CR 2003/47 - Income tax: capital gains: amendment of trust deed: possibility of resettlement of Trust: Macquarie Property Securities Fund

Class Ruling
Income tax: capital gains: amendment of trust deed: possibility of resettlement of Trust: Macquarie Property Securities Fund

Contents Para

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**, **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

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 laws dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- sections 102-5 and 102-20 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- section 104-10 of the ITAA 1997 (capital gains tax (CGT) event A1 – disposal of a CGT asset);
- section 104-25 of the ITAA 1997 (CGT event C2 – ownership of an intangible CGT asset comes to an end);
- section 104-55 of the ITAA 1997 (CGT event E1 – creation of a trust over a CGT asset);
- section 104-60 of the ITAA 1997 (CGT event E2 – transfer of a CGT asset to a trust);

- section 104-65 of the ITAA 1997 (CGT event E3 – conversion of a trust to an unit trust);
- section 104-70 of the ITAA 1997 (CGT event E4 – capital payment for a trust interest);
- section 104-75 of the ITAA 1997 (CGT event E5 – a beneficiary becomes entitled to a trust asset);
- section 104-80 of the ITAA 1997 (CGT event E6 – disposal to beneficiary to end income right);
- section 104-90 of the ITAA 1997 (CGT event E8 – disposal by beneficiary of capital interest);
- section 136-10 of the ITAA 1997; and
- section 136-25 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies is:

- the unitholders of the Macquarie Property Securities Fund as constituted by deed dated 20 July 1993 (the Trust) who are either residents of Australia as defined in subsection 6(1) of the ITAA 1936 or who are non-resident but subject to capital gains tax under the provisions of sections 136-10 and 136-25 of the ITAA 1997; and
- the Responsible Entity (trustee) of the Trust.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

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 described below at paragraphs 11 to 18 in this Ruling.

6. If the arrangement actually carried out is materially different from the arrangement that is 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.

Date of effect

8. This ruling applies to the years of income ended 30 June 2004, 2005 and 2006.

Background

9. The Macquarie Property Securities Fund is constituted as a unit trust with only one class of beneficiary (unitholder). It is registered as a managed investment scheme under section 601EB of the *Corporations Act 2001* and Macquarie Investment Management Ltd. is the Responsible Entity of the Trust for the purposes of this last-mentioned Act.

10. The Responsible Entity proposes to amend the current deed of trust in order that the proposed amendments take effect immediately after the distribution period ending on 30 September 2003. The Responsible Entity is concerned that the amendments may amount to the termination of the Trust and the creation of a new trust with various capital gains tax consequences for the unitholders.

Arrangement

11. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents:

- Application for Class Ruling dated 24 January 2003 in relation to the proposed amendment of the deed of trust of the Macquarie Property Securities Fund;

- The current deed of trust (Appendix 1 of the application);
- The deed of trust incorporating the proposed amendments in 'marked-up' form (Appendix 2 of the application); and
- The Information Memorandum for the Wholesale Pooled Funds managed by Macquarie Investment Management Ltd. (as updated on 13 January 2003).

12. Clauses 1, 2 and 3 of the current deed of trust provide that the unitholders are beneficially entitled to both the income and capital of the Trust in proportion to their unitholding. The Trust's net income is not defined in terms of taxation concepts, but rather in terms of general law. Sub-clause 15(1) of the deed provides that the Responsible Entity has the discretion to decide if realised capital gains and losses form part of the income of the Trust. Sub-clauses 15(8) and (9) provide that income 'distributions' at the end of a Distribution Period (currently a quarter) take the form of reinvestment (the issue of units by the Responsible Entity) unless the Responsible Entity offers unitholders the option of a distribution in cash instead. The proposed amendments will not change these provisions.

13. Clause 1 and sub-clauses 15(2), (4) and (6) provide that net income is calculated and allocated to all unitholders on a weekly basis; distribution takes place on a quarterly basis. Any net loss made by the Trust (as calculated on a weekly basis) is also allocated proportionately to all unitholders, thereby reducing their Accumulated Income Entitlement (the aggregation of entitlements not as yet distributed).

14. Unit prices are calculated by deducting the aggregate of Accumulated Income Entitlements of the unitholders from the Net Asset Value (NAV) of the Trust, the NAV being determined by deducting liabilities from assets. The (adjusted) net asset value is then divided by the total number of units on issue to produce a price per unit. This price per unit is further adjusted by adding transaction costs and any application or withdrawal fees to produce the unit price. This unit price is used as the Deposit Price on subscription for units and as the Withdrawal Price on the redemption of units.

15. If a unitholder's Accumulated Income Entitlement is negative at a distribution date, the Responsible Entity may redeem some of the unitholder's units in order to make good the shortfall (sub-clause 15(7)).

16. Under sub-clause 6(3), if a unitholder with a negative Accumulated Income Entitlement redeems its investment in the Trust between Distribution Dates, the withdrawal proceeds payable by the Responsible Entity for the redeemed units is reduced by the negative

amount. A positive Accumulated Income Entitlement is paid out (in addition to unit price) on redemption if the entire unitholding is redeemed.

17. If only partial redemption occurs, the entire Accumulated Income Entitlement is retained within the Trust until the next Distribution Date when it is paid to the unitholder or until the redemption of the balance of the unitholding (whichever happens first).

18. Under the proposed amendments:

- the calculation and allocation of net income of the Trust will occur on a quarterly rather than a weekly basis;
- such allocation may only occur if there is a positive net income amount. Net losses will no longer be allocated to unitholders. Under the current deed a unitholder's balance of Accumulated Income Entitlement between Distribution Dates could be negative because of the previous (weekly) allocation of losses. Under the proposed amendments such losses will be absorbed within the Trust and will be reflected in a reduced unit price as they will affect the Net Asset Value of the Trust. Unitholders will therefore have the same net outcome under the proposed amendments as under the current trust deed;
- the Responsible Entity will no longer have the power to call for units to make good any negative Accumulated Income Entitlements. This power will be redundant in a situation where Accumulated Income Entitlements can no longer be negative. Also, there will no longer be a need to make good an operating loss of the Trust as such a loss would flow through to reduce unit price; and
- the calculation of Withdrawal Price on redemption of units and Deposit Price on subscription for units will no longer involve the additional step of deducting the aggregate of Accumulated Income Entitlements from Net Asset Value. The calculation of both Withdrawal and Deposit Price will be amended to result in Accumulated Income Entitlements being "wrapped up" in the Net Asset Value of the Trust between Distribution Dates rather than being separately accounted for. As the price per unit is a reflection of Net Asset Value, it will also have been affected by the previous operating results (i.e. either net income or

losses) of the Trust as a whole. Unitholders will have the same net outcome as under the current deed.

Ruling

19. The CGT events described at paragraph 2 will not occur in relation to the class of persons to which this Ruling applies when the proposed amendments are made to the trust deed, as the Commissioner considers that the amendments will not amount to the termination of a trust and the creation of a new trust in respect of the Macquarie Property Securities Fund.

Explanation

20. This is a ruling on the income tax effect of the proposed amendments to the current deed of trust. The proposed amendments to the deed including those relating to the pricing of units will be subject to the *Corporations Act 2001*, in particular Chapter 5C of that Act. This Ruling should not be taken as implying any view as to whether the *Corporations Act 2001* has been complied with.

21. Amendment to the constitution of a trust may alter the nature and character of the trust relationship to such an extent that for the purposes of trust law the previous trust has come to an end and a new trust has been created. In such circumstances a resettlement is said to have taken place in respect of all or only part of the assets of the original trust. The effect at common law of such a resettlement is that there has been a disposal of the trust assets, and as such is likely to have capital gains tax consequences. Specifically, a capital gain could accrue to a beneficiary as a result of the occurrence of various capital gains tax events. This capital gain would form part of the beneficiary's assessable income for tax purposes unless the beneficiary had other capital losses against which the gain could be netted off

22. The Commissioner of Taxation (Commissioner) released a Statement of Principles on 29 August 2001 to provide guidance on when the Commissioner will treat changes as giving rise to a new trust estate. The Statement of Principles does not cover all possibilities or circumstances of every taxpayer. The answer to whether alterations to trusts, taken together, result in terminations and creations of trust estates will generally flow from establishing whether the essential character and nature of the original trust relationship has fundamentally changed.

23. The proposed changes to the deed generally do not fail the indicia of continuity of the trust as set out in paragraph 4 of the Statement of Principles. The proposed change to the powers of the Responsible Entity discussed in paragraph 18 will not result in a change to the essential nature of the relationship between the trustee (Responsible Entity) and the beneficiaries (unitholders).

24. The proposed amendments to the Trust deed will, when implemented, result in procedural changes to the administration of the Trust.

25. The Commissioner does not consider that the proposed amendments to the terms of the Trust result in a fundamental change to the essential nature and character of the original trust relationship. It is the view of the Commissioner that the proposed amendments will not disturb the continuity of the Macquarie Property Securities Fund.

Detailed contents list

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

Commissioner of Taxation
25 June 2003

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 97/16

Subject references:
- capital gains tax
- CGT event A1
- CGT event C2

- CGT events E1-E6 inclusive
- CGT event E8
- present entitlement
- trusts
- trust resettlements
- unit trusts
- unitholders

Legislative references:

- Corporations Act 2001 ch. 5C
- Corporations Act 2001 601EB
- ITAA 1936 6(1)
- ITAA 1997 102-5
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-55
- ITAA 1997 104-60
- ITAA 1997 104-65
- ITAA 1997 104-70
- ITAA 1997 104-75
- ITAA 1997 104-80
- ITAA 1997 104-90
- ITAA 1997 136-10
- ITAA 1997 136-25
- Copyright Act 1968
- TAA 1953 Part IVAAA

Other References:

- Creation of a new trust – Statement of Principles August 2001

ATO references
NO: 2003/006668
ISSN: 1445 2014