

***TD 2009/20 - Income tax: where the net income of a partnership (determined in accordance with section 90 of the Income Tax Assessment Act 1936) includes Foreign Investment Fund (FIF) income, will an Australian resident taxpayer which is assessable on its share of the net income under section 92 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 changed over time. This is a consolidated version of the ruling which was published on *16 December 2009*



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## Taxation Determination

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Income tax: where the net income of a partnership (determined in accordance with section 90 of the *Income Tax Assessment Act 1936*) includes Foreign Investment Fund (FIF) income, will an Australian resident taxpayer which is assessable on its share of the net income under section 92 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 (excluding appendices) 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.

### Ruling

1. No. In relation to partnerships, the effect of sections 485 and 485A of the *Income Tax Assessment Act 1936* (ITAA 1936)<sup>1</sup> 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 determining the net income of the partnership.

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<sup>1</sup> All legislative references are to the ITAA 1936 unless otherwise indicated.

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. *X 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. *X 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 X 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 X 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 X 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. *X 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. This Determination applies to years of income commencing 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).

## Appendix 1 – Explanation

**ⓘ** *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.*

### 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 (treated as a partnership for Australian tax purposes) 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.

## References

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*Previous draft:*

TD 2009/D7

- ITAA 1936 90
- ITAA 1936 92
- ITAA 1936 470

*Related Rulings/Determinations:*

TR 2006/10

- ITAA 1936 485
- ITAA 1936 485(1)
- ITAA 1936 485A
- ITAA 1936 519B(2)
- ITAA 1936 529

*Subject references:*

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

- ITAA 1997 Div 36
- ITAA 1997 290-150
- ITAA 1997 Div 830
- ITAA 1997 830-15
- ITAA 1997 830-20
- ITAA 1997 830-25

*Legislative references:*

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

- SISA 1993
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ATO references

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