CR 2006/31 - Income tax: capital gains: amendment of constitution: possibility of creation of a new trust: Diversified Utility and Energy Trust No 1

Class Ruling

Income tax: capital gains: amendment of constitution: possibility of creation of a new trust: Diversified Utility and Energy Trust No 1

Contents Para

This Ruling 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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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 taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant taxation provision(s)

2. The relevant taxation provisions dealt with in this Ruling are:

- section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 97 and 98 of the ITAA 1936;
- sections 102-5 and 102-20 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997 (capital gains tax (CGT) event A1 – disposal of a CGT asset);
- section 104-25 of the ITAA 1997 (CGT event C2 – cancellation, surrender and similar endings);
- section 104-55 of the ITAA 1997 (CGT event E1 – creating a trust over a CGT asset);

- section 104-60 of the ITAA 1997 (CGT event E2 – transferring a CGT asset to a trust);
- section 104-70 of the ITAA 1997 (CGT event E4 – capital payment for trust interest);
- section 104-75 of the ITAA 1997 (CGT event E5 – beneficiary becoming entitled to a trust asset);
- section 104-80 of the ITAA 1997 (CGT event E6 – disposal to beneficiary to end income right);
- section 104-90 of the ITAA 1997 (CGT event E8 – disposal by beneficiary of capital interest);
- section 104-155 of the ITAA 1997 (CGT event H2 – receipt for event relating to a CGT asset);
- section 136-10 of the ITAA 1997; and
- section 136-25 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is:

- the unitholders of the Diversified Utility and Energy Trust No 1 (the Trust) who are either residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936 or non-residents of Australia who are subject to capital gains tax under the provisions of sections 136-10 and 136-25 of the ITAA 1997; and
- AMPCI Macquarie Infrastructure Management No 1 Limited, as trustee of the Trust (the Responsible Entity).

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 13 to 30 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 to the income year (as defined in subsection 995-1(1) of the ITAA 1997) for a unitholder in which the Constitution of the Trust is amended. For a unitholder that does not have a substituted accounting period, this will be the income year ending 30 June 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

12. This Ruling is withdrawn and ceases to have effect after 30 June 2006. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

13. The scheme that is the subject of this Ruling is described below. This description is based on a number of documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- Application for class ruling from Mallesons Stephen Jaques dated 6 December 2005 on behalf of the Responsible Entity of the Trust;
- Constitution of the Trust incorporating the proposed amendments in 'marked-up' form (Annexure 1 of the application).

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

Background

14. AMPCI Macquarie Infrastructure Management No 1 Limited is the Responsible Entity of the Trust within the meaning of the *Corporations Act 2001* (the Corporations Act).

15. The Trust is a registered managed investment scheme under Chapter 5C of the Corporations Act.

16. The Constitution governing the Trust was executed on 26 June 2003 and amended on several occasions thereafter.

17. Pursuant to clause 3.1 of the Constitution, the beneficial interest in the Trust is divided into units. The Trust has only one class of units and each unit has an equal undivided interest in the income and capital of the Trust.

18. The units in the Trust, as provided under clause 27 of the Constitution, are stapled units. Each unit in the Trust is stapled to a unit in the Diversified Utility and Energy Trust No 2. These securities are stapled together so that one may not be transferred or otherwise dealt with without the other.

19. Under clauses 10.5 and 10.6 of the Constitution, unitholders are entitled to a pro-rata share of the Distribution Amount for each Distribution Period.

20. Distribution Amount is defined in clause 30 of the Constitution as:

(a) for a Distribution Period in a Financial Year (other than the last Distribution Period in a Financial Year) so much of the income or capital as the Trustee considers is appropriate for distribution for the Distribution Period; and

(b) for the last Distribution Period in a Financial Year, the excess of (i) over (ii) for the Distribution Period:

where:

(i) is Distributable Income for the Financial Year; and

(ii) is the aggregate of Distribution Amounts for preceding Distribution Periods in the Financial Year.

21. The Distributable Income of the Trust is calculated in accordance with clause 10.2 of the Constitution.

22. Clause 10.2 provides:

> Distributable Income for a Financial Year will be the amount the Trustee determines to be the distributable income being:
>
> (a) the amount which if distributed in cash to Members for the period would prevent the Trustee being liable to tax on the income of the Trust under section 99 or section 99A of the Tax Act for the Financial Year as if the period is a year of income; and
>
> (b) any additional amount whether income or capital which the Trustee considers appropriate for distribution for the period.

Proposed amendment

23. Following the adoption of the International Financial Reporting Standards (IFRS) and, in particular, Australian Accounting Standard 132 (AASB 132), the Responsible Entity proposes to alter the Constitution to amend clause 10.2.

24. The amended clause 10.2 is to read:

> Distributable Income for a Financial Year will be the amount the Trustee determines to be the distributable income. Unless the Trustee in its discretion otherwise determines, the distributable income will be:
>
> (a) the amount which if distributed in cash to Members for the period would prevent the Trustee being liable to tax on the income of the Trust under section 99 or section 99A of the Tax Act for the Financial Year as if the period is a year of income; and
>
> (b) any additional amount whether income or capital which the Trustee considers appropriate for distribution for the period.

25. The Responsible Entity proposes to make the amendment to the Constitution on or before 30 June 2006.

26. Under AASB 132, a financial instrument should be classified as either a financial liability or an equity instrument in accordance with the substance of the contract and not with its legal form.

27. Under AASB 132, a financial instrument is classified as an equity instrument only if:

(i) the instrument includes no contractual obligation to deliver cash or another financial asset to another entity;

(ii) if the instrument will or may be settled in the issuer's own equity instruments, it is either:

(a) a non-derivative that includes no contractual obligation for the issuer to deliver a variable number of its own equity instruments; or

(b) a derivative that will be settled only by the issuer exchanging a fixed amount of cash or other financial asset for a fixed number of its own equity instruments.

28. Accordingly, under IFRS units in the Trust will be classified as debt instruments if the Responsible Entity has a 'contractual obligation' to pay an ascertainable amount to unitholders (that is, the Distribution Amount of the Trust for the last Distributable Period in a Financial Year).

29. The amendment to the clause will provide the Responsible Entity with the discretion to determine the Distributable Income for a Financial Year by reference to a methodology other than the methodology set out under the existing clause 10.2 of the Constitution.

30. The Trust's accountants are satisfied that the units in the Trust will be classified as equity instruments under AASB 132 since the Responsible Entity has no 'contractual obligation' to pay an ascertainable amount to unitholders (that is the Distribution Amount of the Trust for the last Distributable Period in a Financial Year).

Ruling

31. The amendment to the Constitution of the Trust will not result in the termination of the Trust and the creation of a new trust; thus, for the purposes of including an amount of assessable income under section 97 or 98 of the ITAA 1936, the CGT events described at paragraph 2 of this Ruling will not occur.

Commissioner of Taxation
19 April 2006

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.

32. This is a Ruling on the income tax effect of the amendment as described in the application to the Constitution current as at the date of the application. The amendment to the Constitution is subject to the Corporations Act, in particular Chapter 5C of that Act. This Ruling should not be taken as implying any view as to whether the Corporations Act has been complied with. This Ruling should also not to be taken as implying any view as to whether the units in the Trust have been classified as equity instruments under AASB 132.

33. An 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, with the ensuing 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 (section 102-5 of the ITAA 1997).

34. The Commissioner issued a Statement of Principles on 29 August 2001 (the Statement) to provide guidance on when the Commissioner will treat changes as giving rise to a new trust estate. The Statement does not cover all possibilities or circumstances of every taxpayer. The answer to whether alterations to trusts, taken together, result in terminations and creations of trust estates will flow from establishing whether the essential character and nature of the original trust relationship has fundamentally changed.

35. The amendment to the Constitution as described in the application results in a procedural change. That change does not fail the indicia of continuity of the trust as set out in paragraph 4 of the Statement.

36. The Commissioner does not consider that the change to the terms of the Trust as described in the application results in a fundamental change to the essential nature and character of the original trust relationship. It is the view of the Commissioner that the change does not disturb the continuity of the Trust.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- CGT events
- trusts
- trust resettlements
- unit trusts
- unitholders

Legislative references:

- Copyright Act 1968
- Corporations Act 2001
- Corporations Act 2001 Ch 5C
- ITAA 1936 6(1)
- ITAA 1936 97
- ITAA 1936 98
- ITAA 1997 102-5
- ITAA 1997 102-20
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-55
- ITAA 1997 104-60
- ITAA 1997 104-70
- ITAA 1997 104-75
- ITAA 1997 104-80
- ITAA 1997 104-90
- ITAA 1997 104-155
- ITAA 1997 136-10
- ITAA 1997 136-25
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)

Other references:

- Australian Accounting Standard 132
- Creation of a new trust – Statement of Principles August 2001

ATO references

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