

# ***CR 2020/19 - Multiplex Development and Opportunity Fund - return of capital***



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## Class Ruling

# Multiplex Development and Opportunity Fund – return of capital

### **❶ Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

<b>Table of Contents</b>	<b>Paragraph</b>
What this Ruling is about	1
Who this Ruling applies to	4
When this Ruling applies	6
<b>Ruling</b>	<b>7</b>
<b>Scheme</b>	<b>11</b>
<b>Appendix – Explanation</b>	<b>23</b>

### **What this Ruling is about**

1. This Ruling sets out tax consequences for Multiplex Development and Opportunity Fund (MDOF) unitholders who received the return of capital from MDOF on 5 March 2020 (Payment Date).
2. Full details of the return of capital are set out in paragraphs 11 to 22 of this Ruling.
3. All legislative references in this Ruling are to *Income Tax Assessment Act 1997* unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you were an MDOF unitholder and you:
  - were listed on the register of MDOF on 27 February 2020 (Record Date), being the date for determining entitlement to receive the return of capital, and continued to be listed on the register up to and including the Payment Date
  - received the return of capital on the Payment Date, and
  - held your MDOF units on capital account (that is, you neither held your MDOF units as ‘revenue assets’ (as defined in section 977-50) nor as ‘trading stock’ (as defined in subsection 995-1(1)).

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the return of capital outlined in paragraphs 12 to 22 of this Ruling.

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

## When this Ruling applies

6. This Ruling applies from 1 July 2019 to 30 June 2020.

## Ruling

### The distribution is not a dividend

7. No part of the return of capital paid to you by MDOF on the Payment Date is a dividend as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

### Sections 45A, 45B and 45C do not apply

8. The Commissioner will not make a determination under sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the return of capital paid to you by MDOF on the Payment Date.

### CGT event G1 happens

9. CGT event G1, in section 104-135, happened to you when MDOF paid you the return of capital in respect of the MDOF units you owned at the Record Date and continued to own at the Payment Date.

### Capital gains for foreign resident MDOF unitholders may be disregarded

10. If you are a foreign resident MDOF unitholder who was paid the return of capital, you can disregard any capital gain made when CGT event G1 happened if your MDOF unit is not 'taxable Australian property' (section 855-10).

## Scheme

11. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

## Background

12. MDOF is an Australian resident unlisted unit trust.

13. MDOF is the head entity of a tax consolidated group and is treated for income tax purposes as a company.

14. MDOF's principal activity was property investment. However, since August 2008, when MDOF became closed to new applications, redemptions and investments, MDOF's intention has been to make distributions of capital and profits to MDOF unitholders upon the realisation of its remaining investments.

15. On 27 November 2019, MDOF concluded its final investment and is in the process of being wound up. MDOF expects to cease business by 30 June 2020.

### **Return of capital**

16. As at 31 January 2020, MDOF had \$21,870,597 in its unit capital account and current and retained losses totalling \$20,515,880. The available balance of the unit capital account was \$1,344,716.94.

17. On the Payment Date, MDOF returned capital to all MDOF unitholders of \$1,344,716.94, being \$0.008233 per unit, by debiting its unit capital account by the amount of \$1,344,716.94. Following the return of capital, the balance of the unit capital account was nil.

18. The return of capital amount of \$1,344,716.94 was funded from MDOF's available cash, which comprised a return of capital received from Little Bay South Developer Pty Ltd (a company in which MDOF had a 50% ownership) of \$323,435.43 and from surplus cash of \$1,021,281.51, being residual cash from past settlements available to meet any contingent liabilities.

19. MDOF's distribution history shows that MDOF has progressively paid profits to MDOF unitholders as investments were realised. Further, on the Payment Date, MDOF did not have any undistributed profits and had retained consolidated accounting losses of \$20,515,880.

20. The return of capital has not changed the number of MDOF units on issue, the number of MDOF units held by each MDOF unitholder, or the proportionate unit holdings of the MDOF unitholders.

### **Other matters**

21. For the purposes of Division 197, MDOF's unit capital account is untainted.

22. MDOF has confirmed that units in MDOF do not constitute 'indirect Australian real property interests' as defined in section 855-25 at the time of the return of capital.

**Appendix – Explanation**

**ⓘ** *This Explanation 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.*

<b>Table of Contents</b>	<b>Paragraph</b>
Sections 45A, 45B and 45C do not apply	23
<i>No streaming of dividends and capital benefits</i>	24
<i>No scheme to provide capital benefits</i>	27
CGT event G1 happens	30
Capital gains for foreign resident MDOF unitholders may be disregarded	34

**Sections 45A, 45B and 45C do not apply**

23. Sections 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies to treat all or part of the return of capital received by MDOF unitholders as an unfranked dividend paid by MDOF out of profits.

***No streaming of dividends and capital benefits***

24. Section 45A of the ITAA 1936 applies where capital benefits are streamed to some shareholders, who would derive a greater benefit from the receipt of capital than other shareholders (disadvantaged shareholders) and it is reasonable to assume that the disadvantaged shareholders receive, or are likely to receive, dividends.

25. A 'capital benefit' was provided to MDOF unitholders. However, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some unitholders and dividends to other unitholders.

26. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the return of capital.

***No scheme to provide capital benefits***

27. Section 45B of the ITAA 1936 applies where a company makes certain capital payments to shareholders in substitution for dividends. Broadly, section 45B of the ITAA 1936 applies where:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit, and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme, did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit.

28. The return of capital satisfied the first two conditions. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling MDOF unitholders to obtain a tax benefit.

29. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or part, of the return of capital.

### **CGT event G1 happens**

30. CGT event G1 happens if a company makes a payment to a shareholder in respect of a share that they own in the company, some or all of the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47 of the ITAA 1936, and the payment is not included in the shareholder's assessable income (section 104-135).

31. CGT event G1 happened to an MDOF unitholder when MDOF made the return of capital to them for the MDOF units they owned at the Record Date and continued to own at the Payment Date (section 104-135).

32. An MDOF unitholder will make a capital gain from CGT event G1 happening if the amount of the return of capital of \$0.008233 per unit is more than the cost base of the unitholder's MDOF unit. If the MDOF unitholder makes a capital gain, the unit's cost base and reduced cost base are reduced to nil (subsection 104-135(3)). A shareholder cannot make a capital loss from CGT event G1 (Note 1 to subsection 104-135(3)).

33. If the amount of the return of capital of \$0.008233 per unit is not more than the cost base of the unitholder's MDOF unit, the cost base and reduced cost base of the unit is reduced by the amount of the return of capital (but not below nil) (subsection 104-135(4)).

### **Capital gains for foreign resident MDOF unitholders may be disregarded**

34. Under subsection 855-10(1), an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not taxable Australian property.

35. Section 855-15 sets out when a CGT asset is taxable Australian property:

Item 1	Taxable Australian real property
Item 2	An indirect Australian real property interest not covered by item 5
Item 3	A CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by items 1, 2, or 5
Item 4	An option or right to acquire a CGT asset covered by items 1, 2 or 3
Item 5	A CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

36. An MDOF unit is not a taxable Australian real property and is not an indirect Australian real property interest at the time of the return of capital.

37. An MDOF unitholder, being a foreign resident or the trustee of a foreign trust for CGT purposes, cannot disregard, under subsection 855-10(1), a capital gain from CGT event G1 if, just before the CGT event happens:

- their MDOF unit had been used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- their MDOF unit was covered by subsection 104-165(3) (table item 5 of section 855-15).

**References***Previous draft:*

Not previously issued as a draft

- ITAA 1997 104-135(3)

- ITAA 1997 104-135(4)

- ITAA 1997 104-165(3)

- ITAA 1997 Div 197

*Legislative references:*

- ITAA 1997 Div 230

- ITAA 1936 6(1)

- ITAA 1997 855-10

- ITAA 1936 45A

- ITAA 1997 855-10(1)

- ITAA 1936 45A(2)

- ITAA 1997 855-15

- ITAA 1936 45B

- ITAA 1997 855-25

- ITAA 1936 45B(3)

- ITAA 1997 977-50

- ITAA 1936 45C

- ITAA 1997 995-1(1)

- ITAA 1936 47

- TAA 1953

- ITAA 1997 104-135

## ATO references

NO: 1-KP44B3U

ISSN: 2205-5517

BSL: PGI

ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend income ~~ Dividend income  
 Income tax ~~ Capital management ~~ Anti-avoidance rules ~~ Section 45A  
 Income tax ~~ Capital management ~~ Anti-avoidance rules ~~ Section 45B  
 Income tax ~~ Capital management ~~ Anti-avoidance rules ~~ Section 45C  
 Income tax ~~ Capital management ~~ Returning capital ~~ Share capital return  
 Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events G1 to G3 – shares

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