


CR 2014/96 - Income tax: Multiplex Development and Opportunity Fund - Return of capital

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Class Ruling

Income tax: Multiplex Development and Opportunity Fund – Return of capital

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① 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
- subsection 104-25(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 104-135(1) of the ITAA 1997, and
- section 855-10 of the ITAA 1997.

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

Class of entities

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

- (a) were registered on the register of MDOF as at 24 October 2014 (the Record Date);
- (b) participated in the return of capital;
- (c) hold their units in MDOF (MDOF 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 MDOF 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)

In this Ruling an entity belonging to this class of entities is referred to as a MDOF unitholder.

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 8 to 23 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 information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- application for Class Ruling (including appendices) dated 15 August 2014, and
- further correspondence provided by the applicant.

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

9. MDOF is an Australian resident unlisted unit trust.
10. MDOF is the head entity of a tax consolidated group and is treated as a company for income tax purposes. MDOF 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*.
11. MDOF's principal activity is property investment and development.

Return of capital

12. On 31 October 2014 (the Payment Date), MDOF returned capital to MDOF unitholders of \$17,967,050.41, being 11 cents per unit, by debiting its unit capital account by the amount of \$17,967,050.41.
13. The return of capital amount of \$17,967,050.41 was funded as follows:
- \$633,000 being the balance of the final Claremont Holdings Limited Loan (the Claremont Loan) repayment which was not previously returned to unitholders as part of MDOF's 2013 return of capital
 - \$15,102,786.16 being part of the first Claremont Loan repayment of \$22,860,000, which has not previously been returned by MDOF to unitholders, and
 - \$2,231,264.25 being a return of capital received by MDOF from Multiplex Acumen Vale Syndicate Limited (MAVSL) (in liquidation), in respect of its 49.58% shareholding in the company.
14. The Claremont Loan was provided by Brookfield Multiplex DT Pty Ltd (Multiplex DT), an entity in the MDOF tax consolidated group, to Multiplex Claremont Holdings Pty Ltd as part of the funding for the Claremont Shopping Centre Redevelopment Project. The first and final repayments on the Claremont Loan have been used by MDOF to invest in Little Bay South Developer Pty Ltd (Little Bay) and to fund the MDOF 2013 return of capital.

15. The funds for the Claremont Loan originated from the realisation of investments held by MDOF and its subsidiaries. Any profits (net of expenses and trading losses) that may have been derived from the realisation of these investments have been distributed by MDOF.

16. MDOF reported a net profit of \$3,507,000 for the year ended 30 June 2014 on total revenue of \$4,466,000 and total expenses of \$959,000. Of the total revenue \$3,739,000 is attributable to a share of net profit from its equity accounted investment (80% share) in Little Bay, \$229,000 is attributable to a write back of impairment expenses previously recognised by MDOF on its investment in Little Bay and \$498,000 is attributable to interest income. The total expenses of \$959,000 comprises of management fees of \$795,000 and other expenses of \$164,000.

17. MDOF has recognised its investment in Little Bay as an equity accounted investment in accordance with Australian Accounting Standards AASB 128.

18. MDOF has applied the equity accounted profit of \$3,739,000 from its investment in Little Bay against accumulated losses made on the investment; as a consequence MDOF had cumulative equity accounted losses on its investment in Little Bay totalling \$4,190,000 as at 30 June 2014. Furthermore, as at 30 June 2014 MDOF had no undistributed profits and retained losses of \$24,030,000.

19. MDOF's distribution history shows that profits have progressively been paid to MDOF unitholders as investments are realised. The last distribution of profits was made in March 2010. MDOF did not have undistributed profits at the time the return of capital was made.

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

Other matters

21. In August 2008, MDOF was closed to applications, redemptions and new investments due to market conditions. Since that time no new assets have been purchased by MDOF, other than those contracted prior to that date, and MDOF intends to distribute capital and any profits to MDOF unitholders upon the realisation of any remaining investments.

22. As at 31 October 2014, MDOF had approximately 163,336,829 units on issue. The only entries to the unit capital account of MDOF are in respect of the issue of units (as reduced for capital raising costs) and the reductions of capital in March 2010, October 2011 and December 2013. No other amounts have been credited or transferred to the unit capital account.

23. MDOF's unit capital account is untainted for the purposes of Division 197 of the ITAA 1997.

Ruling

Distribution is not a dividend

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

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

25. 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.

26. 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

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

CGT event C2

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

Foreign resident unitholders

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

30. A foreign resident MDOF 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' (section 855-10 of the ITAA 1997).

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

31. 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 the 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.

32. In the present circumstances, these modifications would result in a distribution from the trust out of profits being treated as a dividend as defined in the ITAA 1936 and the 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.

33. 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

34. 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).

35. 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.

36. 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.

37. The term 'share capital account' is defined in subsection 995-1(1) of the ITAA 1997 to have the meaning given 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.

38. 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 becomes 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.

39. As the return of capital was wholly debited against an amount standing to the credit of MDOF's unit capital account, which is untainted for the purposes of Division 197 of the ITAA 1997, 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

40. 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 capital amount received by the shareholders as an unfranked dividend.

Section 45A – streaming of dividends and capital benefits

41. 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.

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

43. 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

44. 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)).

45. 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, MDOF made a distribution of capital to all MDOF unitholders which constituted the provision of a capital benefit.

Tax benefit

46. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9), if an amount of tax or other amount payable under the ITAA 1936 or the ITAA 1997 is, apart from section 45B, less than the amount that would have been payable or payable at a later time if the capital benefit had instead been an assessable dividend.

47. These conditions are satisfied in the present scheme as the return of capital to MDOF 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

48. The relevant circumstances of the scheme are set out in subsection 45B(8).

49. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme, or any part of the scheme, did so for a purpose of enabling a taxpayer to obtain a tax benefit. The requisite purpose does not have to be the dominant purpose but it must be more than an incidental purpose.

50. In this scheme, the return of capital was made to all MDOF unitholders. Therefore, the factors within paragraphs 45B(8)(c) to 45B(8)(h) do not incline for, or against, a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) pertaining to the provision of ownership interests and demerger are not relevant here. So, in this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

51. Paragraph 45B(8)(a) refers to the extent to which a capital benefit is attributable to capital or to the realised and unrealised profits of the company and its associates (which includes MDOF's subsidiaries). The source of the funds for the return of capital made by MDOF is the Claremont Loan repayments and the return of capital from MAVSL (in liquidation). Although the funds for the Claremont Loan originated from the realisation of investments held by MDOF and its subsidiaries, any profits that were derived from the realisation of those investments have been distributed by MDOF. MDOF also had no undistributed profits at the time of the return of capital. Accordingly, the return of capital is attributable to capital and not to profits, realised or unrealised, of MDOF and its associates.

52. 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. MDOF has regularly distributed profits to its unitholders upon the realisation of its investments. In addition, MDOF has also returned capital to MDOF unitholders in March 2010, October 2011 and December 2013. Since August 2008, when MDOF became closed to new applications, redemptions and investments, MDOF's intention has been to make distributions of capital and profits to MDOF unitholders upon the realisation of its remaining investments. Accordingly, MDOF's pattern of distribution does not suggest that the return of capital was made in substitution for a dividend.

53. Paragraph 45B(8)(k) refers to the matters in subsection 177D(2). 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.

54. In considering the scheme, the return of capital by MDOF to the MDOF 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.

55. It cannot be concluded that MDOF or the MDOF unitholders entered into, or carried out, the scheme for the purpose of enabling the MDOF 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 return of capital.

Section 45C

56. As the Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) in relation to the capital benefit, section 45C 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

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

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

59. If a MDOF unitholder makes a capital gain, the cost base and reduced cost base of the MDOF 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).

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

61. If the MDOF unit was acquired by the MDOF 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

62. The right to receive the return of capital is one of the rights inherent in a MDOF unit at the Record Date. If, after the Record Date but before the time the return of capital is paid, a MDOF unitholder ceased to own a MDOF 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.

63. 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 (subsection 104-25(1) of the ITAA 1997).

64. A MDOF 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 MDOF 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).

65. 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).

66. The cost base of a MDOF 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 MDOF 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 MDOF unitholder disposes of it after the Record Date.

67. Therefore, if the full cost base or reduced cost base of a MDOF 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.

68. As the right to receive the payment of the return of capital was inherent in the MDOF unit during the time it was owned, the right is considered to have been acquired at the time when the corresponding MDOF unit was acquired (subsection 109-5(1) of the ITAA 1997). Accordingly, if the MDOF unit was acquired by the MDOF unitholder at least 12 months before the payment of the return of capital, a capital gain made from the ending of the corresponding right 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).

Foreign resident unitholders

69. 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'.

70. 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).

71. Neither a MDOF unit nor the right to payment is 'taxable Australian real property'.

72. 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 MDOF unit or right to payment was an 'indirect Australian real property interest' not covered by item 5 (item 2 of the table in section 855-15 of the ITAA 1997);
- their MDOF 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 MDOF 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
- capital reductions
- CGT capital proceeds
- CGT cost base
- CGT discount
- CGT events C1-C3 – end of a CGT asset
- CGT events G1-G3 – shares
- distributions
- return of capital on shares
- share capital
- unitholders
- unlisted unit trusts

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)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
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- ITAA 1936 45C
- ITAA 1936 177D(2)
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 104-135(1)
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- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5(1)
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Div 115
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
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- ITAA 1997 713-130
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- ITAA 1997 713-140
- ITAA 1997 855-10
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- ITAA 1997 855-15
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001

ATO references

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