



# ***CR 2002/89 - Income Tax: Dividend, capital reduction and related schemes of arrangement for the demerger of SciGen Limited from Sonic Healthcare Limited***

 This cover sheet is provided for information only. It does not form part of *CR 2002/89 - Income Tax: Dividend, capital reduction and related schemes of arrangement for the demerger of SciGen Limited from Sonic Healthcare Limited*

 This document has changed over time. This is a consolidated version of the ruling which was published on *30 June 2003*



## **Class Ruling**

### **Income Tax: Dividend, capital reduction and related schemes of arrangement for the demerger of SciGen Limited from Sonic Healthcare Limited**

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#### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

#### **What this Class Ruling is about**

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1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are:

- Subsection 6(1) of the *Income Tax Assessment Act 1936* (‘ITAA 1936’);
- Section 44 of the ITAA 1936;
- Section 45B of the ITAA 1936;
- Section 45BA of the ITAA 1936;
- Section 45C of the ITAA 1936;
- Subsection 128B(3D) of the ITAA 1936;
- Section 104-35 of the *Income Tax Assessment Act 1997* (‘ITAA 1997’);
- Section 104-135 of the ITAA 1997;
- Section 104-155 of the ITAA 1997;
- Division 125 of the ITAA 1997;
- Section 136-25 of the ITAA 1997; and

- Section 202-45 of the ITAA 1997.

## **Class of persons**

3. The class of persons to which this Ruling applies are persons who hold shares or options in Sonic Healthcare Limited ('Sonic') and who are registered on either the Sonic Share Register, or the Sonic Options Register on the Record Date, being the date and time for determining entitlement to participate in the demerger and to receive shares, in the form of CHESS Units of Foreign Securities (CUFS), in SciGen Limited ('SciGen'). This Ruling does not apply to the holders of interests granted to the vendors of Roadhaven Limited.

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise arrangement as it is identified in this Ruling and subject to any assumptions stated herein.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement as described in paragraphs 11 to 20, below, in this Ruling.

6. If the arrangement actually carried out is materially different from the arrangement described in this Ruling:

- a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
- b) this Ruling may be withdrawn or modified.

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## **Date of effect**

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8. This Class Ruling applies to the year ending 30 June 2003 or to any applicable substituted accounting period. However, 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## **Withdrawal**

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9. This Class Ruling is withdrawn and ceases to have effect for the years after 30 June 2003 or any applicable substituted accounting period. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who entered into a specified arrangement during the term of the Ruling. Thus the Ruling continues to apply to those persons, even following its withdrawal, for the arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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10. The arrangement that is the subject of this Ruling is described below. This description is based on the documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- a) Correspondence dated 26 July 2002 from PricewaterhouseCoopers requesting administratively binding advice pursuant to Practice Statement PS 2001/4.
- b) Correspondence dated 24 September 2002 from PricewaterhouseCoopers to amend and update the request for administratively binding advice dated 26 July 2002, and to provide a current draft of the Information Memorandum.
- c) Correspondence dated 8 November 2002 from PricewaterhouseCoopers in response to request for further information from the Australian Taxation Office dated 1 November 2002. The following documents accompanied that response and form part of it:

- a copy of Sonic's annual report for 2002;
  - a final version of the Information Memorandum, which included the Implementation Agreement, the Shareholder Scheme of Arrangement and the Optionholder Scheme of Arrangement;
  - a copy of the Vendor Interest Agreement.
- d) The facsimile message dated 15 November 2002 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office dated 14 November 2002.
- e) The facsimile message dated 26 November 2002 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office dated 22 November 2002.
- f) The facsimile message dated 28 November 2002 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office dated 28 November 2002.
- g) The e-mail message dated 29 November 2002 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office dated 29 November 2002.

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

11. The purpose of the arrangement is the demerger of SciGen from Sonic. The demerger group will consist of SciGen and all of its demerger subsidiaries. SciGen is a company incorporated in Singapore.

12. A capital reconstruction of SciGen will take place prior to the demerger. This will include:

- The adoption by SciGen of a new Memorandum and Articles of Association to take effect on listing on the Australian Stock Exchange;
- An increase in SciGen's authorised share capital from S\$400,000 to S\$600,000; and
- The subdivision of SciGen's authorised and issued share capital on the basis of 7.614125 post-demerger shares for each pre-demerger share.

13. Pursuant to the Implementation Agreement, Sonic will subscribe for an additional 150,000,000 SciGen shares at an aggregate subscription price of \$30 million (or \$0.20 per share). After this investment, SciGen will have approximately 419 million shares on issue, Sonic will hold 310 million (74%) of those shares.

14. Under the arrangement, Sonic shareholders will be entitled to receive one SciGen share, in the form of a CUFS, for each Sonic share they hold. Additionally, each Sonic vendor interest holder will be entitled to receive one SciGen share, in the form of a CUFS, for each Sonic share that the vendor is deemed to be entitled under the relevant share exchange agreement. This will involve a capital reduction of \$0.12 for each Sonic share and the proceeds will be compulsorily applied as money subscribed for the transfer of shares, in the form of CUFS, in SciGen.

15. At the same time as the transfer of SciGen shares to Sonic shareholders occurs, Sonic option holders will be issued one SciGen option for each Sonic option they hold. The aggregate of the exercise prices will equal the exercise price of the relevant class of Sonic option prior to the demerger.

16. The Sonic vendor interest holders, who are foreign residents, are parties to the arrangement and are not included in the class of persons to which this Ruling applies. However, the entitlements of the vendor interest holders under the demerger are incorporated into the analysis contained in the Explanations section of the Ruling.

17. The capital reduction of \$0.12 per share will be debited by Sonic against its share capital account.

18. Certain ineligible foreign resident Sonic shareholders will receive SciGen CUFS that will be allocated to a nominee who will sell the CUFS on the shareholders' behalf. Foreign resident shareholders will receive the net proceeds of the on market sale of the CUFS held on their behalf.

19. After the demerger, Sonic will retain approximately 11.5% of SciGen's issued shares.

20. Sonic will not, either on its own or acting in concert with any other party, attempt either a voluntary or mandatory takeover of SciGen after completion of the demerger arrangement.

## **Ruling**

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21. The arrangement will be a demerger as defined for the purposes of Division 125 of the ITAA 1997.

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22. All Australian resident Sonic shareholders and option holders will be entitled to choose CGT roll-over under Division 125.
23. Pursuant to subsection 125-55(2) of the ITAA 1997 foreign residents who are shareholders or option holders who acquire SciGen CUFS, or options to acquire SciGen CUFS, under the demerger will not be entitled to choose roll-over relief, as the new interests in SciGen will not have the necessary connection with Australia under section 136-25.
24. If a shareholder does not choose Division 125 roll-over, no capital gain will arise if the capital return amount in respect of a share (i.e., \$0.12 per share) is less than the cost base of that share.
25. Irrespective of whether a shareholder chooses Division 125 roll-over, a shareholder (other than a foreign resident shareholder or a shareholder in respect to pre-CGT shares) will be required to apportion the CGT cost base of their Sonic shares immediately before the arrangement over their Sonic shares and SciGen CUFS immediately after the arrangement based on the relative market values of the two groups. The Information Memorandum contains estimates of these relative market values.
26. Irrespective of whether an option holder chooses Division 125 roll-over, an option holder (other than a foreign resident option holder or an option holder in respect to pre-CGT options) will be required to apportion the CGT cost base of their Sonic options immediately before the arrangement, over their Sonic options and SciGen options immediately after the arrangement, based on the relative market values of the two groups. The Information Memorandum contains estimates of these relative market values.
27. In respect of Australian resident Sonic option holders, no CGT event will happen as a result of receiving options to acquire SciGen CUFS.
28. Any dividend arising under the demerger will qualify as a demerger dividend under subsection 6(1) of the ITAA 1936 and will not be assessable income by operation of subsections 44(3) and 44(4) of the ITAA 1936.
29. For foreign residents, any demerger dividend will be exempt from Australian dividend withholding tax under subsection 128B(3D) of the ITAA 1936.
30. Any demerger dividend will be an unfrankable dividend under section 202-45 of the ITAA 1997.
31. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA applies to the whole, or any part, of the demerger benefit provided under the demerger. Nor will the Commissioner make a determination under

paragraph 45B(3)(b) that section 45C applies to the whole, or any part, of the capital benefit provided under the demerger.

## **Explanations**

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### **Demerger**

32. For the purposes of the restructuring, under Division 125 of the ITAA 1997, the demerger group will consist of Sonic and all of its demerger subsidiaries. Sonic is the head entity (subsection 125-65(3) of the ITAA 1997) of the demerger group and is also the demerging entity (subsection 125-70(7) of the ITAA 1997). SciGen, as a partly-owned subsidiary of Sonic, is a demerger subsidiary (subsection 125-65(6) of the ITAA 1997) and is the demerged entity (subsection 125-70(6) of the ITAA 1997). None of the demerger subsidiaries, including any subsidiary of SciGen, hold ownership interests in Sonic.

33. The arrangement which is the subject of this Ruling includes a capital restructuring of SciGen and a share capital reduction by Sonic. Accordingly, the condition in paragraph 125-70(1)(a) of the ITAA 1997 is satisfied.

34. Under the restructuring, Sonic will transfer CUFS representing approximately 262 million SciGen shares to existing Sonic shareholders and vendor interest holders on a one-for-one basis. Additionally, SciGen will issue options to Sonic option holders on a one-for-one basis. The demerged entity (SciGen) will thereby have transferred sufficient new ownership interests in itself with the result that owners of original interests in the head entity (Sonic) will own at least 80% of the total ownership interests in the demerged entity. Accordingly, the condition in paragraph 125-70(1)(b) of the ITAA 1997 will be satisfied.

35. Under the restructuring, CGT event G1 (see section 104-135 of the ITAA 1997) happens to Sonic's shareholders in respect of their Sonic shares (as a result of the capital reduction) and those shareholders acquire new interests in SciGen and nothing else. Accordingly, the condition in paragraph 125-70(1)(c) of the ITAA 1997 will be satisfied.

36. The acquisition of SciGen CUFS happens only because the Sonic shareholders own Sonic shares, or Sonic vendor interest holders have a right to acquire Sonic shares. The acquisition of SciGen options happens only because Sonic option holders own Sonic options. Accordingly, the condition in paragraph 125-70(1)(d) of the ITAA 1997 is satisfied.



37. The new interests acquired in SciGen are CUFS or options to acquire CUFS thus satisfying paragraph 125-70(1)(e) of the ITAA 1997.

38. Since it is reasonable for Sonic to assume that more than 50% of the shares in Sonic are owned by Australian residents, the condition in paragraph 125-70(1)(f) of the ITAA 1997 is satisfied.

39. Neither Sonic or SciGen are superannuation funds thus satisfying the condition in paragraph 125-70(1)(g) of the ITAA 1997.

40. Sonic has only ordinary shares on issue (approximately 260 million currently on issue). SciGen will have approximately 419 million ordinary shares (including the CUFS issued in respect of this demerger) on issue. Each Sonic shareholder and vendor interest holder will acquire one SciGen CUFS for each Sonic share they own or are entitled to acquire (vendor interest holders). The ownership interests of the vendor interest holders (original interests in the form of deferred consideration) is considered to be nearly as practicable in the same proportion of the new interests (SciGen CUFS) in the demerged entity.

Additionally, each Sonic option holder will acquire an option to acquire SciGen CUFS on a one-for-one basis.

- Under the demerger each shareholder, vendor interest holder or option holder will acquire a proportionate interest in SciGen which equals (or as nearly as practicable equals) their proportionate interest in Sonic just before the demerger; and
- Just after the demerger, shareholders, vendor interest holders and option holders will hold the same proportionate total market value of ownership interests in Sonic and SciGen as they had in Sonic just before the demerger.

Accordingly, the condition in subsection 125-70(2) of the ITAA 1997 will be satisfied.

41. No other CGT roll-over is available thus satisfying subsection 125-70(5) of the ITAA 1997

42. Accordingly, the proposed demerger arrangement will qualify as a demerger for the purposes of Division 125 of the ITAA 1997.

## **CGT roll-over**

43. Subsection 125-55(1) of the ITAA 1997 provides that you can choose to obtain a roll-over if:

- a) you own an original interest in a company (your original interest);
- b) the company is the head entity of a demerger group;
- c) a demerger happens to the demerger group; and
- d) under the demerger, a CGT event happens to your original interest and you acquire a new or replacement interest (your new interest) in the demerged entity.

44. Subsection 125-55(2) of the ITAA 1997 provides that you cannot choose to obtain roll-over for an original interest if:

- a) you are a foreign resident; and
- b) the new interest you acquire under the demerger in exchange for that original interest does not have the necessary connection with Australia just after you acquire it.

45. Under the arrangement:

- a Sonic shareholder or option holder owns an original interest in Sonic;
- Sonic is the head entity of the Sonic demerger group;
- a demerger happens to the Sonic demerger group;
- as a result of the capital reduction, a CGT Event G1 will happen for all Sonic shareholders under section 104-135 of the ITAA 1997; and
- no foreign resident shareholder in Sonic has an asset with the necessary connection with Australia.

46. On this basis, all Sonic shareholders (other than foreign resident shareholders) will be entitled to choose to obtain roll-over under Division 125 of the ITAA 1997. The consequences of choosing the roll-over are set out in section 125-80, and include:

- i. any capital gain which might otherwise have arisen on the demerger will be disregarded; and
- ii. a shareholder who acquired Sonic shares before 20 September 1985 (i.e., pre-CGT) will be taken to have acquired the corresponding SciGen CUFS before that date.

### **CGT treatment if no roll-over chosen**

47. If a shareholder does not choose demerger roll-over relief under Division 125 of the ITAA 1997, the consequences of roll-over set out above will not arise. However, the cost base of the Sonic

shares and SciGen CUFS will be calculated in accordance with paragraph 50 below.

48. In addition, it will be necessary to determine whether the \$0.12 per share capital return will give rise to an assessable capital gain. The capital return will constitute a CGT Event G1 (see section 104-135). However, under that section, a capital gain will only arise to the extent that the capital return exceeds the cost base of the share. If the cost base of a share exceeds the amount of the capital return (ie. \$0.12) there will be no resulting capital gain as a consequence of the demerger.

49. If any of the original equity interests in Sonic are pre-CGT interests and no demerger roll-over is chosen, then any SciGen CUFS or SciGen options acquired will be taken to be acquired post-CGT.

### **Cost base apportionment**

50. If a shareholder chooses to obtain roll-over in relation to post-CGT shares, section 125-80 of the ITAA 1997 requires an apportionment of the total cost bases (and reduced cost bases) of all of the shareholder's Sonic shares, over those shares and the new SciGen CUFS received in respect of those shares. The apportionment must reflect the relative market values just after demerger. Note 2 to subsection 125-80(2) of the ITAA 1997 recognises that the head entity or demerging entity may advise shareholders of proportions. The final estimated proportions and the appropriate cost base adjustments will be disclosed to shareholders in the Information Memorandum.

51. If a shareholder chooses not to obtain roll-over in relation to post-CGT shares, section 125-85 of the ITAA 1997 provides that the shareholder is required to make the same allocation of cost base (and reduced cost base) as would have been required under section 125-80 of the ITAA 1997 had roll-over been chosen. The final estimated proportions and the appropriate cost base adjustments will be disclosed to shareholders in the Information Memorandum.

### **Sonic option holders**

52. Sonic option holders will be entitled to receive options to acquire CUFS in SciGen on a one-for-one basis. The granting of the SciGen options to Sonic optionholders will not result in any CGT event happening. Both CGT event D1 (section 104-35 of the ITAA 1997) and CGT event H2 (section 104-155 of the ITAA 1997) do not happen where a company grants an option to acquire equity interests in the company. Foreign resident Sonic optionholders will not be entitled to choose demerger roll-over as their SciGen options

will not have the necessary connection with Australia under section 136-25 of the ITAA 1997.

### **Demerger Dividend and Demerger Allocation**

53. The total market value of new SciGen CUFS issued under the Sonic demerger is the demerger allocation, as defined in subsection 6(1) of the ITAA 1936, for the purposes of this arrangement.

54. To the extent that the market value of each SciGen CUFS exceeds the amount debited to capital (\$0.12) by Sonic, that amount will be a dividend assessable to the Sonic shareholders under subsection 44(1) of the ITAA 1936. However, the dividend component of a genuine demerger will not result in a shareholder deriving assessable income if it is a demerger dividend as defined in subsection 6(1) of the ITAA 1936 and Sonic does not make an election under subsection 44(2) of the ITAA 1936 that the demerger dividend is assessable.

55. The demerger dividend is that part of the demerger allocation that, but for the operation of subsections 44(3) and (4) of the ITAA 1936, would be assessable income to the shareholders of Sonic under subsection 44(1) of the ITAA 1936. Under the terms of this arrangement as advised to the Commissioner the demerger dividend would be \$0.08 per share.

56. Sonic will not make an election under subsection 44(2) of the ITAA 1936 to treat the demerger dividend as assessable income. Accordingly, the demerger dividend will not be assessable income or exempt income to the Sonic shareholders under subsections 44(3) and 44(4) of the ITAA 1936.

### **Dividend withholding tax**

57. Subsection 128B(3D) of the ITAA 1936 excludes as income subject to Australian withholding tax, a demerger dividend to which section 45B does not apply. As the Commissioner will not make a determination under subsection 45B(3) in respect of the arrangement, subsection 128B(3D) will operate to preclude the application of Australian dividend withholding tax to any demerger dividend payable to foreign residents.

### **Unfrankable distributions**

58. A demerger dividend is included on the list of unfrankable distributions at section 202-45 of the ITAA 1997. Accordingly, any demerger dividend will be unfrankable.

## Section 45B

59. The purpose of section 45B of the ITAA 1936 is to ensure that relevant amounts are treated as dividends for taxation purposes if:

- a) components of a demerger allocation as between capital and profit do not reflect the circumstances of a demerger; or
- b) certain payments, allocations and distributions are made in substitution for dividends.

60. Specifically, the provision applies where:

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

61. The provision of ownership interests in a company to a person in relation to a demerger, or a distribution or the doing of a thing in relation to an ownership interest which occurs in relation to a demerger that has the effect of increasing the value of an ownership interest owned by the person will be both a demerger benefit and a capital benefit for the purposes of section 45B [subsections 45B(4) and (5)] of the ITAA 1936.

62. However, subsection 45B(6) of the ITAA 1936 provides that, to the extent that the provision of interests, the distribution or the thing done involves the person receiving a demerger dividend, the provision of interests, distribution or other thing done will not constitute the provision of a capital benefit.

63. In respect of this demerger, and whilst the conditions of paragraphs 45B(2)(a) and (b) of the ITAA 1936 are met, a more than incidental purpose of enabling Sonic shareholders and option holders to obtain a tax benefit is not identifiable. In other words, having regard to the relevant circumstances of the scheme as required by subsection 45B(8) of the ITAA 1936, we would not conclude that any of the parties who entered into or carried out the scheme did so with a more than incidental purpose of obtaining a tax benefit.

64. It is apparent that the demerger benefit and capital benefit provided to the Sonic shareholders and option holders reflect the circumstances of the demerger. In this regard, we consider that the apportionment of the demerger benefit between capital and dividend is reasonable. Moreover, it is our view that the capital benefit provided is not attributable to the profits of the company and, we do not consider that Sonic's pattern of distributions indicates that the capital benefit is being paid in substitution for a dividend.

65. Furthermore, and although the tax result for participating shareholders and option holders is favourable, the circumstances of the Sonic shareholders and option holders do not indicate that the demerger was structured with a more than incidental purpose of providing tax benefits.

## **Detailed contents list**

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66. Below is a detailed contents list for this Class Ruling:

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**Commissioner of Taxation**

18 December 2002

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<i>Previous draft:</i>	- ITAA 1936 45B(2)(c)
Not previously released in draft form	- ITAA 1936 45B (3)
	- ITAA 1936 45B(3)(a)
	- ITAA 1936 45B(3)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(4)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 45B(5)
TR 97/16; PS 2001/4	- ITAA 1936 45B(6)
	- ITAA 1936 45B(8)
	- ITAA 1936 45BA
<i>Subject references:</i>	- ITAA 1936 45C
- acquisition of securities	- ITAA 1936 128B(3D)
- acquisition of shares	- ITAA 1997 104-35
- capital benefit	- ITAA 1997 104-135
- capital gains	- ITAA 1997 104-155
- cost base adjustments	- ITAA 1997 125
- demerger	- ITAA 1997 125-55(1)
- demerger allocation	- ITAA 1997 125-55(2)
- demerger benefit	- ITAA 1997 125-65(3)
- demerger dividend	- ITAA 1997 125-65(6)
- demerger subsidiary	- ITAA 1997 125-70 (1)(a)
- demerger group	- ITAA 1997 125-70 (1)(b)
- non-resident shareholders	- ITAA 1997 125-70(1)(c)
- return of capital	- ITAA 1997 125-70(1)(d)
- roll-over	- ITAA 1997 125-70(1)(e)
- shares	- ITAA 1997 125-70(1)(f)
- schemes to provide certain benefits	- ITAA 1997 125-70(1)(g)
- securities rights and options	- ITAA 1997 125-70(1)(h)
- tax benefit	- ITAA 1997 125-70(2)
	- ITAA 1997 125-70(5)
<i>Legislative references:</i>	- ITAA 1997 125-70(6)
- ITAA 1936 6(1)	- ITAA 1997 125-70(7)
- ITAA 1936 44	- ITAA 1997 125-80
- ITAA 1936 44(1)	- ITAA 1997 125-80(2)
- ITAA 1936 44(2)	- ITAA 1997 125-85
- ITAA 1936 44(3)	- ITAA 1997 136-25
- ITAA 1936 44(4)	- ITAA 1997 202-45
- ITAA 1936 45B	- Copyright Act 1968
- ITAA 1936 45B(2)(a)	- TAA 1953 Pt IVAAA
- ITAA 1936 45B(2)(b)	

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**ATO References**

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