

CR 2022/22 - Spark Infrastructure Trust - acquisition, interim distribution and special distribution



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Class Ruling

Spark Infrastructure Trust – acquisition, interim distribution and special distribution

❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for the holders of Scheme Securities (as defined in paragraph 77 of this Ruling) in the Spark Infrastructure Trust (Spark) and subsidiaries of Spark, in relation to the acquisition of those Scheme Securities by Pika Bidco Pty Ltd (Bidco) which was implemented on 22 December 2021 (Implementation Date).
2. Full details of this scheme are set out in paragraphs 47 to 88 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - were a holder of a stapled security which consisted of a unit in Spark and a Loan Note (Spark Securities) on 10 December 2021 (Scheme Record Date)
 - are either
 - a ‘resident of Australia’ (as that term is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)) and are covered by one of the four categories of entities specified in section 207-45, or

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- a ‘foreign resident’ (as that term is defined in subsection 995-1(1)) and do not carry on business in Australia at or through a permanent establishment in Australia
- acquired your Spark Securities after 20 September 1985
- held your Spark Securities on capital account; that is, your Spark Securities were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- are not exempt from Australian income tax
- are not subject to Subdivision 842-I in respect of your Spark Securities
- received
 - the Interim Distribution and the Special Distribution from the Trustee of Spark on 15 September 2021 and 8 December 2021 (respectively), or
 - the Special Distribution from the Trustee of Spark on 8 December 2021, and
- are not under a legal disability.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 47 to 88 of this Ruling.

Note: Division 230 will generally not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 January 2021 to 31 December 2021.

Ruling

Distributions by Spark Infrastructure Trust included in the assessable income of resident security holders

Interim Distribution

7. If you are a resident and you received the Interim Distribution, your assessable income includes:

- 3.5 cents in respect of each Loan Note (section 6-5), and
- your attributable franked distribution determined under section 207-37 in respect of each unit in Spark (subparagraph 207-35(4)(b)(ii)).

8. The amount of the net income of Spark (disregarding any franking credits) for the income year is a crucial part of applying section 207-37, but is not known as at the date of this Ruling. Section 207-37 also requires you to apply section 207-55 to your own circumstances. Your attributable franked distribution as determined under section 207-37 will be worked out and provided to you by the Trustee of Spark. The Commissioner expresses no opinion on the amount of your attributable franked distribution that will be

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calculated by the Trustee of Spark, or the amount of the net income of Spark that will be calculated by the Trustee of Spark.

9. Additionally, in the income year the Interim Distribution was paid (subject to you being a 'qualified person' in relation to the Interim Distribution), you will:

- have to include your share of the franking credit on the Interim Distribution in your assessable income (subparagraph 207-35(4)(b)(i)), and
- be entitled to a tax offset equal to your share of the franking credit on the Interim Distribution (section 207-45).

10. Your entitlement to the franking credit tax offset under Division 207 in relation to the Interim Distribution is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

11. If you are a resident and you also receive the Special Distribution, your assessable income will also include the amounts outlined in paragraphs 12 to 15 of this Ruling.

Special Distribution

12. If you are a resident and you received the Special Distribution, your assessable income includes your attributable franked distribution determined under section 207-37 in respect of each unit in Spark (subparagraph 207-35(4)(b)(ii)).

13. The amount of the net income of Spark (disregarding any franking credits) for the income year is a crucial part of applying section 207-37, but is not known as at the date of this Ruling. Section 207-37 also requires you to apply section 207-55 to your own circumstances. Your attributable franked distribution as determined under section 207-37 will be worked out and provided to you by the Trustee of Spark. The Commissioner expresses no opinion on the amount of your attributable franked distribution that will be calculated by the Trustee of Spark, or the amount of the net income of Spark that will be calculated by the Trustee of Spark.

14. Additionally, in the income year the Special Distribution was paid (subject to you being a 'qualified person' in relation to the Special Distribution), you will:

- have to include your share of the franking credit on the Special Distribution in your assessable income (subparagraph 207-35(4)(b)(i)), and
- be entitled to a tax offset equal to your share of the franking credit on the Special Distribution (section 207-45).

15. Your entitlement to the franking credit tax offset under Division 207 in relation to the Special Distribution is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

16. If you are a resident and you also receive the Interim Distribution, your assessable income will also include the amounts outlined in paragraphs 7 to 10 of this Ruling.

17. If you are a resident, your assessable income will not include any other distribution amounts from Spark, other than the amounts described in paragraphs 7 to 10 and 12 to 15 of this Ruling, as relevant to your particular circumstances.

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Qualified person

18. Paragraph 207-150(1)(a) refers to Division 1A of former Part IIIA of the ITAA 1936, which contains the conditions you must satisfy to be a 'qualified person' in relation to a franked distribution you have received. The main way in which you can be a 'qualified person' is by satisfying the holding period rule.

19. The Interim Distribution and the Special Distribution each constitute a 'related payment' for the purposes of former section 160APHN of the ITAA 1936. This is because the Scheme Consideration paid by Bidco for acquiring the Spark units was reduced by the Interim Distribution and the Special Distribution. This reduction has the effect of passing the benefit of the Interim Distribution and the Special Distribution from the unit holders of Spark to Bidco (former subsection 160APHN(2), former paragraphs 160APHN(3)(f), (4)(c) and (4)(d) of the ITAA 1936).

20. Therefore, you are taken to have made a related payment in respect of the Interim Distribution and the Special Distribution.

21. As Spark is a 'widely held trust', this means that you will satisfy the holding period rule in relation to the Interim Distribution and the Special Distribution only if you held your Spark units for a continuous period of at least 45 days during the secondary qualification period for each distribution (former paragraph 160APHP(1)(b) and former subsection 160APHO(4) of the ITAA 1936).

22. The secondary qualification period begins on the 45th day before, and ends on the 45th day after, the day on which the shares (or, in this case, the interest in shares) became ex dividend (former section 160APHD of the ITAA 1936). Former subsection 160APHE(2) of the ITAA 1936 states that an interest as a beneficiary of a widely held trust (such as Spark) in a share in respect of which a dividend is to be paid becomes ex dividend on the day after the last day on which the acquisition by a person of the interest will entitle the person to receive a distribution from the trust.

23. In relation to the Interim Distribution, during the period from 23 May 2021 to 21 August 2021 (inclusive), you must have held your Spark units for a continuous period of at least 45 days (not counting the day on which the Spark unit was acquired or, if you disposed of the Spark unit, the day on which the disposal occurred, and not counting the days, if any, on which you had 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your Spark units).

24. In relation to the Special Distribution, during the period from 16 October 2021 to 9 December 2021 (inclusive), you must have held your Spark units for a continuous period of at least 45 days (not counting the day on which the Spark unit was acquired or the day on which the disposal of the Spark unit occurred, and not counting the days, if any, on which you had 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your Spark units). You had materially diminished risks of loss or opportunities for gain on and after 10 December 2021 (the Scheme Record Date), when you became committed to disposing of your units in Spark in exchange for the part of the Scheme Consideration attributable to those units. Therefore, the secondary qualification period ended on 9 December 2021.

Integrity rules in relation to franking credits

25. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits you received in relation to the Interim Distribution or the Special Distribution. This is because it cannot be concluded that the Trustee of Spark or the unit holders of Spark entered into or carried out

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the scheme for a more than incidental purpose of enabling the unit holders of Spark to obtain an imputation benefit. Accordingly, the purpose condition in paragraph 177EA(3)(e) of the ITAA 1936 is not satisfied.

26. As there is no streaming of distributions, the Commissioner will not make a determination under subsection 204-30(3) to deny the whole, or any part, of the imputation benefits you received in relation to the Interim Distribution or the Special Distribution.

Distributions by Spark Infrastructure Trust to non-resident security holders

27. If you are a non-resident and you received the Interim Distribution, no part of the 6.13 cents of the Interim Distribution in respect of each of the Spark Securities you held will be included in your assessable income. This is because:

- the interest of 3.5 cents in respect of each Loan Note is non-assessable non-exempt income (section 128D of the ITAA 1936)
- you are not liable for withholding tax on the interest of 3.5 cents in respect of each Loan Note (section 128FA of the ITAA 1936)
- the franked distribution of 2.63 cents in respect of each Spark unit is non-assessable non-exempt income (section 128D of the ITAA 1936)
- you are not liable for withholding tax on the franked distribution in respect of each Spark unit (subparagraph 128B(3)(ga)(i) and subsection 128A(3) of the ITAA 1936), and
- you do not include your share of the franking credit on the Interim Distribution in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

28. If you are a non-resident and you received the Special Distribution, and the Special Distribution is not attributable to a permanent establishment in Australia, no part of the 12 cents of the Special Distribution in respect of each of the Spark Securities you held will be included in your assessable income. This is because:

- the fully franked Special Distribution in respect of each Spark unit is non-assessable non-exempt income (section 128D of the ITAA 1936)
- you are not liable for withholding tax on the fully franked Special Distribution in respect of each Spark unit (subparagraph 128B(3)(ga)(i) and subsection 128A(3) of the ITAA 1936), and
- you do not include your share of the franking credit on the Special Distribution in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

CGT consequences

CGT event E4

29. You do not have to reduce the cost base and reduced cost base of your Spark units, nor do you make a capital gain, under CGT event E4 as a result of the Trustee of Spark transferring the three A Class shares to you (section 104-70). (You cannot make a capital loss from CGT event E4.)

30. For each Spark unit you held, if the amount you received from the Trustee of Spark in respect of the Interim Distribution and/or the Special Distribution is **more** than the

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amount of the Interim Distribution and/or the Special Distribution that is included in your assessable income, CGT event E4 will happen (section 104-70).

31. The difference (being the non-assessable part) will result in either:
- a reduction to the cost base and reduced cost base of your Spark unit equal to the amount of the non-assessable part (subsection 104-70(6)), or
 - your making a capital gain if the non-assessable part is more than the cost base of your Spark unit (subsection 104-70(4)) – CGT event E4 will happen just before the time of any other CGT event (paragraph 104-70(3)(b)).

CGT event A1 happened on disposal of the Scheme Securities

32. Each Spark unit, Loan Note and A Class share (of which there are three) is a separate CGT asset under section 108-5.
33. CGT event A1 happened on the Implementation Date when you disposed of each of your Spark units, Loan Notes and A Class shares to Bidco (section 104-10).

Disposal of units in Spark Infrastructure Trust

34. You received \$2.1175 as the capital proceeds for disposing of each of your Spark units (subsection 116-20(1)).
35. The capital proceeds do not include the Interim Distribution and the Special Distribution as they were not received in respect of CGT event A1 happening to your Spark units.
36. You made a capital gain if the capital proceeds from disposing of each of your Spark units exceed its cost base at the time of CGT event A1 (subsection 104-10(4)). The capital gain is the amount of the excess.
37. You made a capital loss if the capital proceeds from disposing of each of your Spark units are less than its reduced cost base at the time of CGT event A1 (subsection 104-10(4)). The capital loss is the amount of the difference.
38. If you made a capital gain on disposing of your Spark units, you can treat the capital gain as a 'discount capital gain' provided you held your Spark units for at least 12 months (excluding the day of acquisition and the Implementation Date) before the Implementation Date, and the other conditions of Subdivision 115-A are met. (To the extent that Subdivision 115-C is relevant, it must also be satisfied.)

Disposal of A Class shares

39. You do not make a capital gain or capital loss from CGT event A1 happening on the disposal of each of your A Class shares (subsection 104-10(4)).

Disposal of Loan Notes

40. You received 65 cents as the capital proceeds for disposing of each of your Loan Notes (subsection 116-20(1)).
41. You made a capital gain if the capital proceeds from disposing of each of your Loan Notes exceed its cost base at the time of CGT event A1 (subsection 104-10(4)). The capital gain is the amount of the excess.

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42. You made a capital loss if the capital proceeds from disposing of each of your Loan Notes are less than its reduced cost base at the time of CGT event A1 (subsection 104-10(4)). The capital loss is the amount of the difference.

43. As the Loan Notes are a traditional security, if the acquisition cost of a Loan Note you disposed of is less than 65 cents, you will make a gain equal to the difference. The amount of the gain is included in your assessable income (subsection 26BB(2) of the ITAA 1936).

44. Any capital gain you made from disposing of a Loan Note is reduced by the amount you included in your assessable income under subsection 26BB(2) of the ITAA 1936 (subsection 118-20(1)).

45. As the Loan Notes are a traditional security, if the acquisition cost of a Loan Note you disposed of is more than 65 cents, you will make a loss equal to the excess. The amount of the loss is an allowable deduction (subsection 70B(2) of the ITAA 1936).

46. The cost base and reduced cost base of a Loan Note is reduced by the amount you deducted under subsection 70B(2) of the ITAA 1936 (subsections 110-45(2) and 110-55(9)).

Scheme

47. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Spark Infrastructure Trust

48. Spark was settled on 25 October 2005 as a unit trust. The Trustee of Spark is a company incorporated in Australia, Spark Infrastructure RE Limited.

49. Spark is a specialist infrastructure fund that invests in regulated electricity distribution and transmission entities as well as renewable energy projects. It has three wholly-owned subsidiaries which hold the relevant investments:

- Spark Infrastructure Holdings No. 1 Pty Ltd (SIH1)
- Spark Infrastructure Holdings No. 2 Pty Ltd (SIH2), and
- Spark Infrastructure Holdings No. 3 Pty Ltd (SIH3).

50. Spark was a registered managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Corporations Act).

51. Spark was a managed investment trust under Division 275.

52. Spark has one class of units on issue. On the Implementation Date, there were 1,754,954,280 units in Spark on issue.

Loan Notes

53. On the Implementation Date, the Trustee of Spark had 1,754,954,280 Loan Notes on issue.

54. The face value of each Loan Note was 65 cents. The Trustee of Spark paid interest on the Loan Notes every six months.

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55. Each Loan Note was a 'traditional security' under subsection 26BB(1) of the ITAA 1936.

Spark Securities

56. Prior to the Implementation Date, the Spark units and the Loan Notes were stapled on a 1:1 basis and traded as a stapled security (Spark Securities) on the Australian Securities Exchange (ASX).

57. As at 2 September 2021, approximately 53% of the Spark Securities were held by Australian residents.

Interim Distribution

58. On 1 July 2021, the Trustee of Spark declared a half-yearly distribution of 6.25 cents in respect of each Spark Security (Interim Distribution) to be paid to the holders of Spark Securities who held their Spark Securities on 8 July 2021 (Interim Distribution Record Date).

59. The Interim Distribution consisted of:

- 3.5 cents in respect of each Loan Note, and
- 2.75 cents in respect of each unit (of which 2.63 cents was a fully franked distribution, and 0.12 cents was a tax deferred distribution).

60. The distribution ex-date for the Interim Distribution was 7 July 2021 (Interim Distribution Ex-Date).

61. The Interim Distribution was paid on 15 September 2021.

62. The Interim Distribution was funded by franked dividends of \$66 million received by the Trustee of Spark from SIH1 and SIH2.

63. The distribution calculation date for the Interim Distribution was 30 June 2021.

Special Distribution

64. On 24 November 2021, the Trustee of Spark declared the Special Distribution to be paid to the holders of Spark Securities who held their Spark Securities on 1 December 2021 (Special Distribution Record Date).

65. The Special Distribution consisted of a fully franked distribution of 12 cents in respect of each unit.

66. The distribution ex-date for the Special Distribution was 30 November 2021 (Special Distribution Ex-Date).

67. The Special Distribution was paid on 8 December 2021.

68. The Special Distribution was funded by franked dividends of \$210.6 million received by the Trustee of Spark from SIH1 and SIH2.

69. The distribution calculation date for the Special Distribution was the Implementation Date.

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Pika Bidco Pty Ltd

70. Bidco is a private company incorporated in Australia and wholly owned by Pika Holdco Pty Ltd (HoldCo), which is ultimately owned by foreign institutional investors.

71. HoldCo and Bidco have formed an income tax consolidated group under Part 3-90 (HoldCo TCG).

Acquisition of Scheme Securities by Pika Bidco Pty Ltd

72. On 23 August 2021, the Trustee of Spark announced that it had entered a Scheme Implementation Deed with Bidco. Under the Deed, the Trustee of Spark agreed to propose to the holders of Spark Securities that they dispose of all of their Spark Securities to Bidco for money.

73. On 22 November 2021, the unit holders of Spark approved amendments to the constitution of Spark, and a resolution under table item 7 of section 611 of the Corporations Act (which applied to Spark pursuant to section 604 of the Corporations Act), to transfer all of the units in Spark to Bidco.

74. On 22 November 2021, the holders of the Loan Notes agreed to a creditors' scheme of arrangement under Part 5.1 of the Corporations Act to transfer all of the Loan Notes to Bidco. The creditors' scheme of arrangement was subsequently approved by the Supreme Court of New South Wales on 26 November 2021.

75. In order to facilitate the acquisition of Spark by Bidco, the Trustee of Spark transferred 1,754,954,280 A Class shares in each of SIH1, SIH2 and SIH3 to the unit holders of Spark on the Implementation Date, just prior to the acquisition by Bidco.

76. Each A Class share carried the right to receive 0.001 cents (one thousandth of a cent) on the winding up of the issuing company, but carried no voting power, dividend rights or other capital distribution rights.

77. Following the transfer of A Class shares, the Trustee of Spark stapled each Spark unit, each Loan Note, each A Class share in SIH1, each A Class share in SIH2 and each A Class share in SIH3 to form a Scheme Security on the Implementation Date (22 December 2021), just prior to the acquisition by Bidco.

78. Later on the Implementation Date, Bidco acquired the Scheme Securities from the holders of the Scheme Securities, being the entities who were holders of Spark Securities on the Scheme Record Date.

79. Under the acquisition, the holders of the Scheme Securities received \$2.7675 (Scheme Consideration) for transferring each Scheme Security to Bidco on the Implementation Date, consisting of:

- \$2.1175 for each Spark unit (\$2.30 less the amount of the Interim Distribution and the Special Distribution)
- 65 cents for each Loan Note, and
- nil for each A Class share in SIH1, SIH2 and SIH3.

80. Following the acquisition, Spark became a subsidiary member of the HoldCo TCG.

81. The Spark Securities were suspended from trading on the ASX from the close of trading on 29 November 2021.

82. On 23 December 2021, Spark was removed from the official list of the ASX.

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Other information

83. Spark is a fixed trust under section 272-65 of Schedule 2F to the ITAA 1936.

84. For the income year to which this Ruling applies:

- Spark's net income as adjusted by Division 6E of Part III of the ITAA 1936 was nil
- Spark's net income (disregarding the amount of any franking credits) was less than the sum of Spark's net capital gain and all franked dividends included in the assessable income of Spark for the income year
- franked dividends of \$276.6 million were included in the assessable income of Spark for the income year, and
- no net capital gain was included in the assessable income of Spark for the income year.

85. The Trustee of Spark is a 'qualified person' in relation to the franked dividends it received from SIH1 and SIH2.

86. The Interim Distribution and the Special Distribution were paid at the absolute discretion of the Trustee of Spark.

87. The Interim Distribution and the Special Distribution were the only distributions made by the Trustee of Spark to the holders of Spark Securities in the income year to which this Ruling applies.

88. Neither Bidco nor any of its associates funded, or were in any way connected to the funding of, the Interim Distribution or the Special Distribution.

Commissioner of Taxation

16 March 2022

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References

Previous draft:

Not previous issued as a draft

Legislative references:

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- ITAA 1936 26BB(1)
- ITAA 1936 26BB(2)
- ITAA 1936 70B(2)
- ITAA 1936 Pt III Div 6E
- ITAA 1936 former Pt IIIAA Div 1A
- ITAA 1936 128A(3)
- ITAA 1936 128B(3)
- ITAA 1936 128B(3)(ga)(i)
- ITAA 1936 128D
- ITAA 1936 128FA
- ITAA 1936 former 160APHD
- ITAA 1936 former 160APHE(2)
- ITAA 1936 former 160APHM
- ITAA 1936 former 160APHN
- ITAA 1936 former 160APHN(2)
- ITAA 1936 former 160APHN(3)(f)
- ITAA 1936 former 160APHN(4)(c)
- ITAA 1936 former 160APHN(4)(d)
- ITAA 1936 former 160APHP(1)(b)
- ITAA 1936 former 160APHN(2)
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- ITAA 1936 former 160APHP(1)(b)
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- ITAA 1936 177EA(5)(b)
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- ITAA 1997 Pt 3-90
- ITAA 1997 6-5
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- ITAA 1997 104-10
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- ITAA 1997 104-70(3)(b)
- ITAA 1997 104-70(4)
- ITAA 1997 104-70(6)
- ITAA 1997 108-5
- ITAA 1997 110-45(2)
- ITAA 1997 110-55(9)
- ITAA 1997 116-20(1)
- ITAA 1997 118-20(1)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 Subdiv 115-C
- ITAA 1997 204-30(3)
- ITAA 1997 Div 207
- ITAA 1997 207-20
- ITAA 1997 207-20(1)
- ITAA 1997 207-20(2)
- ITAA 1997 207-35(4)(b)(i)
- ITAA 1997 207-35(4)(b)(ii)
- ITAA 1997 207-37
- ITAA 1997 207-45
- ITAA 1997 207-55
- ITAA 1997 207-150(1)(a)
- ITAA 1997 207-70
- ITAA 1997 Div 230
- ITAA 1997 Div 275
- ITAA 1997 Subdiv 842-I
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001 Pt 5.1
- Corporations Act 2001 604
- Corporations Act 2001 611

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ATO references

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Income tax ~~ Assessable income ~~ Dividend income ~~ Dividend paid to non
resident
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 - disposal of a
CGT asset
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events E1 to E9 - trusts
Income tax ~~ Capital gains tax ~~ Capital proceeds
Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 177EA
Income tax ~~ Capital management ~~ Assessability of distribution
Income tax ~~ Capital management ~~ Franking credits / tax offsets
Income tax ~~ Capital management ~~ Qualified person rule
Income tax ~~ Trusts ~~ Managed investment trusts ~~ Stapled securities

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