TR 2005/23A1 - Addendum - Income tax: listed investment companies

Addendum

Taxation Ruling

Income tax: listed investment companies

This Addendum amends Taxation Ruling TR 2005/23 to reflect the withdrawal of Taxation Ruling TR 92/13 and changes to the operation of Subdivision 115-C of the *Income Tax Assessment Act 1997* (ITAA 1997) made by *Tax Laws Amendment (2011 Measures No. 5) Act 2011.*

TR 2005/23 is amended as follows:

1. Paragraph 136

Omit the paragraph; substitute

> 136. It is not unusual for a *listed investment company to own units in a unit trust, and for the unit trust to make *discount capital gains. When the unit trust makes a distribution to a *listed investment company which includes a *discount capital gain, the *discount capital gain is not a *LIC capital gain as defined in subsection 115-285(1).

2. Paragraph 138

Omit the paragraph; substitute

> 138. However, the *capital gain distributed to the *listed investment company is not 'from' the *CGT asset, that is, it is not 'from' the unit in the unit trust (refer paragraph 115-285(1)(b)). Rather, it is 'from' the relevant CGT asset of the unit trust that was subject to the *CGT event, and distributed by the trustee to the *listed investment company.

3. Paragraph 139

Omit the paragraph; substitute

> 139. In addition, the *capital gain is 'made' by the trustee of the unit trust, and not by the *listed investment company. The note to subsection 115-280(1) supports the view that to fall within Subdivision 115-D, the *capital gain must be made directly by the *listed investment company:
>
> > **Note:** the concession is available for LIC capital gains made directly by a listed investment company, and for LIC capital gains that company receives as a dividend

through one or more other *listed investment companies.

Thus, the policy is that the concession available under Subdivision 115-D is available only where:

- a *LIC capital gain is made from the disposal of assets held directly by a *listed investment company – this includes assets that it holds as a member of a partnership or a *VCLP (refer to paragraph 161 of this Ruling); or
- the *listed investment company which pays the dividend in question has itself received a dividend, part of which is attributable to a *LIC capital gain.

However, a *listed investment company does not make a *LIC capital gain when it receives a distribution from a unit trust that includes a *capital gain.

4. Paragraph 140

Omit the paragraph; substitute

140. Moreover, a capital gain taken to have been made by a *listed investment company under section 115-215[10] in respect of a distribution it receives from a unit trust that has made a *capital gain is also not a *LIC capital gain as defined in subsection 115-285(1). Paragraph 115-285(1)(a) requires a *LIC capital gain to be from a *CGT event, whereas capital gains a beneficiary is taken to have made because of the operation of Subdivision 115-C are not from a *CGT event.

5. Paragraph 141

Omit the paragraph; substitute

141. In limited circumstances, section 106-50 provides that where a beneficiary of a trust is absolutely entitled to a *CGT asset as against the trustee, Part 3-1 and Part 3-3 apply to an act by the trustee as if the beneficiary had done it.[11]

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[10] The purpose of section 115-215 is to ensure that appropriate amounts of the trust estate's *capital gains are treated as the beneficiary's capital gains when assessing the beneficiary, so:

- the beneficiary can apply *capital losses against *capital gains; and
- the beneficiary can apply the appropriate *discount percentage (if any) to gains.

[11] Such circumstances must necessarily be very limited for two main reasons. Firstly, it would be expected that interests in trusts would mainly be held by way of unit holdings. In draft Taxation Ruling TR 2004/D25, the Commissioner has put his view that for tax law purposes a beneficiary of a unit trust can not establish absolute entitlement to the assets of the trustee, as the relevant interest of the beneficiary is the unit holding. Section 106 50 will apply if, and only if, the *listed investment

6. Paragraph 143

Omit the second dot point; substitute

- a distribution is made from that trust to the *listed investment company, resulting in the *listed investment company being taken to have a 'grossed up' *capital gain under the mechanism provided in subsection 115-215(3),

7. Paragraph 145

Omit 'applying the proportionate view'

8. Paragraph 146

(a) Omit the second dot point

(b) Omit the third dot point; substitute

- Subsection 115-215(3) states that 'If you are a beneficiary of the trust estate, for each *capital gain of the trust estate, Division 102 applies to you as if you had ... a capital gain ....'

9. Paragraph 148

Omit the paragraph; substitute

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company can establish absolute entitlement to a trust asset as against the trustee, having regard to these considerations. Therefore, a beneficiary that is a *listed investment company can make a *capital gain (and hence a *LIC capital gain) from a *CGT event that happens to a *CGT asset that is held by a trustee only if the following conditions are met:

- a *CGT event happens to a *CGT asset to which the *listed investment company can establish absolute entitlement; and
- the trust is not one in which the *listed investment company holds units.

Secondly, subsection 115-290(4) sets a limit on assets that qualify as 'permitted investments' – refer paragraphs 48 to 52. In the case of an asset that is an interest in a trust, that limit is a 10% interest in the trust – refer subsection 115-290(7). As explained in draft Ruling TR 2004/D25, the occasions on which a *listed investment company holding an interest of only 10% or less in a trust would be able to assert absolute entitlement to an asset as against the trustee, could be expected to be infrequent, because of the existence of interests of other beneficiaries. It is of course possible that some relatively minor assets may be held in a trust of which the *listed investment company is the sole beneficiary, and therefore more likely to be able to establish absolute entitlement to a trust asset or assets, whilst still meeting the requirement set out in paragraph 115-290(1)(c). This requires that at least 90% of its assets must be in permitted investments – relevantly here in trusts in which the *listed investment company holds not more than a 10% interest (vide subsection 115-290(7)). The holding of larger value assets in trusts of which the *listed investment company is the sole beneficiary is more likely to cause failure of the 90% permitted investments rule.

148. There is support for the view that in treating a beneficiary as having certain capital gains, subsection 115-215(3) is a deeming provision: see Pearce and Geddes *Statutory Interpretation in Australia*, 7th edition, at page 152:

> Other expressions such as 'as if' and 'shall be taken to be' are variants on the expression 'deemed' and will be interpreted in the same manner: *Loizos v. Carlton and United Breweries Ltd* (1994) 94 NTR 31 at 32; *R v. Hughes* (2000) 202 CLR 535 at 551; 171 ALR 155 at 162; *Martinez v. Minister for Immigration and Citizenship* (2009) 177 FCR 337 at 348; 256 ALR 32 at 42.

10. Paragraph 153

Omit the paragraph; substitute

153. The Commissioner does not accept the alternative view that a *listed investment company which is a beneficiary of a unit trust that has made a capital gain, makes that same *capital gain from a *CGT asset when it is entitled to a distribution from that unit trust. Even where a distribution from a trust is capital in character in the hands of the listed investment company, it does not follow that the listed investment company has made the *capital gain otherwise made by the trustee of the unit trust.

11. Paragraph 155

Omit the paragraph; substitute

155. In determining whether a *listed investment company makes a *LIC capital gain in relation to a gain made by a trust, it also needs to be remembered that (as mentioned in paragraph 140) any gain the *listed investment company is taken to have made under subsection 115-215(3) arises from that provision and not from a *CGT event. Moreover, Subdivision 115-C only operates to treat a beneficiary as having made a *capital gain for certain limited purposes: see subsection 115-215(1) which specifically states that the purpose of the section is to treat amounts of the trust estate's net income attributable to the trust estate's *capital gains as a beneficiary's capital gains 'when assessing the beneficiary, so that:

(a) the beneficiary can apply *capital losses against gains; and

(b) the beneficiary can apply the appropriate discount percentage (if any) to gains.'

12. Paragraph 156

Omit the paragraph; substitute

> 156. Subsections 115-215(3) and 115-215(4) specify the methodology for calculating the relevant extra *capital gain. In each case, the extra *capital gain is a 'grossed-up' amount. This allows the beneficiary to apply *capital losses against gains, and to apply any appropriate *discount percentage.

Paragraphs 1 to 3 and paragraph 10 of this Addendum apply from 22 June 2011 (being the date on which TR 92/13 was withdrawn).

The remaining paragraphs of this Addendum will generally apply in relation to the 2010-11 and later income years. However, they will not apply for the 2010-11 year in relation to capital gains made by trusts with a 2010-11 income year that started before 1 July 2010 (early balancing trusts), unless the trustee made a valid choice to apply the relevant amendments made by the *Tax Laws Amendment (2011 Measures No. 5) Act 2011.* Nor will they apply in relation to capital gains made by managed investment trusts or trusts treated as managed investment trusts for the purposes of Division 275 of the ITAA 1997, unless the trustee made a valid choice to apply the relevant amendments made by the *Tax Laws Amendment (2011 Measures No. 5) Act 2011.*

Commissioner of Taxation
6 March 2013

ATO references

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