



TD 2009/D7 - Income tax: where an Australian resident taxpayer includes its share of the net income of a partnership in its assessable income under section 92 of the Income Tax Assessment Act 1936, and the net income of the partnership (as determined in accordance with section 90 of that Act) includes Foreign Investment Fund (FIF) income of the partnership, will that taxpayer be entitled to a FIF exemption under subsection 519B(2) of that Act for any relevant proportion of their share of the partnership's net income?

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This document has been finalised by TD 2009/20.

 There is a Compendium for this document: TD 2009/20EC .



Draft Taxation Determination

Income tax: where an Australian resident taxpayer includes its share of the net income of a partnership in its assessable income under section 92 of the *Income Tax Assessment Act 1936*, and the net income of the partnership (as determined in accordance with section 90 of that Act) includes Foreign Investment Fund (FIF) income of the partnership, will that taxpayer be entitled to a FIF exemption under subsection 519B(2) of that Act for any relevant proportion of their share of the partnership's net income?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

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Ruling

1. No. In relation to partnerships, the effect of sections 485 and 485A of the *Income Tax Assessment Act 1936* (ITAA 1936)¹ is that the operative provision of the Foreign Investment Fund (FIF) rules (being section 529 of the ITAA 1936) applies to a partnership as if it were a resident taxpayer. Therefore, FIF income is included in the calculation of the net income of the partnership as determined under section 90 of the ITAA 1936. Accordingly, the conditions for the satisfaction of the FIF exemption under subsection 519B(2) of the ITAA 1936 must be met by the partnership for the purposes of

¹ All legislative references are to the ITAA 1936 unless otherwise indicated.

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determining the net income of the partnership. An Australian resident partner includes its share of the net income of the partnership (determined as above) under section 92 of the ITAA 1936. This is also the case where a non-resident company qualifies as a foreign hybrid company under Division 830 of the *Income Tax Assessment Act 1997* (ITAA 1997) and is therefore treated as if it were a partnership, with each shareholder in the company being treated as a partner, for income tax purposes including the application of Division 5 of Part III of the ITAA 1936.

Example

2. *CS Fund is a resident of Australia for Australian taxation purposes and is a complying superannuation fund as defined in the Superannuation Industry (Supervision) Act 1993.*
3. *CS Fund is a shareholder in a US Limited Liability Company (US LLC). US LLC has two shareholders. The holder of 90% of the contributed share capital is CS Fund. The holder of the other 10% of the contributed share capital is a US resident company which is also the manager of US LLC. US LLC is incorporated in the US and is managed and controlled in the US. The investment and management decisions can only be made by the US resident manager.*
4. *The US LLC makes portfolio investments in companies resident in the United States and in European countries. The US and European companies are not controlled foreign companies of CS Fund.*
5. *The US LLC meets the requirements of a foreign hybrid company under section 830-15 of the ITAA 1997 in respect of the relevant income year. The US LLC is not a complying superannuation fund. For Australian income tax purposes the US LLC is treated as if it were a partnership, and CS Fund is treated as if it were a partner in such partnership, pursuant to the operation of sections 830-20 and 830-25 of the ITAA 1997, respectively.*
6. *Accordingly, the net income of the US LLC partnership is calculated in accordance with section 90. Its assessable income for these purposes includes any FIF income of the US LLC included under section 529 on the basis, pursuant to the operation of section 485A, that US LLC is a Part XI Australian resident. The exemption under subsection 519B(2) is not satisfied in respect of FIF income that is included in the assessable income of US LLC under section 529 because US LLC is not a complying superannuation fund.*
7. *CS Fund will include in its assessable income its share of the net income of the US LLC determined under section 90 pursuant to section 92.*

Date of effect

8. 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 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

9 September 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Explanation

9. A US LLC will be a foreign hybrid company if it satisfies the requirements under section 830-15 of the ITAA 1997 in respect of the relevant income year. A foreign hybrid company will be treated as a partnership and the shareholders in the foreign hybrid company will be treated as the partners of such partnership for Australian income taxation purposes pursuant to sections 830-20 and 830-25 of the ITAA 1997, respectively.

10. Division 5 of Part III of the ITAA 1936 will therefore apply to the US LLC (as the partnership) and to its shareholders (as the partners), subject to the special rules in Division 830 of the ITAA 1997.

11. Section 90 of the ITAA 1936 defines the 'net income' of a partnership to mean the assessable income of the partnership, calculated as if the partnership were a resident taxpayer, less allowable deductions except for deductions allowable under section 290-150 or Division 36 of the ITAA 1997.

12. Subsection 485(1) provides that the operative provision (section 529) applies to a taxpayer in relation to an interest in a FIF. It also provides that when working out the net income of a partnership, section 485A has effect. Section 485A provides that, in working out the net income of a partnership under section 90, the assessable income is to be calculated as if the partnership were a taxpayer that is a Part XI Australian resident. A 'Part XI Australian resident' is defined in section 470 by reference to the definition of 'resident' under section 6. Sections 485, 485A and 529 therefore together operate to determine the partnership to be the taxpayer in relation to the operative FIF provision.

13. Subsection 519B(2) provides that if a taxpayer is a trustee of a complying superannuation entity in relation to a year of income, the 'operative provision' does not apply to the taxpayer in relation to a FIF in respect of the notional accounting period of the FIF that ends in the year of income.

14. Therefore, the US LLC is the relevant taxpayer to which the operative provision in the FIF rules applies, and as it is not a complying superannuation entity, it does not satisfy the requirements of the exemption under subsection 519B(2). The net income of the US LLC (as a partnership for tax purposes) determined in accordance with section 90, in respect of which its shareholders (as partners) are assessable in accordance with section 92, will accordingly include its FIF income pursuant to section 529.

Appendix 2 – Your comments

15. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

16. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- foreign investment funds
- complying superannuation funds
- controlled foreign partnerships
- controlled foreign companies

Legislative references:

- ITAA 1936
- ITAA 1936 6
- ITAA 1936 Pt III Div 5

- ITAA 1936 90
- ITAA 1936 92
- ITAA 1936 470
- ITAA 1936 485
- ITAA 1936 485(1)
- ITAA 1936 485A
- ITAA 1936 519B(2)
- ITAA 1936 529
- ITAA 1997 Div 36
- ITAA 1997 290-150
- ITAA 1997 Div 830
- ITAA 1997 830-15
- ITAA 1997 830-20
- ITAA 1997 830-25
- SISA 1993

ATO references

NO: 2009/2750
1-1OV4689

ISSN: 1038-8982

ATOlaw topic: Income Tax ~~ Entity specific matters ~~ partnerships