

***CR 2014/36 - Income tax: CFS Retail Property Trust Group stapled security - units in CFS Retail Property Trust 2 replaced by shares in CFX Co Limited***

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## Class Ruling

# Income tax: CFS Retail Property Trust Group stapled security – units in CFS Retail Property Trust 2 replaced by shares in CFX Co Limited

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>23</b>
<b>Appendix 1 – Explanation</b>	<b>42</b>
<b>Appendix 2 – Detailed contents list</b>	<b>57</b>

### ● 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 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:

- Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 99B of the ITAA 1936
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Division 104 of the ITAA 1997
- section 110-25 of the ITAA 1997
- section 110-55 of the ITAA 1997
- Division 115 of the ITAA 1997
- Division 725 of the ITAA 1997, and

- Division 727 of the ITAA 1997.

All legislative references in this Ruling 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 stapled securities in the CFS Retail Property Trust Group (which is made up of one unit in CFS Retail Property Trust 1 (CFX 1) and one unit in CFS Retail Property Trust 2 (CFX 2)) who:

- (a) are listed on the unit register of CFX 1 and CFX 2 as at the Record Date (18 March 2014) for the capital distribution in respect of the units in CFX 1
- (b) do not hold their units in CFX 1 and CFX 2 as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, the holders hold their units broadly on capital account
- (c) are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their units.

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

## 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 8 to 22 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**

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7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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**

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8. The following description of the scheme is based on information provided by the applicant (Greenwoods and Freehills Pty Ltd). The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application dated 20 February 2014
- Consolidated Trust Deed of CFS Retail Property Trust 1
- Notices of Meeting and Explanatory Memorandum dated 7 February 2014
- Intra-Group Transactions Deed dated 6 February 2014, and
- correspondence from the applicant.

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

### **The CFS Retail Property Trust Group**

9. A stapled security in the CFS Retail Property Trust Group is made up of:

- one unit in CFS Retail Property Trust 1 (CFX 1), and
- one unit in CFS Retail Property Trust 2 (CFX 2).

10. Units in CFX 1 and CFX 2 are stapled together and listed on the Australian Securities Exchange (ASX) as CFS Retail Property Trust Group stapled securities. The effect of stapling is that CFX 1 and CFX 2 units may only be dealt with together. CFX 1 and CFX 2 each have only one class of units on issue.

11. The CFS Retail Property Trust Group owns interests in, and manages, numerous retail shopping centres and retail outlet centres across Australia.

12. CFX 1 and CFX 2 are registered managed investment schemes for the purposes of the *Corporations Act 2001*.

13. Commonwealth Managed Investments Limited (CMIL), a wholly owned subsidiary of the Commonwealth Bank of Australia Limited (CBA), is the trustee and the responsible entity of CFX 1 and CFX 2. Through various agreements, CMIL has delegated its funds management and property management responsibilities to other CBA subsidiaries.

14. CFX 1 and CFX 2 are each a resident trust estate as defined in subsection 95(2) of the ITAA 1936 and a resident trust for CGT purposes as defined in subsection 995-1(1) of the ITAA 1997.

15. CFX 2 is a public trading trust under Division 6C of Part III of the ITAA 1936.

### **The restructure**

16. The scheme that is the subject of this Ruling involves, broadly, a newly incorporated company called CFX Co Limited acquiring all of the units in CFX 2. As a result, the holders of CFS Retail Property Trust Group stapled securities have ceased to own units in CFX 2, and commence to own shares in CFX Co Limited. Shares in CFX Co Limited will form part of the new CFS Retail Property Trust Group stapled security, replacing units in CFX 2.

17. The resolutions implementing the restructure were approved by the holders of stapled securities in the CFS Retail Property Trust Group at the meeting held on 7 March 2014.

18. To fund the restructure, the trustee of CFX 1 and CFX 2 issued additional ordinary units in each trust, and the trustee of CFX 1 drew down on existing debt facilities.

19. The restructure involved the following steps in this sequence:

- CBA, or a CBA subsidiary, incorporated and owned all but one of the shares in CFX Co Limited. A custodian held the remaining share in CFX Co Limited on behalf of an entity that was not a wholly owned subsidiary of CBA. CFX Co Limited owns all of the shares in CMIL.
- The trustee of CFX 1 made a capital distribution of 7.25 cents per unit in CFX 1 to all of the unit holders of CFX 1. The capital distribution was debited to the Issued Equity account (being a capital reserve account) of CFX 1.
- The capital distribution was not paid in cash to unit holders, but was compulsorily applied on behalf of unit holders to acquire shares in CFX Co Limited.

- CMIL, as the trustee and the responsible entity of CFX 2, acting as agent and attorney for the unit holders of CFX 2 (who were also the unit holders of CFX 1), executed the document to transfer all of the units in CFX 2 to CFX Co Limited. The transfer of the CFX 2 units, together with the compulsory application of the capital distribution in relation to CFX 1 units, represented consideration for the issue of the CFX Co Limited shares.
- As a result of the capital distribution and the transfer of units in CFX 2, each unit holder of CFX 1 became the owner of a total number of shares in CFX Co Limited corresponding to the number of units they hold in CFX 1.
- The units in CFX 1 and CFX 2 were de-stapled.
- CFX Co Limited made a cash payment to a CBA subsidiary, the effect of which was that CMIL (a subsidiary of CFX Co Limited) assumed full funds management responsibilities.
- CFX Co Limited made a cash payment to acquire certain CBA subsidiaries. These acquired entities had property management responsibilities and acted as the trustee of certain trusts.
- The units in CFX 1 were stapled to the shares in CFX Co Limited. The new CFS Retail Property Trust Group stapled securities were listed on the ASX.
- CFX Co Limited formed an income tax consolidated group under Part 3-90. CFX 2 became a subsidiary member of this consolidated group.

### Other matters

20. In respect of CFX 1 and CFX 2, no entity, or no entity and its associates between them, had the right to receive at least 40% of any distribution of trust income, or trust capital, as unit holders of each respective trust at any time during the scheme period (as defined in section 725-55). Further, no entity, or no entity and its associates between them, had *de facto* control of CFX 1 or CFX 2 within the meaning of subsection 727-360(2) at any time during the scheme period.

21. At all times during the IVS period (as defined in subsection 727-150(7)), CFX 1 had at least 300 unit holders.

22. The Issued Equity account of CFX 1 has only been credited with capital raised by the trustee of CFX 1 through the issue of units. It does not include any capitalised profits.

## **Ruling**

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### **Non-assessable capital distribution to CFX 1 unit holders**

23. The capital distribution made to CFX 1 unit holders, which was compulsorily applied to acquire shares in CFX Co Limited, is not included in the assessable income of the unit holders under subsection 99B(1) of the ITAA 1936, or any other provision of Division 6 of Part III of the ITAA 1936.

24. The capital distribution (being corpus) made to CFX 1 unit holders, which was compulsorily applied to acquire shares in CFX Co Limited, does not have the quality of income in the hands of the unit holders, and is not ordinary income of the unit holders under section 6-5.

### **CGT event E4 – non-assessable capital distribution to CFX 1 unit holders**

25. CGT event E4 (section 104-70) happened when the trustee of CFX 1 made a capital distribution of 7.25 cents per unit to all of the unit holders of CFX 1 (which was compulsorily applied to acquire shares in CFX Co Limited) in respect of their units in CFX 1. For the purposes of section 104-70, the entire payment is the non-assessable part.

26. The time of CGT event E4 is just before the end of the income year in which the trustee of CFX 1 made the payment (paragraph 104-70(3)(a)).

27. A unit holder of CFX 1 makes a capital gain if the total of the amounts of the non-assessable payments made by the trustee of CFX 1 during the income year (including this capital distribution) in respect of a CFX 1 unit exceeds the cost base of the unit (subsection 104-70(4)). The capital gain will be equal to the amount of the excess.

28. If the CFX 1 unit was acquired by an Australian resident unit holder at least 12 months before the time of CGT event E4 (see paragraph 26 of this Ruling), a capital gain from CGT event E4 happening to that unit may qualify as a discount capital gain under subsection 115-25(1), provided the other conditions in Subdivision 115-A are satisfied.

29. If a unit holder of CFX 1 makes a capital gain, the cost base and reduced cost base of the CFX 1 unit is reduced to nil (subsection 104-70(5)).

30. If the total of the amounts of the non-assessable payments made by the trustee of CFX 1 during the income year is not more than the cost base of a CFX 1 unit, the cost base and reduced cost base of the unit will be reduced by that total amount (subsection 104-70(6)).

**CGT event A1 – transfer of CFX 2 units**

31. CGT event A1 happened when the unit holders of CFX 1 transferred their units in CFX 2 to CFX Co Limited in partial consideration for CFX Co Limited issuing shares in itself to the unit holders of CFX 1 (section 104-10).

32. The time of CGT event A1 is when CMIL, acting as agent and attorney for the unit holders of CFX 2, executed the document to transfer all of the units in CFX 2 to CFX Co Limited (paragraph 104-10(3)(a)). This happened on 24 March 2014.

33. A unit holder of CFX 1 makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a CFX 2 unit exceeds the cost base of that unit (subsection 104-10(4)).

34. A unit holder of CFX 1 makes a capital loss from CGT event A1 happening if the capital proceeds from the disposal of a CFX 2 unit are less than the reduced cost base of that unit (subsection 104-10(4)).

35. The capital proceeds from CGT event A1 happening is equal to the market value of the property (the new shares issued by CFX Co Limited) that a unit holder of CFX 1 received in respect of the disposal of their units in CFX 2 (subsection 116-20(1)). The market value of the shares in CFX Co Limited is worked out as at the time of CGT event A1 (see paragraph 32 of this Ruling).

36. If the unit in CFX 2 that was disposed of to CFX Co Limited was acquired by an Australian resident unit holder at least 12 months before the time of CGT event A1 (see paragraph 32 of this Ruling), a capital gain from CGT event A1 happening to that unit may qualify as a discount capital gain under subsection 115-25(1), provided the other conditions in Subdivision 115-A are satisfied.

**Cost base and reduced cost base of shares in CFX Co Limited**

37. The total of:

- the amount of the capital distribution made by the trustee of CFX 1, and
- the market value of the units in CFX 2 (being property transferred to CFX Co Limited (worked out as at the time of the acquisition of the shares in CFX Co Limited)),

constitutes the first element of the cost base and reduced cost base of the shares in CFX Co Limited acquired by the unit holders of CFX 1 (subsection 110-25(2)).

38. The unit holders of CFX 1 can calculate the first element of the cost base and reduced cost base of each share in CFX Co Limited by dividing the aggregate cost bases of their shares in CFX Co Limited by the number of shares received.

## **Foreign resident unit holders and CGT consequences**

39. The unit holders of CFX 2 who are foreign residents will disregard a capital gain or capital loss (section 855-10) from CGT event A1 happening when their units in CFX 2 are disposed of to CFX Co Limited if those units are **not** taxable Australian property (as that term is defined in section 855-15).

40. The unit holders of CFX 1 who are foreign residents will disregard a capital gain (section 855-10) from CGT event E4 happening when the trustee of CFX 1 made a capital distribution to the unit holders of CFX 1 in respect of their units in CFX 1 if those units are **not** taxable Australian property (as that term is defined in section 855-15).

## **Value shifting**

41. The value shifting provisions under Division 725 and Division 727 will not apply to the capital distribution made by the trustee of CFX 1, or the unit holders of CFX 2 transferring their units in CFX 2 to CFX Co Limited in partial consideration for CFX Co Limited issuing shares in itself to those unit holders.

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**Commissioner of Taxation**

9 April 2014

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## Appendix 1 – Explanation

**1** *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.*

42. The tax consequences that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

### Non-assessable capital distribution to CFX 1 unit holders

43. 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 the assessable income of the beneficiary, subject to the exceptions in subsection 99B(2) of the ITAA 1936.

44. The exception in paragraph 99B(2)(a) of the ITAA 1936 reduces the amount that would otherwise be included in assessable income by the amount that represents corpus of the trust estate and is not attributable to amounts derived by the trust estate that, if they had been derived directly by a taxpayer being a resident, would have been included in the assessable income of that taxpayer.

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

46. In *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; 10 AITR 367; 14 ATD 286, Windeyer J stated that:

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

47. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; 90 ATC 4413; 21 ATR 1, the High Court unanimously stated that the following factors were important in determining the nature of a receipt:

To determine whether a receipt is of an income or 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.

48. The trustee of CFX 1 made a payment to the unit holders of CFX 1, which was compulsorily applied to acquire shares in CFX Co Limited from its existing shareholder(s). The payment was debited to the Issued Equity account (being a capital reserve account) of CFX 1.

49. The payment by the trustee of CFX 1 to the unit holders represents part of the corpus of the trust estate. The capital reserve account has the quality of capital in the hands of the trustee and that characterisation does not change if the relevant amounts were derived by a hypothetical resident taxpayer.

50. Accordingly, the payment to the CFX 1 unit holders is not included in the assessable income of those unit holders under subsection 99B(1) of the ITAA 1936 as it represents corpus of CFX 1 that is attributable to amounts derived by the trust that, if they had been derived by a taxpayer being a resident, would *not* have been included in the assessable income of that taxpayer.

51. For similar reasons, the payment by the trustee of CFX 1 does not have the quality of income in the hands of the unit holders of CFX 1 and is not ordinary income under section 6-5.

### **Value shifting**

52. There is a direct value shift under a scheme involving equity or loan interests in an entity where there is a decrease in the market value of some equity or loan interests and an increase, or issue at a discount, of other equity or loan interests (section 725-145).

53. There is an indirect value shift where there is an unequal exchange of economic benefits between two entities – the losing entity and the gaining entity (subsection 727-150(3)).

54. There can only be consequences for a direct value shift if there is an entity that controls the target entity (for value shifting purposes) at some time during the scheme period as defined in section 725-55 (paragraph 725-50(b)). Section 727-355 sets out the relevant tests for whether an entity controls (for value shifting purposes) a company. Section 727-360 sets out the relevant tests for whether an entity controls (for value shifting purposes) a fixed trust.

55. There can only be consequences for an indirect value shift if the entities between which the value is shifted (the losing entity and the gaining entity) satisfy an ultimate controller test or a common-ownership nexus test at some time during the IVS period defined in subsection 727-150(7) (paragraph 727-100(c) and sections 727-105 and 727-110).

56. There are no consequences for any direct value shift or indirect value shift that happens under the scheme that is the subject of this Ruling. There are no consequences for any direct value shift as there is no entity that controls (for value shifting purposes) either CFX 1 or CFX 2 (section 727-360) at any time during the period starting when the scheme is entered into and ending when it has been carried out (paragraph 725-50(b) and section 725-55). There are no consequences for any indirect value shift as no entity would satisfy the ultimate controller test (sections 727-105, 727-350 and 727-360) and a condition to consider the common-ownership nexus test is not satisfied, rendering the test inapplicable to the scheme (paragraph 727-110(1)(a)).

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

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

### **Paragraph**

<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
The CFS Retail Property Trust Group	9
The restructure	10
Other matters	20
<b>Ruling</b>	<b>23</b>
Non-assessable capital distribution to CFX 1 unit holders	23
CGT event E4 – non-assessable capital distribution to CFX 1 unit holders	25
CGT event A1 – transfer of CFX 2 units	31
Cost base and reduced cost base of shares in CFX Co Limited	37
Foreign resident unit holders and CGT consequences	39
Value shifting	41
<b>Appendix 1 – Explanation</b>	<b>42</b>
Non-assessable capital distribution to CFX 1 unit holders	43
Value shifting	52
<b>Appendix 2 – Detailed contents list</b>	<b>57</b>

## References

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*Previous draft:*

Not previously issued as a draft

- ITAA 1997 Subdiv 115-A

*Related Rulings/Determinations:*

TR 2006/10

- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)

*Subject references:*

- CGT capital proceeds
- CGT cost base
- CGT event A1 – disposal of a CGT asset
- CGT reduced cost base
- distributions
- CGT discount
- unit trust units

- ITAA 1997 Div 230
- ITAA 1997 Pt 3-90
- ITAA 1997 Div 725
- ITAA 1997 725-50(b)

*Legislative references:*

- ITAA 1936
- ITAA 1936 Div 6 Pt III
- ITAA 1936 95(2)
- ITAA 1936 99B
- ITAA 1936 99B(1)
- ITAA 1936 99B(2)
- ITAA 1936 Div 6C Pt III
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 Div 104
- ITAA 1997 104-10
- ITAA 1997 104-10(3)(a)
- ITAA 1997 104-10(4)
- ITAA 1997 104-70
- ITAA 1997 104-70(3)(a)
- ITAA 1997 104-70(5)
- ITAA 1997 104-70(6)
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)

- ITAA 1997 725-55
- ITAA 1997 725-145
- ITAA 1997 Div 727
- ITAA 1997 727-100(c)
- ITAA 1997 727-105
- ITAA 1997 727-110
- ITAA 1997 727-110(1)(a)
- ITAA 1997 727-150(3)
- ITAA 1997 727-150(7)
- ITAA 1997 727-350
- ITAA 1997 727-355
- ITAA 1997 727-360
- ITAA 1997 727-360(2)
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1963
- Corporations Act 2001

*Case references:*

- *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; 10 AITR 367; 14 ATD 286
- *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; 90 ATC 4413; 21 ATR 1

## ATO references

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