TD 2009/20EC - Compendium

Ruling Compendium – TD 2009/20

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2009/D7 – 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?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	The Tax Office should indicate whether some form of administrative relief ought to be given to those complying superannuation funds that relied on the withdrawn ATO ID 2006/40 and consequently made a foreign hybrid election under section 485AA of the *Income Tax Assessment Act 1936* (ITAA 1936) .	The matter is beyond the scope of the Determination and has been referred to the National Tax Liaison Group Foreign Source Income Sub-group (NTLG FSI Subgroup) for consideration. The issue involves potential administrative relief for taxpayers rather than turning on any question of technical interpretation of the law.
2	The wording of the title of the draft Determination should be more concise.	The Tax Office preference is to maintain a question that is designed for a 'yes/no' answer. The question is to tell readers **exactly** what the Determination is about and **precisely** define its scope. The scope of the Determination involves an exemption under the Foreign Income Fund (FIF) provisions concerning partners in a partnership context and therefore the question is necessarily written to cover the exact scope of the question at issue. The question has been re-drafted to make it more concise whilst maintaining a 'yes/no' answer. Question changed to: Income tax: where the net income of a partnership (as 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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3	An alternative view is that a limited liability company (treated as a partnership for Australian tax purposes) is, in respect of the FIF provisions, only treated as if it were the taxpayer for the purposes of providing a mechanism for the calculation of the relevant attributable income. The share of the net income of the partnership to which a resident partner is entitled would therefore not be included in the partner's assessable income pursuant to section 90 of the ITAA 1936, but included, if at all, on a direct application of the FIF provisions to the partner. The effect for Australian resident partners that are complying superannuation entities is that they would be considered to be the taxpayer for the purposes of applying the FIF provisions (except for the calculation of attributable income) with the result that the Division 11A provisions including the subsection 519B(2) exemption is available for the Australian resident partner.	The Commissioner is unable to accept this alternative view as reasonably arguable for the reasons expressed in the Explanation of the Determination. In particular, as noted at paragraph 12 of the Determination, sections 485, 485A and 529 operate to apply the FIF provisions to the partnership as a taxpayer. The persons entitled to a share of the net income of the partnership are assessable on that share under section 92.
4	The Determination should not be issued with a retrospective application date (as stated at paragraph 8) as there may be many Australian complying superannuation funds that invested in good faith on the alternative view or on the basis of ATO ID 2006/40 which, whilst not articulating the specific arguments of the alternative view, nonetheless concluded that the exemption was available.	Although different to the views expressed in the withdrawn ATO ID 2006/40, the views expressed in the Determination is a view of the law as it has always been. Therefore, a retrospective application of the Determination is appropriate. As stated at paragraph 48 of Law Administration Practice Statement PS LA 2001/8, if 'an entity relies on a current ATO ID where their own circumstances are not materially different from those described in the ATO ID, but the ATO ID is later found to be incorrect, the taxpayer will be liable for any underpaid tax, grants or benefits, unless a time limit imposed by the law precludes the liability. However, they will be protected against any shortfall penalty that would otherwise be imposed'.