TD 2005/28 - Income tax: is the income of a property syndicate taxable as net income of a trust estate under Division 6 of Part III of the Income Tax Assessment Act 1936 where the syndicate is a registered managed investment scheme under the Corporations Act 2001 and the responsible entity holds the income producing property of the syndicate for scheme members as scheme property?

Taxation Determination

Income tax: is the income of a property syndicate taxable as net income of a trust estate under Division 6 of Part III of the *Income Tax Assessment Act 1936* where the syndicate is a registered managed investment scheme under the *Corporations Act 2001* and the responsible entity holds the income producing property of the syndicate for scheme members as scheme property?

Preamble

The number, subject heading, date of effect and paragraphs 1, 6, 7 and 8 of this document are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner.*

1. Yes.

Registered managed investment schemes

2. Where a property syndicate is a 'registered managed investment scheme' 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
- in relation to a managed investment scheme, a member is a person who holds an interest in the scheme (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;
- money that forms part of the scheme property under the provisions of the Act or the *Australian Securities and Investments Commission Act 2001*;
- 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 covered by the determination

4. This determination applies to structured real estate investment schemes (commonly called property syndicates or unlisted property trusts) which have the following features:

- the scheme is a registered managed investment scheme under Chapter 5C of the Act;
- an exemption under section 601QA of the Act from the provisions of Chapter 5C of the Act is not current in relation to the scheme;
- the scheme invests in real estate and derives income by way of rent and it may also make profits from the eventual sale of real estate;
- the real estate has been acquired with the proceeds of contributions, borrowings or other money that forms part of scheme property; and
- the responsible entity holds the real estate for scheme members as part of the scheme property.

5. For the purposes of this determination these schemes are called ***MIS syndicates***.

6. In an MIS syndicate, the responsible entity is in the position of trustee in respect of scheme property. The income producing real estate in these syndicates is held by the responsible entity on behalf of investors generally. Where the real estate is held by the responsible entity, and not by the investors or syndicate members directly, it is held on trust. It is held on trust either pursuant to the scheme's constituent documents, or pursuant to subsection 601FC(2) of the Act, or both. 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.

7. 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. Where a MIS syndicate is comprised of more than one unit trust, each of these trusts is treated separately.

8. An interest in an MIS syndicate may be held by an investor either individually or jointly with others. If two or more scheme members invest jointly in an MIS syndicate through an arrangement that constitutes a partnership between themselves for income tax purposes, the income of that partnership includes its share of the net income of the trust estate of the MIS syndicate.

Transitional arrangements

9. 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, the Commissioner is aware that some MIS syndicates have been lodging partnership tax returns.

10. 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. 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). The Tax Office will advise the relevant industry body on the circumstances under which corrective action (if any) will be taken in relation to MIS syndicate losses distributed to members as partnership losses.

Examples

Example 1

11. Following his retirement, David invests in the Money Coast Commercial Property Syndicate, which is a registered managed investment scheme and is covered by this determination. The syndicate has sent David an annual statement showing his cash distribution for the year to be $1,450 which included a tax deferred component of $50. The net income of the syndicate has been worked out on the basis that the syndicate is a trust estate. David's share of the net income of the syndicate is $1,400 ($1,450 - $50) which he includes in his tax return as a trust distribution. The cost base of David's units in the syndicate is also reduced to reflect the $50 tax deferred component of the cash distribution received.

Example 2

12. David also invested in the newly formed Money Coast Industrial Property Syndicate which is also a registered managed investment scheme covered by this determination. The syndicate acquired recently redeveloped industrial premises and it is still completing some minor fit out work. The syndicate earned some rental income and interest on funds earmarked for the fit out. A small profit has been earned which has been distributed to members (as a tax deferred distribution) but the syndicate has incurred a net loss for income tax purposes. David cannot claim his share of this loss in his tax return. This is because losses incurred by a trust estate are carried forward within the trust for offset against income in future years.

Example 3

13. Tom decides to invest in the Big Dollars Property Syndicate which is a registered managed investment scheme covered by this determination. The minimum investment allowed is greater than what Tom can afford and he invests jointly with his brother-in-law Adrian to reach this minimum. Income derived on this joint investment is treated as income of a partnership for income tax purposes. Income and losses from this joint investment are included in their individual returns. In its first year, the syndicate makes a loss for tax purposes. Even though Tom and Adrian investment is in the form of a partnership for tax purposes, this loss cannot be claimed in their own tax returns. The syndicate loss is not a

loss in the hands of their tax law partnership. This is because the loss was incurred by the property syndicate which is a trust estate and is carried forward within the syndicate for offset against income in future years. However, if they incurred expenses in the partnership in excess of income derived from the syndicate (for example, interest on moneys jointly-borrowed to fund the investment) there would be a tax loss in the partnership that can be claimed in their individual returns.

Date of Effect

14. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation
29 June 2005

Previous draft:

TD 2004/D78

Related Rulings/Determinations:

TR 92/20

Subject References:
- managed investment schemes
- property syndicates
- taxation of trusts
- trust losses

Legislative references:
- Corporations Act 2001 9
- Corporations Act 2001 Chap 5C
- Corporations Act 2001 601ED
- Corporations Act 2001 601FB
- Corporations Act 2001 601FC(2)
- Corporations Act 2001 601QA
- ITAA 1936 Pt III Div 6
- TAA 1953 Pt IVAAA

ATO references
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