

CR 2003/110 - Income tax: capital gains: amendment of trust deed: possibility of resettlement of Trust: Macquarie Australian Enhanced Equities Fund



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Class Ruling

Income tax: capital gains: amendment of trust deed: possibility of resettlement of Trust:
Macquarie Australian Enhanced Equities Fund

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Background	9
Arrangement	11
Ruling	18
Explanation	19
Detailed contents list	23

Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the opinion of the Commissioner of Taxation (the Commissioner) on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997) - capital gains tax (CGT) event A1 - disposal of a CGT asset;
- section 104-25 of the ITAA 1997 (CGT event C2 - ownership of an intangible CGT asset comes to an end);
- section 104-55 of the ITAA 1997 (CGT event E1 - creation of a trust over a CGT asset);
- section 104-60 of the ITAA 1997 (CGT event E2 - transfer of a CGT asset to a trust);
- section 104-65 of the ITAA 1997 (CGT event E3 - conversion of a trust to an unit trust);
- section 104-70 of the ITAA 1997 (CGT event E4 - capital payment for a trust interest);

- section 104-75 of the ITAA 1997 (CGT event E5 - a beneficiary becomes entitled to a trust asset);
- section 104-80 of the ITAA 1997 (CGT event E6 - disposal to beneficiary to end income right); and
- section 104-90 of the ITAA 1997 (CGT event E8 - disposal by beneficiary of capital interest).

Class of persons

3. The class of persons to which this Ruling applies is:
 - the unitholders of the Macquarie Australian Enhanced Equities Fund as constituted by deed dated 5 June 1987 (the Trust) who are either residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) or who are non-resident but subject to capital gains tax under the provisions of sections 136-10 and 136-25 of the ITAA 1997; and
 - the Responsible Entity (trustee) of the Trust.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 11 to 17 in this Ruling.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement 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 years of income ended 30 June 2004, 2005 and 2006.

Background

9. The Macquarie Australian Enhanced Equities Fund is constituted as a unit trust with only one class of beneficiary (unitholder). It is registered as a managed investment scheme under section 601EB of the *Corporations Act 2001* and Macquarie Investment Management Ltd. is the Responsible Entity of the Trust for the purposes of this last-mentioned Act.

10. The Responsible Entity proposes to amend the current deed of trust and for the proposed amendments to take effect immediately after the distribution period ending on 31 March 2004. The Responsible Entity is concerned that the amendments may amount to the termination of the Trust and the creation of a new trust with various capital gains tax consequences for the unitholders.

Arrangement

11. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents:

- application for Class Ruling dated 24 January 2003 in relation to the proposed amendment of the deed of trust of the Macquarie Australian Enhanced Equities Fund;
- the current deed of trust (Appendix 1 of the application);
- a supplemental deed containing the proposed amendments (Appendix 2 of the application); and

- the Information Memorandum for the Wholesale Pooled Funds (of which Macquarie Australian Enhanced Equities Fund is one) managed by Macquarie Investment Management Ltd. (as updated on 13 January 2003).

12. Sub-clauses 1(1) and 8(1) of the current deed provide that the beneficial interest in the Fund is divided into units of equal value that confer an equal interest in the Fund (the Trust). The subscription price of units is determined by dividing the Value of the Fund (assets adjusted for transaction costs less all liabilities including allocated but not yet distributed income) by the current number of units on issue and adding on a service charge and transaction taxes that may be incurred if units are acquired (sub-clause 10(1)).

13. Redemption Price is determined by dividing the Value of the Fund by the number of units on issue and deducting any transaction taxes (sub-clauses 11(1) and (2)). In a situation where the unitholder has redeemed units during an Accrual Period (defined under sub-clause 1(1) to be a six monthly or quarterly period) and has received redemption proceeds, sub-clause 11(13) entitles the Responsible Entity to determine within 40 business days of the end of the financial year whether any part of those redemption proceeds included a realised capital gain.

14. Sub-clause 28(5) provides that the Responsible Entity may at any time distribute capital arising from the proceeds of sales of investments in proportion to unitholding. Sub-clauses 28(12) and (13) provide that the unitholders are entitled to the undistributed balance of net income for a financial year.

15. The supplemental deed proposes the insertion of a new sub-clause 11(12) which will have the effect of limiting the discretion that the Responsible Entity has in sub-clause 11(13). The proposed new sub-clause provides that the capital gain component of the redemption price received by the former unitholder cannot exceed the difference between the redemption price and the issue price of the relevant unit. Any such capital gain must be drawn from capital gains of the Trust realised at or before the relevant redemption. The application states that this proposed amendment has the effect of imposing an objective basis for the distribution of capital gains by the Responsible Entity, thereby minimising any risk to the Responsible Entity when it exercises its discretion under sub-clause 11(13).

16. The supplemental deed also proposes that the remaining unitholders for the relevant Accrual Period will have a proportionate entitlement to the capital gains of the Trust for that period which have not been distributed as part of redemption proceeds in the period.

17. The supplemental deed amends clause 28 of the current deed by stating that the capital gains referred to are realised gains calculated as per section 102-5 of the ITAA 1997. Amendments to help quantify the distributions of capital of the Fund for the relevant Accrual Period are also proposed by this deed.

Ruling

18. The CGT events described at paragraph 2 will not occur in relation to the class of persons to which this Ruling applies when the proposed amendments are made to the trust deed, because the Commissioner considers that the amendments will not amount to the termination of a trust and the creation of a new trust in respect of the Macquarie Australian Enhanced Equities Fund.

Explanation

19. This is a Ruling on the income tax effects of the proposed amendments to the current deed of trust. The proposed amendments to the deed will be subject to the *Corporations Act 2001*, in particular Chapter 5C of that Act. This Ruling is not to be taken as implying any view as to whether the *Corporations Act 2001* has been complied with.

20. 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, and as such is likely to have 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.

21. The Commissioner released a Statement of Principles on 29 August 2001 to provide guidance on when the Commissioner will treat changes to a trust as giving rise to a new trust estate. The Statement of Principles does not cover all possibilities or circumstances of every taxpayer. The answer to whether alterations to trusts, taken together, result in terminations or creations of trust estates will generally flow from establishing whether the essential character

and nature of the original trust relationship has fundamentally changed.

22. The Commissioner does not consider that the proposed amendments to the terms of the Trust result in a fundamental change to the essential nature and character of the original trust relationship. It is the view of the Commissioner that the proposed amendments to the Trust will not fail the continuity test described in paragraph 4 of the Statement of Principles.

Detailed contents list

23. Below is a detailed contents list for this Class Ruling:

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Background	9
Arrangement	11
Ruling	18
Explanation	19
Detailed contents list	23

Commissioner of Taxation

17 December 2003

Previous draft:

Not previously issued as a draft

- trusts
- trust resettlements
- unit trusts
- unitholders

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16

Legislative references:

Subject references:

- capital gains tax
- CGT event A1
- CGT event C2
- CGT events E1-E6 inclusive
- CGT event E8
- present entitlement

- Corporations Act 2001 ch. 5C
- Corporations Act 2001 601EB
- Copyright Act 1968
- ITAA 1936 6(1)
- ITAA 1997 102-5
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-55

- ITAA 1997 104-60
- ITAA 1997 104-65
- ITAA 1997 104-70
- ITAA 1997 104-75
- ITAA 1997 104-80
- ITAA 1997 104-90
- ITAA 1997 136-10
- ITAA 1997 136-25

- TAA 1953 Part IVAAA

Other references:

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

ATO references

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