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Managed investment trusts

Detailed information about managed investment trusts.

Managed investment trusts - overview

What you need to know about managed investment trusts (MITs) and attribution managed investment trusts (AMITs).

Capital treatment elections

An overview of the MIT capital treatment election rules, including eligibility requirements and how to make an election.

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QC 37842

Managed investment trusts: election into capital treatment

An overview of the MIT capital treatment election rules, including eligibility requirements and how to make an election.

Last updated 9 May 2016

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Managed investment trust capital treatment election rules, including eligibility requirements and making an election.

If you're the trustee of a managed investment trust (MIT), this information will help you work out whether you're eligible to make a capital treatment election and how to make an election.

The MIT capital treatment rules allow the trustee of an eligible MIT to choose to apply the capital gains tax (CGT) provisions for the taxation of gains and losses on disposal of certain eligible assets, rather than on revenue account. For the purposes of the MIT capital treatment rules, a disposal also includes ceasing to own, or otherwise realising, the asset.

You must make the election in the first year the trust qualifies as a MIT, and it is irrevocable as long as the MIT remains eligible. If a MIT does not make a capital treatment election in the first year, it will be taxed on revenue account under general tax law principles.

These rules apply to CGT events that happen on or after the start of the 2008–09 income year.

Eligibility for making a capital treatment election

A trust will be eligible to make a capital treatment election if it meets the definition of a MIT. The election must be made in the first year the trust is a MIT.

The definition of a MIT has changed since the start of the capital treatment rules in 2008–09. There were extensive amendments in 2010, and further amendments in 2016. You should consider the

definition of a MIT at the relevant time in determining whether the MIT is eligible to make a capital treatment election in a specific year.

See also:

- Eligibility requirements

Changes under the new tax system for MITs

A new tax system for MITs came into effect in May 2016. Under the new system, a number of definitional changes affect capital treatment elections by MITs. These include relocation of the definition of a MIT to section 275-10 of the ITAA 1997.

When the eligibility of the trust changes

Capital treatment by reason of having made an election will not apply in any year in which the trust ceases to be a MIT. Disposals of eligible assets in these years are subject to tax by reference to general tax law principles.

If the trust again meets the definition of a MIT in a later income year, the capital treatment election will apply because the election, once made, is irrevocable.

> Example
>
> Bayley Trust is a MIT that has made an election into capital treatment, which is in force for 2008–09 and later income years.
>
> In the 2010–11 income year, Bayley Trust fails to meet the definition of a MIT, so the capital treatment election does not apply in that year. Bayley Trust disposes of units in a unit trust during the year. Because the capital treatment election does not apply, the character of the gain from the disposal of the units will be determined in accordance with general tax law principles.

Eligible CGT assets

Assets eligible for capital treatment are:

- shares in a company (including a foreign hybrid company)
- non-share equity interests in a company

- units in a unit trust
- land (including an interest in land)
- a right or option to acquire or dispose of any assets listed above.

However, an asset is not an eligible asset if it is a debt interest, or a financial arrangement to which Taxation of Financial Arrangements (TOFA) applies.

Special rules

Some assets will not be eligible for capital treatment, even where the trustee has made an election for capital treatment. Generally, these will be assets purchased and/or held as trading stock, and include:

- land, an interest in land, or a right or option to acquire or dispose of such an asset, which is held as trading stock or which was acquired before 20 September 1985 and is part of a profit-making undertaking or plan
- an asset acquired in an income year in which the capital treatment election was not in force, and the asset was treated as trading stock in the MIT's financial report and income tax return for
  - the most recent income year ending before the income year in which the election first came into force
  - the most recent income year ending before the time of the CGT event.

Example

Griffin Trust is a MIT and has made an election which is in force for the 2008–09 and later income years.

In the 2009–10 income year, Griffin Trust disposes of units in a unit trust which it had been treating as trading stock in both its financial report and income tax return for the 2007–08 and 2008–09 income years. The units were acquired in 2007.

Although Griffin Trust has made an election for capital treatment, any gain or loss from the disposal of the units will not be assessed under the CGT provisions.

This is because the units were acquired before the election was in force, and the asset had previously been treated as trading stock in the Griffin Trust financial report and income tax return for both the 2007–08 income year (being the most recent income year prior to the income year in which the election was made) and the 2008–09 income year (being the most recent income year ending before the time of the CGT event).

Making a capital treatment election

The trustee of an eligible MIT can make an election for capital treatment.

Trusts that became a MIT prior to the 2009–10 income year

When must you make an election?

You must make an election on or before the **latest** of the following days:

- 2 September 2010
- a later date, if we allow it.

When will an election take effect?

Once you make the election, it will have effect for the 2008–09 and later income years.

How can you make an election?

The period in which a trustee can make an election for a trust that became a MIT prior to the 2009–10 income year **has now expired**.

However, we may allow a trustee to make the election upon request.

Next steps:

- Request for an extension of time to make an election

Trusts that became a MIT in 2009–10 or a later income year

When must you make an election?

You must make an election on or before the **latest** of the following days:

- the day the trust is required to lodge its income tax return for the income year in which it became a MIT
- a later date, if we allow it.

When will an election take effect?

Once you make the election, it will have effect for the income year in which the trust becomes a MIT and later income years.

How can you make an election?

If you are the trustee of a MIT, you can make an election by answering 'Yes' to the following question on the Trust tax return:

- If the trust is a managed investment trust, has the trustee made an election for capital account treatment?

If you are the trustee of an AMIT, you can make an election by answering 'Yes' to the following question on the AMIT tax return:

- Has the trustee made an election into managed investment trust capital account treatment?

You must make the election within the relevant timeframe.

If you are the trustee of a trust that became a MIT prior to the 2009–10 income year, and you have previously made an election for capital treatment, you still need to answer 'Yes' to this question for each year you are required to complete a Trust tax return or AMIT tax return.

Request for an extension of time to make a capital election

The Commissioner has discretion to grant a MIT an extension of time to make an election into capital treatment.

Who can make a request for an extension of time?

Generally, the trustee of a MIT must apply to the Commissioner to request for an extension of time to make an election into capital treatment.

How can a request be made?

The application should be in writing and include sufficient information to demonstrate why discretion would be reasonable.

The written request should:

- provide details of the circumstances giving rise to why the election was not made on time
- propose a date by which the election will be made
- give assurance future obligations will be met on time once the stated circumstances are resolved.

Note: There is no prescribed application form.

What factors will the Commissioner consider in exercising the discretion?

We follow these guidelines when making our decision:

- Where an extension is granted, it will generally be on a short-term basis to allow the trustee to overcome the problems preventing them from making the election. The extension will generally only be provided for a short period after the date the election should have been made.
- Consideration will be given to how soon steps were taken to make an election and whether a timely request was made to the Commissioner to seek an extension of time.
- Each case will be considered on its merits based on all the relevant facts and circumstances.
- The Commissioner will have regard to the subject matter, scope and purpose of subsection 275-115(3) of the ITAA 1997 which establishes a deadline for making an election into capital treatment.
- The Commissioner may consider whether the entity has acted in a manner consistent with the proposed election, based on the way it has prepared its accounts and returns.
- The Commissioner will consider whether there were circumstances beyond the control of the trustee that contributed to the delay in making the election, whether reasonable steps were taken to mitigate the effect of those circumstances, and whether the trustee will be able to make the election at a particular time in future.

- Consequences of the proposed extension of time for making the election may be considered, including any impact on distribution statements or on ATO lodgment obligations of the MIT.
- The Commissioner must ensure he does not confer an advantage on a taxpayer or group of taxpayers.
- The Commissioner will have regard to whether the request for an extension of time is for an improper purpose or in bad faith.

How will I be informed of the exercise of the Commissioner's discretion?

If the discretion is exercised following your request, you will receive written advice of a new date by which the election must be made.

If the discretion is not exercised, you will be advised in writing, and given the reasons for that decision.

Amendments to previous years

There are rules that limit the Commissioner's ability to amend an assessment for a year prior to the 2008–09 income year. This relates to amendments to treat a gain or loss from an asset as being on revenue account or on capital account.

However, these rules only apply if:

- there is a capital treatment election in force for the 2008–09 income year, and
- the gain or loss that arose in the previous income year would have been subject to capital treatment had the election been in force for that previous year.

The rules do not apply if an entity gives the Commissioner a written consent to the amendment.

Tax consequences of capital elections

Once a MIT makes an election, it is permanent and cannot be reversed.

For a MIT that makes an election for capital treatment, gains and losses on disposal of eligible assets will be assessed only under the CGT provisions for each year that the MIT is an eligible MIT.

However, the capital election will not apply where the trust does not meet the definition of a MIT for the relevant income year.

See also:

- Capital gains tax essentials

Tax consequences of not making an election

If a MIT is eligible to make an election, but does not do so by the relevant date, any gains or losses on the disposal of eligible assets will be treated on revenue account under general tax law principles.

QC 23181

Stapled Structures

An overview of the new measure dealing with stapled structures.

Last updated 20 March 2023

On this page

Overview

Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019 (Stapled Structures Act) introduced a number of measures to address risks posed by stapled structures and similar arrangements and limit access to concessions previously available to foreign investors for passive income.

This page focuses on Non-concessional MIT income (NCMI) - specifying the MIT withholding rate on income attributable to non-

concessional MIT income is 30%.

Non-concessional MIT income

To improve the integrity of the income tax law for arrangements involving stapled structures and to limit access to tax concessions for foreign investors, the managed investment trust (MIT) withholding rate on fund payments that are attributable to non-concessional MIT income has been changed to 30%.

An amount of a fund payment will be non-concessional MIT income if it is attributable to income that is:

- MIT cross staple arrangement income
- MIT trading trust income
- MIT agricultural income
- MIT residential housing income.

These amendments apply from 1 July 2019. Transitional rules apply to appropriate existing arrangements from the impact of the amendments. See transitional rules below.

MIT cross staple arrangement income

A MIT will have an amount of MIT cross staple arrangement income if, broadly, it derives, receives or makes an amount that is attributable to a cross staple arrangement between an operating entity and an asset entity.

What is a cross staple arrangement?

A cross staple arrangement is an arrangement that is entered into by two or more entities (the arrangement entities) if:

- at least one of the arrangement entities is an asset entity
- at least one of the arrangement entities is an operating entity
- the following conditions are satisfied
  - one or more other entities who are not party to the cross staple arrangement (the external entities) each hold a total participation interest in each arrangement entity (that is, in both the asset entity and the operating entity)

- the sum of the total participation interests held by the external entities in each arrangement entity is 80 per cent or more.

Example 1: Cross staple arrangement

Cross staple arrangement. Asset trust is an asset entity and Op Co is an operating entity.

Asset Trust is an asset entity and Op Co is an operating entity.

- Investor A holds 30% of the units in Asset Trust and 30 per cent of the shares in Op Co.
- Investor B holds 70% of the units in Asset Trust and 70 per cent of the shares in Op Co.
- Investor A and B, which are entities that are not parties to the cross staple arrangement, together hold 100% of the participation interests in Asset Trust and Op Co.
- Therefore, the lease entered between Asset Trust and Op Co is a cross staple arrangement.

What is MIT cross staple arrangement income?

A MIT will have an amount of MIT cross staple arrangement income in relation to an income year if:

- the MIT has an amount of assessable income for that income year
- the amount of assessable income is, or is attributable to, an amount that is derived, received or made directly or indirectly through interposed entities from an operating entity under a cross staple arrangement
- the amount of assessable income is not an amount that is excluded from being a fund payment of a MIT – broadly, amounts that are not a fund payment of a MIT include:
  - dividends, interest and royalties
  - net capital gains in relation to a capital gains tax (CGT) asset that is not taxable Australian property
  - amounts which are not Australian sourced income.

Exceptions

There are four circumstances in which an amount that is attributable to a cross staple arrangement will not be MIT cross staple arrangement income of a MIT. These are:

- where cross staple rent can be traced to an amount of third party rent from land investment charged by an operating entity
- where the income from a cross staple arrangement satisfies the de minimis rule for an asset entity
- where the income from a cross staple arrangement is, or is attributable to, rent from an approved economic infrastructure facility
- where the income from a cross staple arrangement is, or is attributable to, a capital gain that arises because an operating entity acquires an asset from the asset entity.

Approved economic infrastructure facility

If your facility or improvement to a facility is covered by the approved economic infrastructure facility exception under section 12-439 of Schedule 1 of the *Taxation Administration Act 1953* (TAA 1953), the amount that is attributable to rent from the approved economic infrastructure facility will not be MIT cross staple arrangement income.

Further, the operating entity is able to obtain a specific deduction for an amount of rent from land investment that is derived by an asset entity, provided certain conditions are met. This includes that the relevant entities have made a valid choice in relation to the cross staple arrangement.

The operating entity may claim a specific deduction when the exception applies. The exception is for 15 years either from:

- the day an asset that is part of the facility is first put to use (for approved facilities)
- the day an asset that is part of the facility is first put to use after it has been improved under an improvement (for approved improvements).

For more information on the approved economic infrastructure facility exception and how to make the choice to apply the specific deduction,

see Stapled Groups – Approved economic infrastructure facility exception.

Transitional provisions

Transitional relief is available in respect of fund payments that are attributable to MIT cross staple arrangement income where a cross staple arrangement is covered by section 12-440 of Schedule 1 of the TAA 1953 and the relevant entities have made a valid choice to apply the transitional provisions. The choice must have been made in the approved form by 30 June 2019 (or later time allowed by the Commissioner) and the Commissioner notified of the choice. The choice is an important condition precedent to the application of the transitional provisions and cannot be backdated.

Transitional relief may be available in respect of a facility where either:

- an entity owned or leased the facility prior to 27 March 2018
- an entity has entered into a contract before 27 March 2018 for the acquisition, creation or lease of the facility
- an Australian Government agency approved the acquisition, creation or lease of the facility before 27 March 2018.

Where the above is satisfied, transitional relief is available in respect of a cross staple arrangement:

- that was entered into in relation to the facility before 27 March 2018
- where it was reasonable on 27 March 2018 to conclude that it would be entered into in relation to the facility.

Transitional relief is generally available for the following periods:

- seven years in respect of a cross staple arrangement that relates to a facility that is not an economic infrastructure facility
- 15 years in respect of a cross staple arrangement that relates to an economic infrastructure facility.

Certain cross staple arrangements may have a shorter transition period, depending on when assets forming part of the facility are first put to use.

Entities to the cross staple arrangement must continue to satisfy requirements in order to apply the transitional provisions. For example, changes in ownership or to the MIT eligibility of the asset entity may

cause the relevant entities to cease qualification for transitional relief for some or all of the transitional period.

Similarly, changes to the cross staple arrangement, ceasing to have a cross staple arrangement, or alterations to the facility, such that it ceases to be the facility identified by subsections 12-440(1) or (2) may cause the relevant entities to cease qualification for transitional relief. LCR 2020/2 provides further guidance and examples of scenarios that may cease qualification for transition.

Entities subject to transitional relief are still required to disclose full details of the trust's NCMI at the relevant labels of the trust income tax return, including excluded amounts. The correct disclosures of NCMI (and excluded from NCMI) for all trusts are essential to ensure the applicable withholding rate is applied at the withholding MIT level. Penalties may apply for incorrect reporting.

For more information on application of the Transitional provisions and reporting, see LCR 2020/2.

MIT trading trust income

The MIT trading trust income rules broadly ensure that distributions from a trading trust to a MIT (either directly or indirectly through a chain of flow-through entities) are treated as non-concessional MIT income and subject to MIT withholding at a rate of 30%.

A MIT will have an amount of MIT trading trust income in relation to an income year if:

- the MIT has an amount of assessable income for that income year
- the amount of assessable income is, or is attributable to, an amount that is derived, received or made from a separate entity (the second entity) – in this case, the second entity will generally make a payment (directly or indirectly through, for example, interposed trusts) to the MIT
- the amount of assessable income is not an amount that is disregarded in calculating a fund payment of a MIT – these amounts include:
  - dividends, interest and royalties
  - net capital gains in relation to a CGT asset that is not taxable Australian property

- amounts which are not Australian sourced income.

The amount will be MIT trading trust income of the MIT if:

- the MIT holds a total participation interest (as defined in section 960-180 of the ITAA 1997) in the second entity of greater than nil
- the amount arises because of that total participation interest
- the second entity is either:
  - a trading trust in relation to the income year – a trading trust is defined in section 102N of the *Income Tax Assessment Act 1936* (ITAA 1936) to mean, broadly, a unit trust that carries on trading business (that is, business other than eligible investment business) or that controls, directly or indirectly, the affairs or operations of another entity that carries on a trading business
  - a partnership or a trust that is not a unit trust that, if it was a unit trust throughout the income year, would be a trading trust
  - the second entity is not a public trading trust in relation to the income year.

Therefore, an amount constitutes MIT trading trust income under section 12-446 in Schedule 1 to the TAA 1953 to the extent that a MIT receives distributions directly, or indirectly through interposed entities. This can be from a trading trust (or another entity which would be a trading trust if it were a unit trust) because these amounts represent trading profits, and are taxed at a rate of 30%.

However, arrangements such as a cross staple lease between an asset entity and an operating entity that is a trading trust will be MIT cross staple arrangement income, rather than MIT trading trust income.

Transitional rules

The amendments generally apply to a fund payment made by a MIT in relation to an income year if:

- the fund payment is made on or after 1 July 2019
- the income year is the 2019–20 income year or a later income year.

However, transitional rules apply in relation to MIT trading trust income that is attributable to assets that exist at the time of announcement of the measure.

The MIT trading trust income transitional rules apply if:

- a MIT would have an amount of MIT trading trust income (the relevant amount) for an income year disregarding this transitional rule
- immediately before 27 March 2018, the MIT held a total participation interest in the second entity of an amount (the pre-announcement TPI amount) greater than nil
- the amount was derived, received or made by the MIT before 1 July 2026.

If a MIT held all of its total participation interests (TPI) in the second entity immediately before 27 March 2018, the MIT trading trust income transitional rules apply so that all of the relevant amount is taken not to be MIT trading trust income and will continue to be eligible for the concessional 15% MIT withholding rate for the specified period.

MIT agricultural income

The MIT agricultural income rules ensure that amounts of assessable income of a MIT that are attributable to an asset (whether or not held by the MIT) that is Australian agricultural land for rent are treated as non-concessional MIT income and subject to MIT withholding at a rate of 30% – that is, at the rate equal to the top corporate tax rate.

MIT agricultural income is an amount of assessable income of a MIT to the extent that the amount is attributable to an asset that is Australian agricultural land for rent (whether or not held by the MIT).

Australian agricultural land for rent is Division 6C land situated in Australia that:

- is used, or could reasonably be used, for carrying on a primary production business
- is held primarily for the purposes of deriving or receiving rent.

Division 6C land includes an interest in land and fixtures on land. It also includes investments in moveable property, being property that is:

- incidental to and relevant to the renting of the land
- customarily supplied or provided in connection with the renting of the land
- ancillary to the ownership and use of the land.

Agricultural land for rent will include land that is held primarily for the purpose of deriving rent where the lessee or another entity uses the land to carry on a primary production business.

However, if agricultural land was held in a trust not primarily for the purposes of deriving rent, the MIT trading trust income rules may apply.

If an economic infrastructure facility is a fixture on Australian agricultural land for rent:

- the economic infrastructure facility is taken as being separate from the Australian agricultural land for rent
- the economic infrastructure facility is not Australian agricultural land for rent.

Transitional rules

The amendments generally apply to a fund payment made by a MIT in relation to an income year if:

- the fund payment is made on or after 1 July 2019
- the income year is the 2019–20 income year or a later income year.

However, transitional rules apply so that an amount (the relevant amount) is not treated as MIT agricultural income of a MIT if, among other things:

- the relevant amount is included in the assessable income of the MIT
- the relevant amount would be MIT agricultural income (disregarding the transitional rule) of the MIT because it is attributable to an asset that is Australian agricultural land for rent
- the MIT derived, received or made the relevant amount before 1 July 2026.

The MIT agricultural income transitional rule ensures that assessable income attributable to Australian agricultural land for rent held, directly or indirectly, as at 27 March 2018 (the date of announcement for this measure) will not be treated as MIT agricultural income until 1 July 2026.

In these circumstances, the transitional rule will apply so that the relevant amount is not treated as MIT agricultural income and will continue to be eligible for the concessional 15% MIT withholding.

MIT residential housing income

The MIT residential housing income rules ensure that amounts of assessable income of a MIT that are attributable to an asset (whether or not held by the MIT) that is residential housing (other than affordable housing) are treated as non-concessional MIT income and subject to MIT withholding at a rate of 30% – that is, at the rate equal to the top corporate tax rate.

MIT residential housing income is defined as any assessable income of a MIT to the extent it is attributable to a residential dwelling asset (whether or not held by the MIT).

However, an amount included in assessable income of a MIT is not MIT residential housing income if it is:

- a dividend, interest or a royalty subject to, or exempted from, withholding tax
- a net capital gain from a CGT event that happens in relation to a CGT asset that is not taxable Australian property
- not from an Australian source.

A residential dwelling asset is an asset that is:

- a dwelling
- taxable Australian real property
- any of the following:
  - residential premises but not commercial residential premises
  - certain student accommodation such as tertiary student accommodation.

MIT residential housing income of a MIT is the assessable income of a MIT that is attributable to residential dwelling assets (such as rent, net capital gains and licence fees). It also includes income from derivative arrangements such as an acquisition of a rental income stream from residential housing.

Providing affordable housing

However, to encourage investment in affordable housing, an amount is not MIT residential housing income to the extent it relates to the use of dwellings to provide affordable housing.

The circumstances in which a dwelling is used to provide affordable housing are defined in section 980-5 of the ITAA 1997, which was inserted by the Stapled Structures Act.

Broadly, to satisfy this definition for a day, an asset must be tenanted or available to be tenanted under the management of an eligible community housing provider and that provider must have issued the owner with a certificate covering the asset for the relevant period. The tenants or occupants must also not hold an interest of 10% or more in the MIT.

Transitional rules

The amendments generally apply to a fund payment made by a MIT in relation to an income year if:

- the fund payment is made on or after 1 July 2019; and
- the income year is the 2019–20 income year or a later income year.

However, transitional rules apply so that an amount (the relevant amount) is not treated as MIT residential housing income of a MIT if, among other things:

- the relevant amount is included in the assessable income of the MIT
- the relevant amount would be MIT residential housing income of the MIT disregarding this transitional rule because it is attributable to a facility that consists of or contains a residential dwelling asset
- the MIT derived, received or made the relevant amount before 1 October 2027.

The MIT residential housing income transitional rules ensure that MITs directly or indirectly holding residential premises (when this measure was first announced on 14 September 2017 by the former Treasurer) have a 10 year transitional period before the measure applies to assets they held at the time of the announcement.

The transitional rules also ensure that MITs have a 10 year transition period until 1 October 2027 before the measure applies to assets held immediately prior to the date of introduction of this Bill into Parliament that were used primarily to provide accommodation for students (other than in connection with a school within the meaning of the GST Act).

Changes to Total Participation Interests - transitional rules

An apportionment methodology applies where the relevant MIT's participation interest has increased for the following:

- Amounts attributable to an asset that is Australian agricultural land for rent where the MIT's participation interest in the entity holding the asset has increased since 27 March 2018.
- Amounts attributable to a trading trust where the relevant MIT's participation interest in the trading trust has increased since 27 March 2018.
- Amounts attributable to a residential dwelling asset where the relevant MIT's participation interest in the entity that holds, or contracted for the asset, has increased since 14 September 2017.

The transitional rules apply so that a part of the relevant amount is taken not to be MIT agricultural, trading trust or residential housing income and will continue to be eligible for the concessional 15% MIT withholding rate for the specified period. The relevant part is worked out using the following formula:

Pre – announcement TPI ÷ Post – announcement TPI

Legislation

Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019 (Stapled Structures Act)

Guidance

LCR 2020/2 *Non-concessional MIT income*

QC 58560

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