



Class Ruling

Income tax: Return of capital, acquisition of new interests and stapling of securities to form a new stapled security: Centro Australia Wholesale Fund

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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

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:

- section 99B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-70 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- section 110-55 of the ITAA 1997;

- section 112-20 of the ITAA 1997;
- subsection 112-25(4) of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997; and
- section 130-60 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the holders of Centro Australia Wholesale Fund (CAWF) units who:

- participated in the Scheme that is the subject of this Ruling;
- were residents of Australia within the meaning of subsection 6(1) of the ITAA 1936 on 14 December 2011 (Implementation Date);
- held their units in CAWF on capital account; and
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their CAWF units.

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

In this Ruling, a person belonging to this class of entities is referred to as a 'CAWF unit holder'.

Qualifications

4. The Commissioner makes this Ruling on the precise scheme 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 18 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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3-5 National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

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

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:

- Class ruling application dated 17 October 2011 from CPT Manager Limited;
- Equalisation Model and calculations provided on 17 October 2011;
- Stapling Deed Centro Retail Australia dated 23 November 2011 and Deed of Accession and Amendment to the Stapling Deed dated 23 November 2011 (Stapling Deeds);
- CAWF Explanatory Memorandum dated 5 October 2011;
- Disclosure Document dated 5 October 2011; and
- Implementation Agreement as modified on 17 November 2011.

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

Background

10. CAWF is an open ended wholesale fund investing in quality Australian retail property.

11. The responsible entity for CAWF is Centro Retail Australia Limited.

12. On 9 August 2011, CAWF entered into an Implementation Agreement by way of which the Australian assets of CAWF, Centro Retail Group (CER), Centro DPF Holding Trust (DHT) and Centro Properties Group (CNP) were to be aggregated together to form a newly listed Australian retail shopping centre property group to be called Centro Retail Australia (CRA).

13. The restructure was approved by members of CNP, CER, CAWF and DHT on 22 November 2011 and was carried out on the Implementation Date.

Restructure

14. The following steps and transactions occurred on the Implementation Date pursuant to the Implementation Agreement and the Stapling Deeds:

- CAWF consolidated its issued units on the basis of an approximate ratio of 1:3.11 reducing the overall units in CAWF from 1,644,887,630 to 529,675,568;
- CAWF partially redeemed the number of units in accordance with the Implementation Agreement which resulted in a total of 315,922,529 units in CAWF remaining on issue;
- CAWF returned capital totalling \$561,691,727 by distributing an amount of \$1.7779 per unit to CAWF unit holders;
- CAWF satisfied the capital reduction by each CAWF unit holder receiving a new stapled security in CER (consisting of a unit in Centro Retail Trust (CRT) and an ordinary share in Centro Retail Limited (CRL)) and a new unit in DHT. Of the \$1.7779 per unit capital reduction amount, \$1.4075 was applied to subscribe for a stapled security in CER (all of which was applied to acquire the unit in CRT and no amount was applied to acquire the ordinary share in CRL) and \$0.3704 was applied to subscribe for a unit in DHT;
- CAWF was listed on the Australian Securities Exchange (ASX);
- each CAWF unit holder's units were legally stapled with their newly issued CER stapled securities and their newly issued units in DHT to form CRA stapled securities; and
- CRA stapled securities were listed on the ASX.

15. It was an objective that immediately after the restructure each CRA stapled security would have a net asset value of approximately \$2.50.

Class Action True-Up Securities (CATS)

16. CER is currently subject to class action litigation and the potential liability, if any, arising from the class action litigation is unknown. In order to compensate CAWF unit holders for any liability resulting from the litigation, options were issued on the Implementation Date to all CAWF unit holders on a 1:1 basis by each of DHT, CAWF and CER (an option was issued by each of CRL and CRT).

17. The options received from each of DHT, CAWF and CER by each CAWF unit holder were legally stapled to form CATS stapled securities. A CATS stapled security is not listed on the ASX.

18. A CATS stapled security provides its holder with an entitlement, at the choice of the majority of the issuers and subject to a cap, to either receive a cash payment or to be issued with new CRA stapled securities in the event CER becomes liable to pay specified amounts in relation to the CER class action litigation.

Ruling

Consolidation of units in CAWF

19. The consolidation of units in CAWF will not result in a CGT event happening (paragraph 112-25(4)(a)).

20. Each element of the cost base and reduced cost base of a new consolidated CAWF unit (at the time of consolidation) is the sum of the corresponding elements of the original units that are consolidated to form the new unit (paragraph 112-25(4)(b)).

21. Each CAWF unit holder is taken to have acquired the new consolidated units at the time that they acquired the original units to which they relate (section 109-5).

Return of capital by CAWF

Non-assessable payments

22. The return of capital by CAWF to CAWF unit holders is not assessable income of CAWF unit holders under section 99B of the ITAA 1936.

23. The return of capital by CAWF to CAWF unit holders is not assessable as ordinary income of CAWF unit holders under section 6-5.

CGT event E4

24. The return of capital (a non-assessable payment) by CAWF resulted in CGT event E4 happening to CAWF unit holders in respect of each of their CAWF units (section 104-70).

25. A CAWF unit holder will make a capital gain when CGT event E4 happens if the sum of all the non-assessable parts of payments made by the trustee during the income year in respect of a CAWF unit exceeds the cost base of the unit (subsection 104-70(4)). A CAWF unit holder cannot make a capital loss when CGT event E4 happens to their CAWF units.

26. Where a CAWF unit holder makes a capital gain when CGT event E4 happens, the cost base and reduced cost base of the CAWF unit are reduced to nil (subsection 104-70(5)).

27. However, if the sum of all the non-assessable parts of payments made by the trustee during the income year is less than or equal to the cost base of the CAWF unit, the cost base and reduced cost base of that CAWF unit will be reduced (but not below nil) by the non-assessable payments (subsection 104-70(6)). The non-assessable payments will include the amount of the capital return (\$1.7779).

28. A CAWF unit holder who makes a capital gain when CGT event E4 happens may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A.

Acquisition of new stapled securities in CER

29. The first element of the cost base and reduced cost base of each CRL share acquired by CAWF unit holders in satisfaction of the return of capital from CAWF will be nil (item 5 of the table in subsection 112-20(3)).

30. The first element of the cost base and reduced cost base of each CRT unit acquired by CAWF unit holders in satisfaction of the return of capital from CAWF will be \$1.4075 (subsection 110-25(2) and section 110-55).

31. A CAWF unit holder acquires the CRT units and the CRL shares at the time the units and the shares are issued or allotted to the unit holder, being 14 December 2011 (items 3 and 2 of the table in section 109-10).

Acquisition of new units in DHT

32. The first element of the cost base and reduced cost base of each DHT unit acquired by CAWF unit holders in satisfaction of the return of capital from CAWF will be \$0.3704 (subsection 110-25(2) and section 110-55).

33. A CAWF unit holder acquires the DHT units at the time the units are issued to the unit holder, being 14 December 2011 (item 3 of the table in section 109-10).

Implications of listing CAWF on the ASX

34. The listing of CAWF on the ASX will not result in any income tax consequences for CAWF unit holders.

Implications of the stapling of securities to form a CRA stapled security

35. No CGT event in Division 104 will happen because of the stapling of the shares in CRL and the units in CRT, CAWF and DHT to form a CRA stapled security.

Issue of CATS stapled securities

36. The issue of CATS stapled securities to CAWF unit holders is not assessable as ordinary income of CAWF unit holders under section 6-5.

37. No CGT event in Division 104 will happen to CAWF unit holders because of the issue of the CATS stapled securities to them.

38. A CAWF unit holder will acquire the CATS stapled securities at the time those securities are issued to the unit holder, being 13 December 2011 (items 2 and 3 of the table in section 109-10).

39. The first element of the cost base and reduced cost base of the CATS stapled securities will be nil (items 5 and 6 of the table in subsection 112-20(3)).

Redeeming of CATS stapled securities

40. CGT event C2 will happen when a CAWF unit holder's CATS stapled securities are redeemed for cash or for the issue of new CRA stapled securities.

41. If a CAWF unit holder's CATS stapled securities are redeemed for cash, the unit holder will make a capital gain to the extent that the cash amount received in respect of a CATS stapled security exceeds the cost base of that security at the time it is redeemed.

42. A CAWF unit holder who makes a capital gain if the CATS stapled securities are redeemed for cash may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A.

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43. If a CAWF unit holder's CATS stapled securities are redeemed for the issue of new CRA stapled securities, any capital gain or capital loss made when CGT event C2 happens will be disregarded (subsection 130-60(3)). The first element of the cost base and reduced cost base of the CRA stapled securities acquired will be calculated in accordance with subsection 130-60(1) at the time the CATS stapled securities are redeemed.

Commissioner of Taxation

1 February 2012

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Consolidation of units in CAWF

44. The Ruling section provides an explanation of the Commissioner's decision in this regard. No further explanation is warranted.

Return of capital by CAWF

Non-assessable payments

45. Division 6 of Part III of the ITAA 1936 is the primary scheme for including distributions from trusts in the assessable income of beneficiaries. Subsection 99B(1) of the ITAA 1936 provides that an amount, being property of a trust estate, paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during the year of income, is assessable income of the beneficiary, subject to the exceptions in subsection 99B(2) of the ITAA 1936.

46. Based on the facts, CAWF unit holders will not include the payment from CAWF in their assessable income under subsection 99B(1) of the ITAA 1936.

47. Section 6-5 provides that a taxpayer's assessable income includes income according to ordinary concepts (ordinary income).

48. In *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514, Windeyer J stated at page 526 that:

Whether or not a particular receipt is income depends upon its quality in the hands of the recipient

49. The High Court of Australia in *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124 at page 138 unanimously stated that the following factors were important in determining the nature of receipt:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes, the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

50. The payment by CAWF to CAWF unit holders does not have the character of income in the hands of the CAWF unit holders and will not be ordinary income of CAWF unit holders under section 6-5.

CGT event E4

51. Under section 104-70, CGT event E4 happens if the trustee of a trust makes a payment to a unit holder in respect of their unit in the trust, and some or all of the payment is not included in the unit holder's assessable income (the non-assessable payment).

52. The total amount of the capital distribution by CAWF to CAWF unit holders will be \$1.7779 per unit. No part of this amount will be included in the assessable income of CAWF unit holders. Therefore, CGT event E4 will happen to each CAWF unit as a result of the capital distribution by CAWF.

53. The consequences of CGT event E4 happening are determined on an annual basis having regard to all such CGT events that happen to a unit during an income year (subsection 104-70(3)).

54. A CAWF unit holder will make a capital gain when CGT event E4 happens to the extent (if any) that the sum of all the non-assessable parts of payments made by the trustee during the income year in respect of a CAWF unit exceeds the cost base of the unit (subsection 104-70(4)).

55. Where a CAWF unit holder makes a capital gain when CGT event E4 happens, the cost base and reduced cost base of the CAWF unit are reduced to nil (subsection 104-70(5)).

56. However, if the sum of all the non-assessable parts of payments made by the trustee during the income year is less than or equal to the cost base of the CAWF unit, the cost base and reduced cost base of that CAWF unit will be reduced (but not below nil) by the non-assessable payments (subsections 104-70(6)). The non-assessable payments will include the amount of the capital return (\$1.7779).

57. A CAWF unit holder who makes a capital gain when CGT event E4 happens may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A. The time when CGT event E4 happens to each CAWF unit is determined in accordance with subsection 104-70(3).

Acquisition of new stapled securities in CER

58. Subsection 112-20(1) states that the first element of the cost base and reduced cost of a CGT asset is its market value at the time of acquisition if no expenditure was incurred to acquire it. However, there is an exception where the CGT asset is a share in the company and no expenditure was incurred to acquire the share (Item 5 of the table in subsection 112-20(3)).

59. Accordingly, the first element of the cost base and reduced cost base of each newly acquired CRL share by CAWF unit holders will be nil since no part of the return of capital that was applied by CAWF on behalf of its unit holders to acquire CER stapled securities was applied to acquire CRL shares.

60. Subsections 110-25(2) and 110-55(2) state that the first element of the cost base and reduced cost base of a CGT asset is the total of any money paid, or required to be paid, and the market value of any other property given or required to be given in respect of acquiring the asset.

61. Accordingly, the first element of the cost base and reduced cost base of each newly acquired CRT unit by CAWF unit holders is \$1.4075, being the amount applied by CAWF on behalf of its unit holders to subscribe for each CRT unit.

62. Each CRT unit and CRL share (forming a CER stapled security) are acquired by a CAWF unit holder at the time the units and the shares are issued or allotted to the unit holder, being 14 December 2011 (items 3 and 2 of the table in section 109-10).

Acquisition of new units in DHT

63. Under subsections 110-25(2) and 110-55(2), the first element of the cost base and reduced cost base of each newly acquired DHT unit by CAWF unit holders is \$0.3704, being the amount applied by CAWF on behalf of its unit holders to subscribe for each DHT unit.

64. Each DHT unit is acquired by a CAWF unit holder at the time the units are issued to the unit holder, being 14 December 2011 (item 3 of the table in section 109-10).

Implications of listing CAWF on the ASX

65. The Commissioner does not consider that any further explanation of his decision in this regard is warranted.

Implications of the stapling of securities to form a CRA stapled security

66. The effect of the stapling arrangement is to apply restrictions to the transferability of the individual securities that together make up the CRA stapled security, such that they cannot be sold separately. Each individual security (that is, each share in CRL and unit in CRT, CAWF and DHT) will retain its legal character without any change in beneficial ownership. There is no variation to the rights or obligations attaching to, or the beneficial ownership of, the individual securities comprising the CRA stapled security as a consequence of stapling.

67. Therefore, no CGT event in Division 104 will happen as a consequence of the stapling of shares in CRL and units in CRT, CAWF and DHT to form a CRA stapled security.

Issue of CATS stapled securities

Section 6-5

68. As stated at paragraph 47 of this Ruling, section 6-5 provides that a taxpayer's assessable income includes ordinary income. The receipt of CATS stapled securities by CAWF unit holders does not have the character of income in the hands of the CAWF unit holders and does not constitute the derivation of ordinary income for the purposes of section 6-5.

CGT Consequences

69. No CGT event in Division 104 will happen to CAWF unit holders as a result of the CATS stapled securities being issued to them.

70. Under items 2 and 3 of the table in section 109-10, the CATS stapled securities are acquired by a CAWF unit holder at the time that they were issued to the unit holder, being 14 December 2011.

71. As no consideration was paid to acquire the CATS stapled securities by CAWF unit holders, the first element of the cost base and reduced cost base of the CATS stapled securities will be nil. The market value substitution rule in section 112-20 will not apply due to the exceptions in items 5 and 6 of the table in subsection 112-20(3).

Redeeming of CATS stapled securities

72. CGT event C2 occurs when the ownership of an intangible asset ends by way of the asset being redeemed. Accordingly, CGT event C2 will happen when a CAWF unit holder's CATS stapled securities are redeemed.

Redeeming of CATS stapled securities for cash

73. If a CAWF unit holder's CATS stapled securities are redeemed for cash, the unit holder will make a capital gain to the extent that the cash amount received in respect of a CATS stapled security exceeds the cost base of that security at the time it is redeemed.

74. A CAWF unit holder who makes a capital gain if the CATS stapled securities are redeemed for cash may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A.

Redeeming of CATS stapled securities for CRA stapled securities

75. Subdivision 130-C outlines the CGT consequences that occur if a person acquires shares or units by converting a convertible interest. Subsection 130-60(3) provides for any capital gain or capital loss made from converting the convertible interest to be disregarded.

76. Pursuant to the definitions in section 995-1 and subsection 974-75(1), a convertible interest includes an interest that may be converted into an equity interest in the issuing company or trust.

77. Each of the options forming the CATS stapled securities are convertible interests as defined in the ITAA 1997. Accordingly, if a CAWF unit holder's CATS stapled securities are redeemed for the issue of new CRA stapled securities, any capital gain or capital loss made when CGT event C2 happens will be disregarded under subsection 130-60(3).

78. The first element of the cost base and reduced cost base of the acquired CRA stapled securities will be calculated in accordance with subsection 130-60(1) at the time the CATS stapled securities are redeemed.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- acquisition dates
- capital gains
- CGT cost base
- trusts
- stapled structure

Legislative references:

- ITAA 1936 99B
- ITAA 1997 6-5
- ITAA 1997 104-70
- ITAA 1997 109-10

- ITAA 1997 110-25(2)
- ITAA 1997 110-55
- ITAA 1997 112-20
- ITAA 1997 112-25(4)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 130-60
- ITAA 1997 974-75(1)
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968

Case references:

- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124

ATO references

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