CR 2012/9 - Income tax: Return of capital: Centro Properties Group

Class Ruling

Income tax: Return of capital: Centro Properties Group

Contents Para

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

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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; and
- Subdivision 115-A 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 Properties Group (CNP) stapled securities 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 CNP stapled securities 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 CNP stapled securities.

  (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 'CNP security 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 17 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.

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;
- Implementation Agreement as modified on 17 November 2011;
- Senior Facilities Continuation Agreement dated 15 January 2009;
- Escrow Deed dated 8 August 2011;
- Junior Stakeholder Allowance Agreement dated 29 July 2011; and
- Senior Lenders Scheme Booklet dated 5 October 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.

10. CNP was a fully integrated fund involved in the ownership, leasing, management and redevelopment of retail property in Australasia and the United States of America (USA).

11. CNP is listed (on a suspended basis) on the Australian Securities Exchange (ASX) as a stapled security. Each stapled security consists of one separate CNPR Limited (CNPR) ordinary share and one separate Centro Property Trust (CPT) unit. The effect of the stapling is that the CNPR shares and CPT units can only be dealt with as one security on the ASX.

12. The responsible entity for CPT is CPT Manager Limited.

13. On 28 February 2011, CNP entered into a binding purchase agreement to sell all of its assets in the USA for US$9.4 billion. The sale was completed on 29 June 2011. An amount of $170 million from the sale proceeds was retained and paid into an escrow account pursuant to the Junior Stakeholder Allowance Agreement and the Escrow Deed (Escrow Amount).

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

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

16. Upon approval of the restructure, pursuant to clause 12.3 of the Implementation Agreement, part of the Escrow Amount was available for distribution by CNP to its security holders and unsecured creditors (Junior Stakeholder Amount).

17. On 22 December 2011, CNP paid an amount of $48,925,082 out of the Junior Stakeholder Amount to CNP security holders. An amount of $0.0503 was paid to CNP security holders in respect of each of their CPT units. No amount was paid to CNP security holders in respect of their CNPR shares.

Ruling

Return of capital by CPT

Non-assessable payment

18. The payment of $0.0503 per unit by CPT to CNP security holders in respect of their CPT units is not assessable income of CNP security holders under section 99B of the ITAA 1936.

19. The payment of $0.0503 per unit by CPT to CNP security holders in respect of their CPT units is not assessable as ordinary income of CNP security holders under section 6-5.

CGT Event E4

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

21. A CNP security 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 the CPT unit exceeds the cost base of the unit (subsection 104-70(4)). A CNP security holder cannot make a capital loss when CGT event E4 happens to their CPT units.

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

23. 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 CPT unit, the cost base and reduced cost base of that CPT 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 ($0.0503).

CGT Discount

24. A CNP security 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.

Commissioner of Taxation
1 February 2012

Appendix 1 – Explanation

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.

Return of capital by CPT

Non-assessable payment

25. 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.

26. Based on the facts, CNP security holders will not include the payment from CPT in their assessable income under subsection 99B(1) of the ITAA 1936.

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

28. 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

29. 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.

30. The payment from CPT does not have the character of income in the hands of the CNP security holders and will not be ordinary income of CNP security holders under section 6-5.

CGT event E4

31. 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).

32. The total amount of the capital distribution by CPT to CNP security holders will be $0.0503 per unit. No part of this amount will be included in the assessable income of CNP security holders. Therefore, CGT event E4 will happen to each CPT unit as a result of the capital distribution by CPT.

33. 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)).

34. A CNP security 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 CPT unit exceeds the cost base of the unit (subsection 104-70(4)).

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

36. 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 CPT unit, the cost base and reduced cost base of that CPT 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 ($0.0503).

CGT discount

37. A CNP security 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 CPT unit is determined in accordance with subsection 104-70(3).

Appendix 2 – Detailed contents list

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

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

Legislative references:

- ITAA 1936 99B
- ITAA 1997 6-5
- ITAA 1997 104-70
- ITAA 1997 Subdiv 115-A
- 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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