



## Class Ruling

### Income tax: APN Champion Retail Fund – cancellation of units

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#### **① 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. The relevant provisions dealt with in this Ruling are:

- subsection 177D(2) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 116-20 of the ITAA 1997, and
- section 116-30 of the ITAA 1997.

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

## Class of entities

3. The class of entities to which this Ruling applies are the holders of Ordinary units or Class A units in the APN Champion Retail Fund (CRF) who:

- had their units cancelled as a result of a determination made by the APN FM on or around 31 July 2016
- held their units 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 units in CRF.

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

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

## Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 22 of this Ruling.

7. 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.

## Date of effect

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8. This Ruling applies from 1 July 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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).

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## 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:

- Class Ruling application dated 4 May 2016
- APN Champion Retail Fund Constitution (the Constitution)
- Minutes for a meeting of directors of APN Funds Management Ltd held on or around 31 July 2016, and
- other correspondence received from the applicant on 4 May 2016.

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

### Champion Retail Fund

10. CRF is an Australian resident unit trust and a fixed term unlisted property fund established in 2008 to invest in a portfolio of supermarkets across Greece. The responsible entity for CRF is APN Funds Management Ltd (APN FM).

11. At all relevant times, CRF's property assets were owned by Zenon Real Estate SA (Zenon), an entity under CRF's control.

12. The property portfolio was originally acquired for a total cost of approximately €76.6 million. By June 2012, the value of the property portfolio had fallen to €36.9 million, and currently the property portfolio is valued at €16.3 million. CRF has been in a net liability position since 2012.

13. In the year ending 30 June 2015, the directors of APN FM resolved that CRF could no longer be considered to be a going concern.

14. CRF has prepared its consolidated financial statements on the wind-up basis of accounting for the year ended 30 June 2015. The financial report for that financial year shows CRF's net asset deficiency as approximately €24.1 million.

15. It is extremely unlikely that the proceeds from the sale of the assets will exceed the value of the outstanding debt.

16. On 22 April 2016, APN FM wrote to the CRF unit holders notifying them that, among other things, there would be no further returns from CRF to the unit holders and that from 31 July 2016 APN FM would commence the winding up and realisation of CRF's assets.

17. To facilitate the wind-up of CRF, an application has been lodged in Greece to place Zenon into Special Administration. The wind-up is unlikely to be resolved within five years.

## **Wind up/cancellation of units**

18. In the course of the winding up of CRF and under clause 26.7 of the Constitution, APN:

- made a final determination that there will be no final distribution from the net proceeds of the realisation of CRF's assets, and
- made a determination, the effect of which was that 99.9% of the issued units in CRF was cancelled.

19. APN also proposes to lodge with the Australian Securities and Investments Commission (ASIC) a Form 5138 *Notification of commencement or completion of winding up of a registered scheme* in respect of CRF.

20. The unit holders were not entitled to any consideration for the cancellation of their units.

## **Assumptions**

21. The Commissioner assumes for the purposes of this Ruling that:

- the declaration by APN FM that there will be no final distribution to unit holders of the net proceeds from realisation of the assets of the fund is a 'final distribution' of those net proceeds that triggered the operation of clause 26.7 of the Constitution
- APN FM's power to 'determine otherwise' under clause 26.7 of the Constitution is a power to determine that some or all of the existing units are not to be cancelled and taken to be redeemed under that clause (subject to any other relevant provisions in the Constitution and to the applicable general law governing the APN FM's performance of its functions under the Constitution), and
- the market value of the units at the time of their cancellation was nil.

## **Ruling**

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### **CGT Capital Loss**

22. CGT event C2 happened in relation to each unit holder when their units in CRF were cancelled under the scheme (section 104-25).

23. The capital proceeds received by each unit holder from CGT event C2 happening are taken to be nil (sections 116-20 and 116-30).

24. A unit holder made a capital loss upon the pro rata cancellation of their CRF units equal to their reduced cost base (subsection 104-25(3)).

#### **Part IVA**

25. On the basis of the assumptions set out in paragraph 20 of this Ruling, Part IVA of the ITAA 1936 would not apply to the scheme. On balance, it would not be concluded, having regard to the factors set out in subsection 177D(2) of the ITAA 1936, that choosing to permit the cancellation of most, as opposed to none, of the issued units was done for the dominant purpose of obtaining a tax benefit for unit holders.

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**Commissioner of Taxation**

31 August 2016

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## 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.*

26. Under section 108-5 each unit in CRF is a CGT asset.

27. CGT event C2 happened when each unit in CRF was cancelled on or around 31 July 2016 (subsection 104-25(1)).

28. A unit holder made a capital gain when CGT event C2 happened if the capital proceeds from the ending of the CRF unit were more than the cost base of the unit. Conversely, a unit holder made a capital loss if the capital proceeds were less than the reduced cost base of the unit (subsection 104-25(3)).

29. Unit holders have been advised that they will receive no consideration from the ending of their CRF units when CGT event C2 happened. Under subsection 116-30(1) where no capital proceeds are received in respect of a CGT event the unit holders will be taken to have received the market value of the CRF units. On this occasion however, the market value of the CRF units is also nil.

30. Accordingly, as the capital proceeds from the ending of their CRF units when CGT event C2 happened are nil, unit holders made a capital loss equal to the reduced cost base of their CRF units.

## **Appendix 2 – Detailed contents list**

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

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## References

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|                                        |                       |
|----------------------------------------|-----------------------|
| <i>Previous draft:</i>                 | - ITAA 1997 104-25    |
| Not previously issued as a draft       | - ITAA 1997 104-25(1) |
|                                        | - ITAA 1997 104-25(3) |
| <i>Related Rulings/Determinations:</i> | - ITAA 1997 108-5     |
| TR 2006/10                             | - ITAA 1997 116-20    |
|                                        | - ITAA 1997 116-30    |
| <i>Legislative references:</i>         | - ITAA 1997 116-30(1) |
| - ITAA 1936                            | - TAA 1953            |
| - ITAA 1936 177D(2)                    |                       |
| - ITAA 1997                            |                       |

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### ATO references

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