


CR 2011/90 - Income tax: return of capital: Multiplex Development and Opportunity Fund

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Class Ruling

Income tax: return of capital: Multiplex Development and Opportunity Fund

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ⓘ 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 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

Unless otherwise stated, all subsequent legislative references in this Ruling are to the ITAA 1936.

Class of entities

3. The class of entities to which this Ruling applies are the holders of units (Multiplex unitholders) in Multiplex Development and Opportunity Fund (Multiplex Development) who:

- (a) were registered on the register of Multiplex Development as at the Record Date (30 September 2011);
- (b) participated in the return of capital;
- (c) hold their units in Multiplex Development (Multiplex units) on capital account; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to the gains and losses on their Multiplex units.

(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 arrangement 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 9 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.

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Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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 to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:

- application for Class Ruling (including appendices), dated 27 June 2011; and
- further correspondence from the applicant dated 4 July to 30 September 2011.

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

Background

10. Multiplex Development is an Australian resident unlisted unit trust.

11. Multiplex Development is the head entity of a tax consolidated group and is treated as a company for income tax purposes. Multiplex Development holds either directly or indirectly a number of entities. To the extent that these entities are corporate subsidiaries, they are subject to the *Corporations Act 2001*.

12. Multiplex Development's principal activity is real estate investment.

Return of capital

13. On 6 October 2011, Multiplex Development made a return of capital to Multiplex unitholders of \$66,700,000, being 40.8350 cents per unit.

14. The return of capital was funded from the proceeds (net of the repayment of bank debt) of \$85,639,809 from the sale of two residential property development projects.

15. These development projects were undertaken with funds sourced from borrowings and from contributions from Multiplex unitholders by way of subscriptions for units in Multiplex Development. The sale of the two development projects resulted in aggregated losses for Multiplex Development.

16. The return of capital has not changed the number of Multiplex units on issue, the number of Multiplex units held by each Multiplex unitholder, or the proportionate unitholdings of the Multiplex unitholders.

17. Multiplex Development's distribution history shows that profits have progressively been paid to Multiplex unitholders. Multiplex did not have undistributed profits at the time the return of capital was made.

Other matters

18. Due to market conditions, Multiplex Development was closed to applications, redemptions and new investments in August 2008. Since that time, no new assets have been purchased by Multiplex Development other than those contracted prior to that date.

19. As at 31 December 2010, Multiplex Development had 163,336,831 units on issue. The only entries to the unit capital account of Multiplex Development are in respect of the issue of units (as reduced for capital raising costs) and the reduction of capital in March 2010. No other amounts have been credited or transferred to the unit capital account.

20. Multiplex Development's unit capital account is untainted for the purposes of Division 197 of the ITAA 1997.

Ruling

Distribution is not a dividend

21. The payment of the return of capital to Multiplex unitholders is not a dividend, as defined in subsection 6(1).

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

22. The Commissioner will not make a determination under section 45A that section 45C applies to the whole, or any part, of the return of capital.

23. The Commissioner will not make a determination under section 45B that section 45C applies to the whole, or any part, of the return of capital.

Capital gains tax***CGT event G1***

24. CGT event G1, in subsection 104-135(1) of the ITAA 1997, happened when Multiplex Development paid the return of capital in respect of a Multiplex unit that a Multiplex unitholder owned at the Record Date and continued to own at the time of the payment.

CGT event C2

25. CGT event C2, in subsection 104-25(1) of the ITAA 1997, happened when Multiplex Development paid the return of capital in respect of a Multiplex unit that a Multiplex unitholder owned at the Record Date but ceased to own before the time of the payment.

Foreign resident unitholders

26. A foreign resident Multiplex unitholder who was paid the return of capital disregards any capital gain made when CGT event G1 happened if their Multiplex unit is not 'taxable Australian property' (855-10 of the ITAA 1997).

27. A foreign resident Multiplex unitholder who was paid the return of capital disregards any capital gain made when CGT event C2 happened if their right to receive the return of capital is not 'taxable Australian property' (855-10 of the ITAA 1997).

Commissioner of Taxation12 October 2011

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.*

Unit Trust Considerations

28. As a consequence of the consolidation rules in Division 713 of the ITAA 1997, section 45B of the ITAA 1936 can apply to particular types of trusts. This is due to the fact that certain corporate unit trusts and public trading trusts are treated like a company for tax purposes when they elect to become the head company of a consolidated group. For these trusts, the modifications to the applied law pursuant to section 713-140 of the ITAA 1997 provide that a reference to a dividend in the ITAA 1936 and ITAA 1997 includes a reference to a distribution from the trust out of profits, and a reference to a share capital account includes a reference to the amount of the trust estate that is not attributable to profits.

29. In the present circumstances, these modifications will result in the distribution from the trust out of profits being treated as a dividend as defined in the ITAA 1936 and ITAA 1997. Further, it will result in an amount of the trust estate that is not attributable to profits being treated in the same way as a share capital account.

30. Sections 713-130, 713-135 and 713-140 of the ITAA 1997 provide that the applied law involves corresponding treatment of analogous characteristics, things and persons relating to a trust to those of a company. In effect, in this Ruling, units and unitholders are to be treated as shares and shareholders, respectively, for the purposes of the applied law.

Distribution is not a dividend

31. 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).

32. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, later paragraphs in this subsection exclude certain items from being a dividend for tax purposes.

33. Paragraph (d) of subsection 6(1) specifically excludes from the definition of 'dividend' an amount of the distribution debited against an amount standing to the credit of a company's share capital account.

34. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account that a 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.

35. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account, except for certain purposes, if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account and the account is not already tainted.

36. As the return of capital was wholly debited against an amount standing to the credit of Multiplex Development's unit capital account, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the return of capital does not constitute a dividend.

Anti-avoidance provisions

37. Section 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 capital amount received by the shareholders as an unfranked dividend.

Section 45A – streaming of dividends and capital benefits

38. Section 45A applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

39. Multiplex Development provided Multiplex unitholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)) and the capital benefit was provided to all Multiplex unitholders in the same proportion as their individual unit holding. As all Multiplex unitholders benefited equally from the return of capital, there is no 'streaming' of capital benefits to some unitholders and not to others.

40. Accordingly, section 45A will not apply to the return of capital and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the whole or any part of the return of capital amount.

Section 45B –Scheme to provide capital benefits

41. Section 45B is an anti-avoidance provision which, if it applies, will allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital amount received by the unitholders as an unfranked dividend.

42. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision will apply 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, who entered into the scheme or carried out the scheme or any part of the scheme did so for a purpose, other than the incidental purpose of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

43. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) to include a distribution to the person of share capital. Under the present Scheme, Multiplex Development made a distribution of capital to all Multiplex unitholders which constituted the provision of a capital benefit.

Tax Benefit

44. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9), if an amount of tax or other amount payable under the income tax laws is less than the amount that would have been payable or payable at a later time if the capital benefit had instead been a dividend.

45. These conditions are satisfied in the present Scheme as the return of capital to Multiplex unitholders will be assessed under the capital gains tax provisions of the income tax law rather than being immediately assessed as a dividend.

Relevant circumstances

46. Paragraph 45B(2)(c) sets out an objective purpose test having regard to 'the relevant circumstances of the Scheme', as set out in subsection 45B(8). The test will be satisfied for any non-incidental purpose.

47. Subsection 45B(8) lists factors in paragraphs (a) to (k) that are relevant circumstances in determining whether a person entered into, or carried out, a scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. The list of factors is not exclusive and not all factors listed will be relevant to every scheme.

48. In this Scheme, the return of capital was made to all Multiplex unitholders so, therefore, the factors within paragraphs 45B(8)(c) to 45B(8)(f) do not incline for, or against, a conclusion as to purpose. The relevant factors are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

49. Paragraph 45B(8)(a) refers to the extent to which a capital benefit is attributable to realised and unrealised profits of the company and its associates (which includes Multiplex Development's subsidiaries). As all of the profits of Multiplex Development have been distributed to Multiplex unitholders as franked dividends, the return of capital is not attributable to the profits of Multiplex Development.

50. Paragraph 45B(8)(b) refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of the company or its associates. Multiplex Development has confirmed that it has regularly made distributions and intends to continue to do so. In these circumstances, the return of capital to Multiplex unitholders under this Scheme does not incline to the conclusion that it is being made in substitution for dividends.

51. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to 177D(b)(viii). These are matters by reference to which a scheme is examined from a practical perspective to compare its tax and non tax objectives. These matters include, among other things, the form and substance of the scheme and its financial implications for the parties to it.

52. In considering the Scheme, the return of capital by Multiplex Development to the Multiplex unitholders was consistent with it being, in form and substance, a return of capital. The Scheme did not lead to the conclusion that the requisite purpose existed and that the Scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

53. It cannot be concluded that Multiplex Development or the Multiplex unitholders entered into, or carried out, the Scheme for the purpose of enabling the Multiplex unitholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C will apply to the whole or any part of the proposed return of capital.

Section 45C

54. As the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 in relation to the capital benefit, section 45C of the ITAA 1936 will not deem the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax

CGT event G1 – section 104-135

55. CGT event G1 happened when Multiplex Development paid the return of capital to a Multiplex unitholder in respect of a unit that they owned in Multiplex Development at the Record Date and continued to own at the Payment Date (section 104-135(1) of the ITAA 1997).

56. A Multiplex unitholder makes a capital gain if the return of capital amount is more than the cost base of their Multiplex unit. The amount of the capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

57. If a Multiplex unitholder makes a capital gain, the cost base and reduced cost base of the Multiplex unit is reduced to nil. It is not possible to make a capital loss when CGT event G1 happens (subsection 104-135(3) of the ITAA 1997).

58. If the return of capital is equal to, or less than, the cost base of the Multiplex unit at the time of the payment, the cost base and reduced cost base of the Multiplex unit is reduced (but not below nil) by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

59. If the Multiplex unit was acquired by the Multiplex unitholder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 happening may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Division 115 of the ITAA 1997 are satisfied).

CGT event C2 – section 104-25

60. The right to receive the return of capital is one of the rights inherent in a Multiplex unit at the Record Date. If, after the Record Date but before the time the return of capital is paid, a Multiplex unitholder ceased to own a Multiplex unit, the right to receive the return of capital in respect of that unit was retained by the unitholder and is a separate CGT asset.

61. CGT event C2 happened when the return of capital was paid. The right to receive the payment (being an intangible CGT asset) ended by the right being discharged or satisfied when the payment was made (section 104-25 of the ITAA 1997).

62. A Multiplex unitholder makes a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. A Multiplex unitholder makes a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

63. In working out the capital gain or capital loss made when CGT event C2 happened, the capital proceeds are the amount of the return of capital (subsection 116-20(1) of the ITAA 1997).

64. The cost base of a Multiplex unitholder's right to receive the return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the Multiplex unit that will be applied in working out a capital gain or capital loss made when a CGT event happens to the unit when the Multiplex unitholder disposes of it after the Record Date.

65. Therefore, if the full cost base or reduced cost base of a Multiplex unit is applied in working out a capital gain or capital loss made when a CGT event happens to that unit, the right to receive the return of capital will generally have a nil cost base.

66. As the right to receive the payment of the return of capital was inherent in the Multiplex unit during the time it was owned, the right is considered to have been acquired at the time when the corresponding Multiplex unit was acquired (section 109-5 of the ITAA 1997). Accordingly, if the Multiplex unit was acquired at least 12 months before the payment of the return of capital, a capital gain made from the ending of the corresponding right will satisfy the requirements of section 115-25 of the ITAA 1997. Such a capital gain will be eligible to be treated as a discount capital gain under Division 115 of the ITAA 1997, provided the other conditions of that Division are satisfied.

Foreign resident unitholders

67. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

68. Section 855-15 of the ITAA 1997 sets out when a CGT asset is 'taxable Australian property':

| | |
|--------|---|
| 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) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident). |

69. Neither a Multiplex unit nor the right to payment is 'taxable Australian real property'.

70. However, a foreign resident, or the trustee of a foreign trust, for CGT purposes, cannot disregard, under subsection 855-10(1) of the ITAA 1997, a capital gain from CGT event G1 or CGT event C2 if just before the CGT event happens:

- their Multiplex unit or right to payment was an 'indirect Australian real property interest' (item 2 of the table in section 855-15 of the ITAA 1997);
- their Multiplex unit or right to payment had been used at any time by the foreign resident 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
- their Multiplex unit or right to payment was covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Appendix 2 – Detailed contents list

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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 on capital of shares
- shareholder payments
- stapled companies
- stapled structure

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 6(1)(d)
- ITAA 1936 44(1)
- ITAA 1936 45(B)
- ITAA 1936 45(B)(2)(a)
- ITAA 1936 45(B)(2)(b)
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- ITAA 1997 104-25
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- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 115-A
- ITAA 1997 115-25
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 Div 713
- ITAA 1997 713-130
- ITAA 1997 713-135
- ITAA 1997 713-140
- ITAA 1997 Subdiv 713-C
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001

ATO references

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 Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 - end of a CGT asset
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