Draft Taxation Determination

Income tax: is a payment received by an investor in a non-forestry managed investment scheme upon the winding-up of the scheme, that does not involve the disposal of your interest in the scheme to another person, *necessarily* ordinary or statutory income under the *Income Tax Assessment Act 1997*?

This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. No.

2. However, whilst the proceeds received from a scheme that has been wound up ***may*** constitute assessable ordinary or statutory income, it will depend very much on what the payment is for actually for.

Example

3. *Nane invested in a horticultural managed investment scheme in 2007, and claimed deductions in her 2007 and 2008 taxation returns. In 2009, the scheme assets (being unsold stock on hand) were sold by a liquidator. Nane's interest in the scheme came to an end. Nane will remain entitled to the relevant deductions previously claimed. She will also be assessed on her share of the proceeds of sale of the assets disposed of.*

Date of effect

4. When the final Determination is issued, it is proposed to apply 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).

Commissioner of Taxation
30 September 2009

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Explanation

5. Managed investment schemes are collective investment arrangements regulated under the *Corporations Act 2001.* The statutory framework operates at the scheme level whilst individual investors may correctly be described as 'members' who hold an 'interest' in the scheme itself.

6. An individual taxpayer may carry on a business either alone or in a partnership with others. An investor in a managed investment scheme can be regarded as carrying on their own individual business. See *Hance v. FC of T*; *Hannebery v. FC of T* 2008 ATC 20-085. As such, deductible expenses are made for rent and management fees etc. Amounts received for the sale of produce from the operation of the scheme will be income earned from personal exertion rather than income from property. Allowable deductions will not cease to be allowable because the business fails.

7. A feature of non-forestry managed investment schemes is that each business operator is a lessee or sub-lessee of a plot of land on which they conduct their business. Once their primary production business is established, it is expected, particularly in cropping cases, that an annual net payment for the sale of their produce will be received. It is also expected that once the leases or sub-leases expire, the scheme itself comes to an end. No payment is envisaged to arise from the cessation of a scheme (other than, perhaps, a final payment on account of the produce). In effect the cessation of the lease or sub-lease means that the particular business of the taxpayer in the context of that scheme also comes to an end.

8. The sale of the annual crop is a sale of the business owner's trading stock. The proceeds are income. Subdivision 70-D of the *Income Tax Assessment Act 1997* (ITAA 1997) also treats certain other assets as if they are trading stock on hand of a taxpayer carrying on a business. Standing or growing crops and crop-stools are examples. Subsection 70-90(1) of the ITAA 1997 provides that if you dispose of an asset that is an item of your trading stock outside the ordinary course of your business, your assessable income includes the ***market value*** of the item on the day of the disposal. The actual receipt is not itself included as income.

9. If a responsible entity of a managed investment scheme becomes insolvent and is unable to continue to meet its obligations, it may be that the purpose of the scheme itself also cannot be accomplished. A managed investment scheme may be wound-up within the terms of the *Corporations Act 2001*. Money or other property that is part of the scheme property that remains may be paid to investors. Whether this is on account of the disposal of produce or otherwise will be an important consideration in determining its character in the hands of the individual members of the scheme.

10. *Prima facie,* receipts from the conduct of a business are assessable income. A payment that is the consideration received in respect of the disposal of the assets of a business may be an income or capital receipt depending on the circumstances. As mentioned above, a disposal of assets that are, or are deemed to be, trading stock may give rise to assessable income. It is unlikely that an individual who is carrying on a business of primary production in the context of a managed investment scheme will have any goodwill associated with that business. Accordingly, whilst a member's interest may be the subject of, for example, CGT Event C2, this does not necessarily mean that any money received will be the capital proceeds ***from the ending*** of the interest. Rather, it is more likely to be a distribution of the remaining scheme property to investors as a result of their business endeavours, albeit that these have been conducted under contractual arrangements with the Responsible Entity. As such any payment is also unlikely to be the capital proceeds from the ending of the taxpayer's business.

Appendix 2 – Your comments

11. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

12. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**30 October 2009**
Contact officer:	**Lynton Hastwell**
Email address:	**Lynton.Hastwell@ato.gov.au**
Telephone:	**(08) 8208 1920**
Facsimile:	**(08) 8208 1898**
Address:	**Australian Taxation Office** **GPO Box 9977** **Adelaide SA 5001**

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2009/D9; TD 2009/D10

Subject references:

- assessable income
- carrying on a business

Legislative references:

- ITAA 1997
- ITAA 1997 Subdiv 70-D
- ITAA 1997 70-90(1)
- Corporations Act 2001

Case references:

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

ATO references

NO: 1-1ON6T7E
ISSN: 1038-8982
ATOlaw topic: Income Tax ~~ Assessable income ~~ business and professional income - Australian sourced