


CR 2014/59 - Income tax: APN European Retail Property Group - cancellation of units

 This cover sheet is provided for information only. It does not form part of *CR 2014/59 - Income tax: APN European Retail Property Group - cancellation of units*



Class Ruling

Income tax: APN European Retail Property Group – cancellation of units

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	28
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	33
Appendix 2:	
Detailed contents list	43

ⓘ 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:

- subsection 177D(2) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 116-20 of the ITAA 1997, and
- section 116-30 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the unit holders in APN European Retail Property Group (AEZ) which comprises stapled units in the APN European Retail Property Management Trust (PMT) and APN European Retail Property Holding Trust (ERT) who:

- are listed on the register of PMT as at the close of business on 25 June 2014 (Record Date)
- are listed on the register of ERT as at the close of business on 25 June 2014 (Record Date)
- hold their units in PMT and ERT on capital account on the Record Date(s), and
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their units in PMT and ERT.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

4. In this Ruling a person belonging to this class of entities is referred to as a 'unit holder'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 9 to 27 of this Ruling.

7. 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 from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

9. 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:

- Class Ruling application dated 17 May 2013
- Deed of Repeal and Replacement APN/UKA European Retail Property Management Trust dated 25 May 2007
- Deed of Repeal and Replacement APN/UKA European Retail Property Holding Trust dated 10 July 2007
- APN European Retail Property Group Consolidated financial report for the year ended 30 June 2012 and for the half-year ended 31 December 2012, and
- other correspondence received from the applicant dated between 27 May 2013 and 23 June 2014 inclusive.

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

AEZ Group

10. AEZ commenced operations in July 2005 as a single holding Australian resident trust. In July 2007 it became a stapled structure comprising of units in PMT and units in ERT.

11. ERT is an Australian property unit trust. PMT is an Australian public trading trust.

12. The group invested in a diversified portfolio of retail properties in Europe, mainly in Spain, Germany and Greece. Since AEZ commenced operations the European real estate sector has experienced depressed returns and valuations. This impacted directly upon the values of the retail properties held by AEZ.

13. In light of these developments APN Funds Management Limited (APN FM) (the responsible entity) entered into a consensual wind-down and property asset sale programme with its principal lender.

14. The sale programme was approved by AEZ unit holders in December 2011. The sale programme facilitated the orderly disposal and wind up of all the AEZ entities while preserving the solvency of the AEZ Group.

15. All of the property assets of AEZ have now been sold, however the proceeds of these sales has been insufficient for AEZ to repay its liabilities.

16. APN FM as responsible entity considers that there is no prospect of any further distributions or returns to investors.

17. Unit holders were notified of this prospect in the financial statements for the year ended 30 June 2012. The Directors' report to accompany those Financial Statements contained the following statement:

Notwithstanding the remaining sales, it is now clear that proceeds will not be sufficient to fully repay these liabilities. Regrettably, this infers there will be a zero return to investors.

18. AEZ delisted from the Australian Securities Exchange on 3 September 2012.

Wind up/cancellation of units

19. A number of steps have been undertaken for the process of winding up the AEZ group.

20. PMT and ERT became unstapled on 26 June 2014.

21. All units in PMT and 99% of units in ERT were cancelled on 26 June 2014 for nil consideration.

22. Although all properties held by ERT have been sold, the process to formally wind up the ERT structure is expected to take a considerable period of time that may involve a number of years. This is because a number of downstream entities in various European jurisdictions have to be wound up. There is also some ongoing litigation involving some of the downstream entities of the group.

23. APN FM nevertheless considers that unit holders will not receive any further distributions in respect of their holdings in ERT.

24. In light of this prospect APN FM has sought to reduce the capital structure of ERT to the extent possible, in advance of the final wind up of the AEZ Group. Accordingly, a pro-rata cancellation under the provisions of Clause 30.7 of the ERT Constitution took place on 26 June 2014 whereby 99 per cent of the units in ERT on issue were cancelled.

25. The Commissioner assumes for the purposes of this Ruling that:

- a declaration by APN FM that there will be no final distribution to unit holders of the net proceeds from realisation of the assets of the fund is a 'final distribution' of those net proceeds which would trigger the operation of clause 30.7 of the ERT Constitution, and
- APN FM's power to 'determine otherwise' under clause 30.7 of the ERT Constitution is a power to determine that some or all of the existing units are not to be cancelled and taken to be redeemed under that clause (subject to any other relevant provisions in the ERT Constitution and to the applicable general law governing the responsible entity's performance of its functions under the ERT Constitution).

26. The changes in unit holdings are summarised as follows:

ERT units on issue	ERT units pro-rata cancelled	Remaining ERT units after pro rata cancellation
544,910,660	539,461,553	5,449,107

27. The redemption price for units in PMT and ERT was calculated under Clause 9 of the respective PMT and ERT Constitutions. In summary the redemption price was calculated using a formula comprising the net asset value of the units. Due to the distressed financial position of PMT and ERT there was a negative net asset value and accordingly, the unit holders received no consideration for the cancellation of their units.

Ruling

CGT Capital Loss

28. CGT event C2 happened in relation to each unit holder when their units in PMT and ERT were cancelled under the scheme (section 104-25).

29. The capital proceeds received by each unit holder from CGT event C2 happening are taken to be nil (sections 116-20 and 116-30).

30. A unit holder will make a capital loss upon the cancellation of their PMT units equal to the reduced cost base of the PMT units (subsection 104-25(3)).

31. A unit holder will make a capital loss upon the pro-rata cancellation of their ERT units equal to the reduced cost base of the PMT units (subsection 104-25(3)).

Part IVA

32. On the basis of the assumptions set out in paragraph 25 of this Ruling, Part IVA of the ITAA 1936 would not apply to the scheme. On balance, it would not be concluded, having regard to the factors set out in subsection 177D(2) of the ITAA 1936, that choosing to permit the cancellation of most, as opposed to none, of the issued units was done for the dominant purpose of obtaining a tax benefit for unit holders.

Commissioner of Taxation

9 July 2014

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.*

PMT

33. Under section 108-5 each unit in PMT is a CGT asset.
34. CGT event C2 happened when each unit in PMT was cancelled on 26 June 2014 (subsection 104-25(1)).
35. A unit holder will make a capital gain when CGT event C2 happens if the capital proceeds from the ending of the PMT unit are more than the cost base of the unit. Conversely, a unit holder will make a capital loss if the capital proceeds are less than the reduced cost base of the unit (subsection 104-25(3)).
36. Unit holders have been advised that they will receive no consideration from the ending of their PMT units when CGT event C2 happens. Under subsection 116-30(1) where no capital proceeds have been received in respect of a CGT event the unit holders will be taken to have received the market value of the PMT units. On this occasion however, the market value of the PMT units is also nil.
37. Accordingly, as the capital proceeds from the ending of their PMT units when CGT event C2 happens are nil, unit holders will make a capital loss equal to the reduced cost base of their PMT units.

ERT

38. Under section 108-5 each unit in ERT is a CGT asset.
39. CGT event C2 happened when each unit in ERT was cancelled on 26 June 2014 (subsection 104-25(1)).
40. A unit holder will make a capital gain when CGT event C2 happens if the capital proceeds from the ending of the ERT unit are more than the cost base of the unit. Conversely, a unit holder will make a capital loss if the capital proceeds are less than the reduced cost base of the unit (subsection 104-25(3)).
41. Unit holders have been advised that they will receive no consideration from the ending of their ERT units when CGT event C2 happens. Under subsection 116-30(1) where no capital proceeds have been received in respect of a CGT event the unit holders will be taken to have received the market value of the ERT units. On this occasion however, the market value of the ERT units is also nil.
42. Accordingly, as the capital proceeds from the ending of their ERT units when CGT event C2 happens are nil, unit holders will make a capital loss equal to the reduced cost base of their ERT units.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	5
Date of effect	8
Scheme	9
AEZ Group	10
Wind up/cancellation of units	19
Ruling	28
CGT Capital Loss	28
Part IVA	32
Appendix 1 – Explanation	33
PMT	33
ERT	38
Appendix 2 – Detailed contents list	43

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- anti avoidance
- capital gains tax
- CGT events C1-C3 – end of a CGT asset
- unit trust distributions

- ITAA 1936 Part IVA
- ITAA 1936 177D(2)
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 108-5
- ITAA 1997 116-20
- ITAA 1997 116-30
- ITAA 1997 116-30(1)
- TAA 1953
- Copyright Act 1968

Legislative references:

- ITAA 1936

ATO references

NO:	1-4QGVK3F
ISSN:	1445-2014
ATOlaw topic:	Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 – end of a CGT asset

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).