CR 2014/95 - Income tax: Lend Lease Corporation Limited Capital Reallocation

Class Ruling

Income tax: Lend Lease Corporation Limited Capital Reallocation

Contents Para

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 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 44 of the ITAA 1936
- subsection 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 110-25(5) of the ITAA 1997
- subsection 110-55(2) of the ITAA 1997
- section 197-50 of the ITAA 1997

- section 855-10 of the ITAA 1997
- section 855-15 of the ITAA 1997, and
- section 995-1 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are the security holders of Lend Lease Group (LLG) that holds shares in Lend Lease Corporation Limited (LLC) and also units in Lend Lease Trust (LLT) which are stapled to the shares of LLC. These security holders are those that:

(a) participate in the arrangement that is the subject of this Ruling

(b) owned their securities on the Record Date 20 November 2014 (Record Date) and continued to own the securities until the Payment Date 21 November 2014 (Payment Date)

(c) held their securities neither as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997) – that is, broadly they were held on capital account, and

(d) are not subject to the Taxation of Financial Arrangements (ToFA) rules in Division 230 of the ITAA 1997 in relation to gains and losses on their LLC shares.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them).

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 8 to 20 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

7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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 and incorporates the Class Ruling request dated 18 July 2014 and other information and documents provided by PricewaterhouseCoopers.

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

9. LLC is an Australian listed public company which was listed on the Australian Securities Exchange (ASX) in June 1962

10. Following shareholder approval, the units in LLT were stapled to the shares in LLC and began trading as a stapled security on 27 November 2009.

11. On 21 November 2014, LLG made a return of capital payment of $0.691 per LLC share, totalling $400.5 million. A condition precedent to the return of capital was that LLG security holders would vote to have the return of capital compulsorily subscribed as additional contributions on the LLT units. The compulsory contribution on LLT units was made on the same day. Security holders approved the return of capital and the compulsory contribution at the Annual General Meeting on 14 November 2014.

12. The total amount of the capital returned was debited to the untainted share capital account of LLC.

13. As at 30 June 2014, the balance sheet of LLC disclosed that shareholders equity comprised of $1,618.2 million share capital and $1,188.3 million of retained profits.

14. LLC had previously undertaken a number of significant capital raisings in 2009 and 2010 ($1,109.1 million in total) designed to fund growth opportunities across the business.

15. LLC's current distribution policy is to pay out to security holders between 40% and 60% of statutory profit after tax. The distributions to security holders from year to year include dividends paid by LLC and distributions paid by LLT.

16. Approximately 30% of LLG security holders are held by non-residents. There is no security holder located in a foreign jurisdiction that has a 10% or greater interest in LLG.

17. LLC's franking account balance is approximately $16 million as disclosed in the Financial Report for the year ended 30 June 2014.

18. The arrangement enabled the release of share capital by LLC in order to facilitate the capitalisation of LLT. This was designed to enable LLT to invest in assets that are considered to be more appropriately held by LLT than LLC.

Ruling

Distribution of capital is not a dividend

19. The return of share capital payment made to LLC shareholders will not be a dividend as defined in subsection 6(1).

The application of sections 45A, 45B and 45C

20. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) that section 45C applies to the whole or any part of the return of share capital received by LLC shareholders. Accordingly, no part of the capital return will be taken to be a dividend for income tax purposes.

Capital gains tax (CGT) consequences

21. CGT event G1 (section 104-135 of the ITAA 1997) happened when LLC made the return of share capital payment to an LLC shareholder in respect of a share owned by the shareholder at the Record Date and which the shareholder continued to own on the Payment Date.

Foreign resident shareholders

22. A foreign resident LLC shareholder who received the return of capital payment may disregard any capital gain made when CGT event G1 happened if their LLC share did not constitute 'taxable Australian property' (section 855-10 of the ITAA 1997).

Capital contribution

23. The fourth element of the cost base and reduced cost base of a LLT unit includes the amount of the capital contribution that is referable to that unit (subsections 110-25(5) and 110-55(2) of the ITAA 1997).

Commissioner of Taxation
26 November 2014

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.

Distribution is not dividend

24. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder 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).

25. The term 'dividend' is defined in subsection 6(1) and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

26. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

27. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. LLC has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

28. The return of share capital payment was recorded as a debit to LLC's share capital account. As the share capital account of LLC was not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies. Accordingly, the return of share capital payment was not a dividend as defined in subsection 6(1).

Anti-avoidance provisions

29. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of return of capital amounts received by LLC shareholders as an unfranked dividend paid by the company out of profits.

Section 45A – streaming of dividends and capital benefits

30. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (the Disadvantaged Shareholders) and the Disadvantaged Shareholders receive, or are likely to receive, dividends.

31. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include the distribution to the shareholder of share capital. LLC provided its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b) when LLC made the return of share capital payment to its shareholders.

32. The capital benefit will be provided to all LLC shareholders in the same proportion as their share holdings.

33. Accordingly, section 45A does not apply to the return of share capital payment and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the return of share capital.

Section 45B – scheme to provide capital benefits

34. Section 45B applies where certain capital payments, including a return of share capital, are paid to shareholders in substitution for dividends. It allows the Commissioner to make a determination that section 45C applies to a capital benefit. Should section 45C apply, the capital benefit is taken to be a dividend. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a))
- under the scheme a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)), and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

35. Under the scheme, the return of capital would constitute the provision of a capital benefit as the return constitutes a distribution of share capital to shareholders in accordance with paragraph 45B(5)(b).

36. Pursuant to subsection 45B(9), it is likely that each LLG security holder, to which this ruling applies obtained a tax benefit. The relevant tax benefit was attributable to the return of capital being assessed under the capital gains tax (CGT) regime, rather than being assessed as a dividend under subsection 44(1).

37. Paragraph 45B(2)(c) requires the Commissioner to consider whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling the security holders (the relevant taxpayers) to obtain a tax benefit. The conclusion as to purpose is to be obtained with regard to the 'relevant circumstances' of a scheme which includes the factors set out in subsection 45B(8).

38. Having regard to the relevant circumstances of the scheme pursuant to subsection 45B(8), it cannot be concluded that either LLG or the LLG security holders entered into or carried out the scheme for a more than incidental purpose of enabling the security holders to obtain a tax benefit.

39. Having regard to the relevant circumstances of the scheme, it cannot be concluded that the Capital Reallocation scheme was entered into for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. The scheme has been carried out for genuine commercial reasons, being the desire to reallocate capital from LLC to LLT to enable LLT to meet its existing commitments and acquire further passive investments. This will assist Lend Lease to achieve its strategy of growing its passive investment base.

40. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat the whole the whole, or any part of the return of capital as an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax consequences

CGT event G1 – section 104-135

41. CGT event G1 happened when LLC made the return of share capital payment to a LLC shareholder in respect of a share that the shareholder owned at the Record Date and continued to own at the Payment Date (subsection 104-135(1) of the ITAA 1997). The Payment date will be the time that CGT event G1 happened (subsection 104-135(2) of the ITAA 1997).

42. A LLC shareholder made a capital gain if the return of share capital is more than the cost base of the shareholder's LLC share. The amount of the capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

43. If a LLC shareholder made a capital gain when CGT event G1 happened, the cost base and reduced cost base of the LLC share is reduced to nil. A LLC shareholder cannot make a capital loss when CGT event G1 happened (subsection 104-135(3) of the ITAA 1997).

44. If the return of share capital (i.e. $0.691 cents per share) is equal to or less than the cost base of the LLC share at the time of payment, the cost base and reduced cost base of the share will be reduced by the amount of the payment (subsection 104-135(4) of the ITAA 1997).

45. A capital gain made when CGT event G1 happens will be eligible to be treated as a discount capital gain under Subdivision 115-A provided that the shareholder acquired the LLC share at least 12 months before the return of share capital payment was made (subsection 115-25(1) of the ITAA 1997) and the other conditions of that Division are satisfied.

Foreign resident shareholders

46. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, the entity is a foreign resident, or is the trustee of a foreign trust for CGT purposes, and
- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

47. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out five categories of CGT assets:

Item 1	taxable Australian real property
Item 2	an indirect Australian real property interest not covered by item 5
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3, and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

48. A foreign resident, or the trustee of a foreign resident trust for CGT purposes, cannot disregard a capital gain or capital loss made when a CGT event G1 happened to their LLC share under subsection 855-10(1) if:

(a) their LLC share was an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997), or

(b) their LLC share had been used at any time by them in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or

(c) their LLC share was covered by subsection 104 165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Capital contribution

49. The capital distribution paid on each LLC share will be applied to each LLT unit as a capital contribution. This capital contribution represents capital expenditure incurred by a security holder for the purpose of increasing the value of their LLT units.

50. The fourth element of the cost base and the reduced cost base of each LLT unit includes the amount of the capital contribution that is referable to that unit are set out in subsections 110-25(5) and 110-55(2) of the ITAA 1997.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital benefit
- capital gains tax
- CGT cost base
- dividend income
- return of capital on shares
- shareholder payments
- stapled companies
- stapled structure

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1997 104-135
- ITAA 1997 104–135(1)
- ITAA 1997 104–135(2)
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104–165(3)
- ITAA 1997 110-25(5)
- ITAA 1997 110-55(2)
- ITAA 1997 Div 115
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115–25(1)
- ITAA 1997 Div 197
- ITAA 1997 197–50
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977–50
- ITAA 1997 995-1
- ITAA 1997 995–1(1)
- TAA 1953

ATO references

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