


TD 2004/D78 - Income tax: is the income derived from a property syndicate that is structured to comply with the requirements of the managed investment scheme provisions of the Corporations Act 2001 taxable as net income of a trust estate under Division 6 of Pt III of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 2005/28.



Draft Taxation Determination

Income tax: is the income derived from a property syndicate that is structured to comply with the requirements of the managed investment scheme provisions of the *Corporations Act 2001* taxable as net income of a trust estate under Division 6 of Pt III of the *Income Tax Assessment Act 1936*?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Yes.

Registered managed investment schemes

2. Where a property syndicate is a 'registered managed investment scheme' (MIS syndicate) under section 601ED of the *Corporations Act 2001* (the Act), the following apply:
 - the responsible entity is the company that operates the managed investment scheme and performs the functions conferred on it by the scheme's constitution and the Act (section 601FB of the Act);
 - the responsible entity of that registered scheme holds scheme property on trust for scheme members (subsection 601FC(2) of the Act); and
 - a scheme member is a person who holds an interest in the syndicate (section 9 of the Act).
3. 'Scheme property' is defined widely to cover as presently relevant:
 - contributions to the scheme of money or money's worth;
 - borrowings by the responsible entity for the purpose of the scheme;
 - property acquired with the proceeds of these contributions, borrowings and other money that forms part of scheme property; and

- income and property derived on any of the above (section 9 of the Act).

Tax treatment of MIS syndicates

4. The property investments held by an MIS syndicate are 'scheme property'. The responsible entity is in the position of trustee in respect of the scheme property of the MIS syndicate. Income earned on these investments is income of a trust estate. The assessable income and allowable deductions of the MIS syndicate compose the net income of the trust estate for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936*, dealing with the taxation of trust income (the trust provisions).

5. The responsible entity and scheme members are taxable in accordance with these provisions as trustee and beneficiaries, respectively, of the trust estate comprising the scheme property of the MIS syndicate. The responsible entity is required to lodge a trust return, and the scheme members (and the responsible entity, if applicable) are taxable on the net income of the MIS syndicate in accordance with the rules applicable to the taxation of trusts.

6. If some or all of the scheme members comprise a partnership for income tax purposes, the income derived by the partnership will be in the form of a share of the net income of the trust estate of the MIS syndicate.

Date of Effect

7. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Transitional arrangements

8. Some MIS syndicates, and their investors, may have been lodging income tax returns on a basis that does not include syndicate income as income from a trust estate. For example, we are aware that some MIS syndicates have been lodging partnership tax returns.

9. In cases where the correct amount of net income was returned by an MIS syndicate as a partnership, despite lodging returns incorrectly, and returning income on an incorrect basis, the correct amount of taxable income will have been returned, and the correct amount of tax will have been paid, in respect of these syndicates. In these circumstances, no practical purpose is served by requiring amended returns to be lodged by the MIS syndicate or members for income years that ended prior to the date of issue of this determination. Accordingly, in these cases, trust returns will only need to be lodged on a prospective basis and no amendment is required to members' returns.

10. However, where the MIS syndicate incurred losses for tax purposes, the amount of tax that has been paid by scheme members may be less than the amount properly payable (that is, because of the incorrect distribution of these losses of the syndicate for inclusion in members' returns). In these cases, the responsible entity should contact us in order to rectify the situation. In these cases, amendments to syndicate and members returns may not be required. Factors that will be taken into account included whether subsequent syndicate income has absorbed these losses, and reaching agreement on the prospective treatment of these losses.

Your comments

11. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

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Commissioner of Taxation

24 November 2004

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20

Legislative references:

- Corporations Act 2001 9
- Corporations Act 2001 601ED
- Corporations Act 2001 601FB
- Corporations Act 2001 601FC(2)
- ITAA 1936 Pt III Div 6
- TAA 1953 Pt IVAAA

ATO references

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