share and amount to approximately \$30 million. VRL will debit the capital component of the distribution to its ordinary share capital account.

30. The dividend component will be \$0.80 per ordinary share and amount to approximately \$121 million which will be debited in its entirety to the retained earnings of VRL. VRL anticipates that on a stand-alone basis the company will have sufficient retained earnings to cover the debit.

31. The proposed return of capital is subject to the approval of ordinary shareholders by way of a special resolution at a General Meeting to be held in June 2011 with the distribution to shareholders to occur in July 2011.

### **Other aspects**

32. The directors of VRL have advised that VRL's share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

33. The dividend payment history of VRL for the 30 June 2006 to 2010 financial years inclusive indicates an average dividend paid of 17.285 cents per ordinary share. The directors of VRL have stated an objective of paying regular dividends in the future.

34. The capital loss position of VRL's major shareholder, Village Roadshow Corporation Pty Ltd is approximately \$730,000.

35. None of the shares in the company were acquired before 20 September 1985 as the company (formerly De Laurentis Entertainments Ltd) was not incorporated until 11 November 1986.

36. The Directors of VRL advised that approximately 9.6% of the shares in VRL are held by shareholders who are resident outside of Australia.

## **Ruling**

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37. This Ruling deals with the income tax treatment of only the 'capital component' of the proposed distribution described at paragraph 28 of this Ruling. It does not deal with the tax treatment of the dividend component.

## **Proposed distribution of capital is not a dividend**

38. The proposed \$0.20 cents per share return of capital will not be a dividend as defined in subsection 6(1) of the ITAA 1936.

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

39. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of VRL's proposed return of share capital of \$0.20 cents per ordinary share. Accordingly, no part of the return of capital will be taken to be an unfranked dividend for income tax purposes.

## **Capital gains tax consequences**

40. CGT event G1 (section 104-135 of the ITAA 1997) will happen when VRL pays the \$0.20 cents per share return of capital to a VRL shareholder in respect of a VRL share that they own at the Record Date and continue to own at the Payment Date.

41. CGT event C2 (section 104-25 of the ITAA 1997) will happen when VRL pays the \$0.20 cents per return of capital to a VRL shareholder in respect of a VRL share that they own at the Record Date but cease to own before the Payment Date.

## **Foreign resident shareholders**

42. A foreign resident VRL shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happens if their VRL share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

43. A foreign resident VRL shareholder who is paid the return of capital but no longer owns VRL shares on the Payment Date disregards any capital gain or capital loss made as a result of CGT event C2 happening (section 855-10 of the ITAA 1997).

## **Appendix 1 – Explanation**

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**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.*

### **Proposed distribution of capital is not a dividend**

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

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

46. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

47. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account, and the account is not already tainted.

48. The proposed return of capital will be recorded as a debit to VRL's share capital account. As the share capital account of VRL is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph 6(1)(d) of the ITAA 1936 will apply.

49. Accordingly, the return of share capital by VRL to the ordinary shareholders will not be a dividend as defined in subsection 6(1).

### **Application of sections 45B and 45C to the proposed return of capital**

50. Section 45B is an anti-avoidance provision, which, if it applies, allows the Commissioner to make a determination that section 45C applies to treat all or part of the return of the share capital amount as an unfranked dividend.

51. Section 45B applies where certain capital 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));
- 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)); 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)).

Each of these conditions is considered in paragraphs 52 to 66 of this Ruling.

## **Scheme**

52. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise or undertaking, scheme, plan or proposal.

53. The arrangement involving VRL's proposed return of capital to its ordinary shareholders will constitute a 'scheme' for the purposes of section 45B.

## **Capital benefit**

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

55. As VRL's return of capital will be recorded by means of a debit to VRL's share capital account, its ordinary shareholders will be taken to have been provided with a capital benefit as defined under paragraph 45B(5)(b).

## **Tax benefit**

56. A taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) if an amount of tax or other amount payable under the income tax laws would, apart from section 45B, be less than the amount that would have been payable or payable at a later time if the capital benefit had instead been assessed as a dividend.

57. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the 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. 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. Therefore, VRL shareholders will obtain tax benefits from the proposed return of capital.

### **Relevant circumstances**

58. Paragraph 45B(2)(c) 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).

59. Subsection 45B(8) lists a number of factors in paragraphs 45B(8)(a) to 45B(8)(k) that are the relevant circumstances in determining whether a person entered into or carried out a scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. The list of factors is not exclusive and not all factors listed will be relevant to every scheme.

60. In this scheme the return of share capital will be made to all the ordinary shareholders in VRL regardless of individual circumstances, so 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.

61. The factors within paragraphs 45B(8)(i) and 45B(8)(j) are not relevant to the circumstances of this scheme. The relevant factors are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

62. Paragraph 45B(8)(a) refers to the extent to which a capital benefit is attributable to realised and unrealised profits of the company and its associates (which includes subsidiaries of VRL). The proposed distribution will include a dividend attributable to a significant proportion of the profits from the disposal of AEO. In the circumstances of the scheme the return of share capital will not be attributable to the profits of VRL.

63. Paragraph 45B(8)(b) refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of VRL or its associates. VRL has a consistent history of making regular franked dividend distributions to the ordinary shareholders and expects this dividend distribution policy to continue. Accordingly, VRL's pattern of distributions does not suggest that the proposed return of share capital will be made in substitution for a dividend.

64. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) and 177D(b)(viii). 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. These matters include, among other things, the form and substance of the scheme and its financial implications for the parties involved.

65. The practical implications of the proposed scheme by VRL to return an amount of capital arising from the disposal of part of its business to the ordinary shareholders will be consistent with it being, in form and substance a return of capital. The proposed scheme would not lead to the conclusion that a requisite purpose exists and that the scheme is to be carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

66. It cannot be concluded that VRL or the participating ordinary shareholders in VRL entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the proposed return of share capital.

## **Section 45C**

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

## **Capital gains tax consequences**

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

68. CGT event G1 will happen when VRL pays the \$0.20 cents per share return of capital amount to a VRL shareholder in respect of a share that they own at the Record Date and continues to own at the Payment Date (section 104-135 of the ITAA 1997).

69. If the return of capital (\$0.20 per share) is equal to or less than the cost base of the VRL 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).

70. A VRL shareholder will make a capital gain if the \$0.20 cents per share return of capital is more than the cost base of their VRL share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess.

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

72. 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 VRL 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 of the ITAA 1997 are satisfied.

### ***CGT event C2 – section 104-25***

73. The right to receive the return of capital is one of the rights inherent in a VRL share at the Record Date. If, after the Record Date but before the Payment Date, a VRL shareholder ceases to own a VRL share in respect of which the return of capital is payable, the right to receive the return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset.

74. CGT event C2 will happen when the return of capital is paid (section 104-25 of the ITAA 1997). The right to receive the payment (being an intangible CGT asset) will end by the right being discharged or satisfied when the payment is made.

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

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

77. The cost base of the VRL 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 VRL 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 VRL shareholder disposed of the share after the Record Date.

78. Therefore, if the full cost base or reduced cost base of the VRL 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, the VRL shareholder will generally make a capital gain equal to the amount of the return of capital.

**Foreign resident shareholders**

79. 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 in relation to a CGT asset that is not 'taxable Australian property'.

80. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

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).

81. Therefore, a foreign resident VRL shareholder who receives a payment of the return of capital and makes a capital gain from CGT event G1 happening to their VRL shares, can disregard the capital gain if the VRL shares are not 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

82. However, a foreign resident VRL shareholder, just before CGT event G1 happens, cannot disregard a capital gain under subsection 855-10(1) of the ITAA 1997 if the VRL share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

83. If the return of capital is equal to or less than the cost base of the VRL share at the Payment Date, a foreign resident VRL shareholder will need to reduce their cost base and reduced cost base by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997). The adjusted cost base will be relevant for the purpose of determining if a capital gain or loss will be made on any later disposal.

84. A Foreign Resident VRL shareholder who is entitled to the return of capital but who no longer owns VRL shares on the Payment Date shall disregard any capital gain or loss that arises as a result of CGT event C2 happening (section 855-10 of the ITAA 1997). This is because the right to the payment will not be taxable Australian property as defined in section 855-15 of the ITAA 1997.

**Appendix 2 – Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>9</b>
Overview	10
Background to the acquisition of AEO	17
Capital structure	25
Distribution to shareholders	28
Other aspects	32
<b>Ruling</b>	<b>37</b>
Proposed distribution of capital is not a dividend	38
The application of sections 45B and 45C to the proposed return of capital	39
Capital gains tax consequences	40
Foreign resident shareholders	42
<b>Appendix 1 – Explanation</b>	<b>44</b>
Proposed distribution of capital is not a dividend	44
Application of sections 45B and 45C to the proposed return of capital	50
Scheme	52
Capital benefit	54
Tax benefit	56
Relevant circumstances	58
Section 45C	67
Capital gains tax consequences	68
CGT event G1 – section 104-135	68
CGT event C2 – section 104-25	73
Foreign resident shareholders	79
<b>Appendix 2 – Detailed contents list</b>	<b>85</b>

## References

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- Previous draft:*
- ITAA 1936 45B(8)(i)
  - ITAA 1936 45B(8)(j)
  - ITAA 1936 45B(8)(k)
- Not previously issued as a draft
- Related Rulings/Determinations:*
- ITAA 1936 45B(9)
  - ITAA 1936 45C
  - ITAA 1936 128B
  - ITAA 1936 Pt IVA
- TR 2006/10
- Subject references:*
- capital benefit
  - capital reduction
  - CGT events C1-C3 - end of a CGT asset
  - return of capital on shares
  - share capital
- Legislative references:*
- ITAA 1936 6(1)
  - ITAA 1936 44(1)
  - 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)
  - ITAA 1936 45B(5)(b)
  - ITAA 1936 45B(8)
  - ITAA 1936 45B(8)(a)
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  - ITAA 1936 45B(8)(c)
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  - ITAA 1936 45B(8)(e)
  - ITAA 1936 45B(8)(f)
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  - ITAA 1997 104-25
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  - ITAA 1997 104-135
  - ITAA 1997 104-135(3)
  - ITAA 1997 104-135(4)
  - ITAA 1997 104-165(3)
  - 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 Div 197
  - ITAA 1997 197-50
  - ITAA 1997 Div 230
  - ITAA 1997 855-10
  - ITAA 1997 855-10(1)
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No: 1-Y0834S  
 ISSN: 1445-2014  
 ATOLaw topic: Income Tax ~ Return of Capital