



CR 2006/30 - Income tax: capital gains: amendment of constitution: possibility of creation of a new trust: Macquarie Infrastructure Trust (II)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2005*



Class Ruling

Income tax: capital gains: amendment of constitution: possibility of creation of a new trust: Macquarie Infrastructure Trust (II)

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① This Ruling 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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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 taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant taxation provision(s)

2. The relevant taxation provisions dealt with in this Ruling are:

- section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 97 and 98 of the 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 – cancellation, surrender and similar endings);
- section 104-55 of the ITAA 1997 (CGT event E1 – creating a trust over a CGT asset);

- section 104-60 of the ITAA 1997 (CGT event E2 – transferring a CGT asset to a trust);
- section 104-70 of the ITAA 1997 (CGT event E4 – capital payment for trust interest);
- section 104-75 of the ITAA 1997 (CGT event E5 – beneficiary becoming 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 104-155 of the ITAA 1997 (CGT event H2 – receipt for event relating to a CGT asset);
- section 136-10 of the ITAA 1997; and
- section 136-25 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is:
 - the unitholders of the Macquarie Infrastructure Trust (II) (the Trust) who are either residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936 or non-residents of Australia who are subject to capital gains tax under the provisions of sections 136-10 and 136-25 of the ITAA 1997; and
 - Macquarie Infrastructure Investment Management Limited, as trustee of the Trust (the Responsible Entity).

Qualifications

4. The Commissioner makes this Ruling based 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 13 to 26 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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Date of effect

8. This Ruling applies to the income year (as defined in subsection 995-1(1) of the ITAA 1997) for a unitholder in which the Constitution of the Trust is amended. For a unitholder that does not have a substituted accounting period, this will be the income year ending 30 June 2006. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

12. This Ruling is withdrawn and ceases to have effect after 30 June 2006. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

13. The scheme that is the subject of this Ruling is described below. This description is based on a number of documents. 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 scheme are:

- Application for class ruling from Mallesons Stephen Jaques dated 7 December 2005 on behalf of the Responsible Entity of the Trust;
- Constitution of the Trust incorporating the proposed amendments in 'marked-up' form (Annexure 1 of the application).

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

Background

14. Macquarie Infrastructure Investment Management Limited is the Responsible Entity of the Trust within the meaning of the *Corporations Act 2001* (the Corporations Act).

15. The Trust is a registered managed investment scheme under Chapter 5C of the Corporations Act.

16. The Trust is a public trading trust for the purposes of Division 6C of Part III of the ITAA 1936. For the purposes of the tax law, the Trust is treated as if it were a company.

17. It is anticipated that the Trust will continue to be a public trading trust.

18. The Constitution governing the Trust was executed on 18 July 1996 and amended on several occasions thereafter.

19. Pursuant to clause 3.1 of the Constitution, the beneficial interest in the Trust is divided into units. The Trust has only one class of units and each unit has an equal undivided interest in the income and capital of the Trust.

20. The units in the Trust, as provided under clauses 27 and 27A of the Constitution, are stapled units. Each unit in the Trust is stapled to a unit in the Macquarie Infrastructure Trust (I) (MIT I) and a share in Macquarie Infrastructure Group International Limited. These securities are stapled together so that one may not be transferred or otherwise dealt with without the other.

21. The Net Income of the Trust is provided for under Clause 9.3 of the Constitution which states:

The Manager must determine the net income of the Trust for each Period. The Net Income of the Trust for a Period is to be the Taxable Period Income for the Period but if it is necessary in calculating the Taxable Period Income to gross up any amount of income, or include any amount of deemed assessable income or to make any deemed deductions, the grossing up or deemed assessable income (excluding net capital gains included in assessable income) or deemed deductions must not be included in calculating the Net Income of the Trust for the Period unless the Manager determines that the grossing up or deemed assessable income or deemed deductions should be included in calculating the Net Income of the Trust.

22. The Net Income of the Trust is distributed in accordance with clause 9.30 of the Constitution. Such income is allocated to unitholders on a pro-rata basis.

Proposed amendment

23. The Responsible Entity proposes to amend clause 9.3 of the Constitution to ensure that the methodology for calculating Net Income is consistent with the methodology applied by MIT I.

24. The amended clause 9.3 is to read:

The Manager must determine the net income of the Trust for each Period. Unless the Manager in its discretion otherwise determines, the Net Income of the Trust for a Period is to be the Taxable Period Income for the Period but if it is necessary in calculating the Taxable Period Income to gross up any amount of income, or include any amount of deemed assessable income or to make any deemed deductions, the grossing up or deemed assessable income (excluding net capital gains included in assessable income) or deemed deductions must not be included in calculating the Net Income of the Trust for the Period unless the Manager determines that the grossing up or deemed assessable income or deemed deductions should be included in calculating the Net Income of the Trust.

25. Under the proposed amendment, the Responsible Entity will hold a discretion to determine the Net Income of the Trust for a Period by reference to a methodology other than the methodology set out under the existing clause 9.3.

26. The Responsible Entity proposes to make the amendment to the Constitution on or before 30 June 2006.

Ruling

27. The amendment to the Constitution of the Trust will not result in the termination of the Trust and the creation of a new trust; thus, for the purposes of including an amount of assessable income under section 97 or 98 of the ITAA 1936, the CGT events described at paragraph 2 of this Ruling will not occur.

Commissioner of Taxation

19 April 2006

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.*

28. This is a Ruling on the income tax effect of the amendment as described in the application to the Constitution current as at the date of the application. The amendment to the Constitution is subject to the Corporations Act, in particular Chapter 5C of that Act. This Ruling should not be taken as implying any view as to whether the Corporations Act has been complied with.

29. An 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, with the ensuing 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 (section 102-5 of the ITAA 1997).

30. The Commissioner issued a Statement of Principles on 29 August 2001 (the Statement) to provide guidance on when the Commissioner will treat changes as giving rise to a new trust estate. The Statement 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 flow from establishing whether the essential character and nature of the original trust relationship has fundamentally changed.

31. The amendment to the Constitution as described in the application results in a procedural change. That change does not fail the indicia of continuity of the trust as set out in paragraph 4 of the Statement.

32. The Commissioner does not consider that the change to the terms of the Trust as described in the application results in a fundamental change to the essential nature and character of the original trust relationship. It is the view of the Commissioner that the change does not disturb the continuity of the Trust.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- CGT events
- trusts
- trust resettlements
- unit trusts
- unitholders

Legislative references:

- Copyright Act 1968
- Corporations Act 2001
- Corporations Act 2001 Ch 5C
- ITAA 1936 6(1)
- ITAA 1936 97
- ITAA 1936 98
- ITAA 1936 Pt III Div 6C
- ITAA 1997 102-5
- ITAA 1997 102-20

- ITAA 1997 104-10

- ITAA 1997 104-25

- ITAA 1997 104-55

- ITAA 1997 104-60

- ITAA 1997 104-70

- ITAA 1997 104-75

- ITAA 1997 104-80

- ITAA 1997 104-90

- ITAA 1997 104-155

- ITAA 1997 136-10

- ITAA 1997 136-25

- ITAA 1997 995-1(1)

- TAA 1953

- TAA 1953 Sch 1 357-75(1)

Other references:

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

ATO references

NO: 2006/5759

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ CGT events E1 to
E9 - trusts
Income Tax ~~ Entity specific matters ~~ trusts