

***CR 2009/9 - Income tax: distributions from the sale of
land held by the Underbank Country Club
Incorporated (in liquidation)***



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Class Ruling

Income tax: distributions from the sale of land held by the Underbank Country Club Incorporated (in liquidation)

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① 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:

- section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 47 of the ITAA 1936;
- Part 3-1 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Part 3-3 of the ITAA 1997;
- section 102-5 of the ITAA 1997;
- subsection 102-10 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the members of Underbank Country Club Incorporated (UCCI) (in liquidation) who received distributions from the liquidation of UCCI.

Qualifications

4. 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 24 of this Ruling.

5. 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.

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Date of effect

7. This Ruling applies from 1 July 2006 to 30 June 2007. The Ruling continues to apply after 1 July 2007 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

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

- application for Class Ruling dated 25 August 2008 from PKF;

- letter from PKF dated 24 October 2008;
 - letter from PKF dated 10 December 2008.
9. Underbank Country Club Limited (UCCL) was incorporated on 21 April 1977 under the *Companies Act 1961* (Vic). Clause III of the Memorandum of Association of UCCL prevented any distribution of income or property to any member of the Club.
10. UCCL was incorporated as a company limited by guarantee.
11. Membership of UCCL was limited to the owners of land in the 'Underbank Estate.'
12. Members did not initially pay a separate amount to become members of UCCL but from 1993 members were required to pay an annual membership fee of 'either \$52 or 20 hours work'. The membership fee had increased to \$75 per annum by 2002.
13. On 11 September 1980, UCCL acquired land (the Underbank land) comprising two titles which covered approximately 12.39 hectares. The land was made available to the Underbank Country Club (UCC).
14. The Underbank land was situated within the Underbank Estate in which there are more than 240 residential properties.
15. The Underbank land was for the use and enjoyment of the members of the UCC, who were also the members of UCCL. Apart from the Underbank land, the only other assets of UCCL were items of plant and equipment.
16. UCCL became an incorporated association, The Underbank Country Club Inc (UCCI), on 8 August 1990, under the *Associations Incorporations Act 1981* (Vic) (AIA 1981) and adopted the Model Rules included in that Act. The members of UCCL became the members of UCCI. UCCI's Statement of Purposes prevented it from distributing income and property to its members.
17. The Underbank land was used at various times for a golf course, a bowling green and a swimming pool. A restaurant also operated from the premises for a time and paid rent to the UCC. The restaurant business ceased to operate in 2000.
18. UCCI was placed into voluntary liquidation on 25 August 2003.
19. The liquidator sold the Underbank land to a developer by contract of sale dated 31 March 2004 for \$1.6 million.
20. Neither the liquidator nor UCCI sought to develop the Underbank land commercially prior to the sale of the Underbank land.
21. The liquidator applied to the Supreme Court of Victoria on 22 October 2004 for directions from the Court as to the persons entitled to share in the distribution of the assets of UCCI.

22. The Court's decision is dated 24 March 2006 and orders were made on 14 August 2006. The Court determined that the net liquidation proceeds, approximately \$1.35 million, should be distributed to the members of UCCI.

23. The liquidator distributed the surplus funds of approximately \$1.35 million to the members of the UCCI in accordance with the orders of the Supreme Court of Victoria. No part of the distributed proceeds related to income derived by UCCI from the restaurant lease.

24. One hundred and sixty four members, representing 83 households within the Underbank Estate, were declared by the Supreme Court of Victoria to be eligible to participate in the distribution of the assets of UCCI.

Ruling

Capital gains tax

25. UCCI is considered to be the same entity as UCCL for the purposes of Part 3-1 and Part 3-3 of the ITAA 1997.

26. Any capital gain or capital loss made on the sale of the Underbank land is disregarded as that CGT asset was acquired before 20 September 1985.

27. None of the proceeds from the sale of the Underbank land that was distributed by the liquidator to the members of UCCI (in liquidation) represents either a capital gain that section 102-5 of the ITAA 1997 requires any member to include in the calculation of net capital gain, or an amount that section 102-10 of the ITAA 1997 requires any member to include in the calculation of net capital loss.

Dividend

28. No amount of the proceeds from the sale of the Underbank land that were distributed by the liquidator to the members of UCCI (in liquidation) represents a dividend under section 44 of the ITAA 1936.

29. No amount of the proceeds from the sale of the Underbank land that were distributed by the liquidator to the members of UCCI (in liquidation) represents a dividend under section 47 of the ITAA 1936.

Appendix 1 – Explanation

❶ *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.*

Capital gains tax

30. Pursuant to the succession clause in subsection 10(5) of the AIA 1981, there was no change of personality for CGT purposes between the entity that was incorporated under the *Companies Act 1961* (Vic) and the entity that was incorporated under the AIA 1981.

31. The distribution of profits or assets was not permitted by UCCL's Memorandum of Association and was not a purpose recognised in UCCI's Statement of Purposes. The distribution of the proceeds from the sale of the Underbank land was undertaken pursuant to the decision of Mandie J in *Re Underbank Country Club Inc (in liq)* [2006] VSC 93.

32. Paragraph 149-15(3) of the ITAA 1997 is satisfied such that UCCI remained the ultimate owner of the Underbank land.

33. The Underbank land remained a pre-CGT asset at the time of its sale and the capital gain was disregarded pursuant to paragraph 104-10(5)(a) of the ITAA 1997.

34. The development of the Underbank land over the years was not of such a nature as to characterise the sale proceeds as ordinary income.

35. In the circumstances of this Ruling, the liquidator's distribution is considered to be a distribution of capital.

Dividend

Section 44

36. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

37. In *Commissioner of Taxation (NSW) v. Stevenson* (1937) 59 CLR 80, the joint judgment of Rich, Dixon and McTiernan JJ confirmed that no part of a distribution from a company in liquidation answers the description of a dividend. Accordingly, no part of the proceeds from the sale of the Underbank land that were distributed by the liquidator to the members of UCCI (in liquidation) represents a dividend under section 44 of the ITAA 1936.

Section 47

38. Section 47 of the ITAA 1936, in brief, provides that distributions by a liquidator are assessable to the extent to which they represent either income or a net capital gain which is included in a company's assessable income.

39. The Underbank land disposed of was acquired for the sole purpose of developing a country club for the benefit of resident members. The sale of the land was made in the course of a voluntary liquidation and not in the ordinary course of carrying on a business. It was an integral asset of UCCI and there was no intention of UCCI making a profit or gain on its disposal for the benefit of members. The proceeds of sale were of a capital nature and not ordinary income of UCCI.

40. As the pre-CGT status of the land was preserved until its disposal, there was no net capital gain which could be included in UCCI's assessable income. Therefore, no amount of the proceeds from the sale of the Underbank land that were distributed by the liquidator to the members of UCCI (in liquidation) represents a dividend under section 47 of the ITAA 1936.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital gains tax
- dividend income
- insolvency
- liquidation
- ordinary income
- ownership, interests, control & rights
- voluntary liquidation

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44

- ITAA 1936 44(1)
- ITAA 1936 47
- ITAA 1997 Pt 3-1
- ITAA 1997 102-5
- ITAA 1997 102-10
- ITAA 1997 104-10(5)(a)
- ITAA 1997 Pt 3-3
- ITAA 1997 149-15(3)
- TAA 1953
- Associations Incorporation Act 1981 (Vic) 10(5)
- Companies Act 1961 (Vic)
- Copyright Act 1968

Case references:

- Re Underbank Country Club Inc (in liq) [2006] VSC 93
- Commissioner of Taxation (NSW) v. Stevenson (1937) 59 CLR 80

ATO references

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ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ CGT event C2 –
cancellation, surrender and similar endings
Income Tax ~~ Assessable income