




# ATO Interpretative Decision

ATO ID 2010/7

## Income Tax

### Self managed superannuation funds: tax treatment of futures contracts

FOI status: may be released

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## Issue

Where a self managed superannuation fund (SMSF) buys and sells ASX Mini Index Futures Contracts, are the gains and losses determined under the Capital Gains Tax (CGT) provisions?

## Decision

Yes. Where an SMSF buys and sells ASX Mini Index Futures Contracts, the gains and losses are determined under the CGT provisions.

## Facts

The taxpayer is an SMSF that is a complying superannuation fund (the Fund).

The taxpayer buys and sells ASX Mini Index Futures through a broker.

ASX Mini Index Futures are cash settled.

On establishment of the contract, the taxpayer pays a small initial margin. Open positions for both buyers and sellers are settled to market each day and subject to variation margins.

On closing out or expiry of the contract, a cash settlement amount is calculated by the calculation agent and forwarded to the Australian Clearing House (ACH). The cash settlement amount is calculated using the Opening Price Index Calculation (OPIC) based on the opening prices of the stocks in the Underlying Index on expiry morning. This amount is reduced by the margins payments already made and a net amount is either payable to or receivable by the Fund.

## Reasons for Decision

The provisions relating to the taxation of complying superannuation funds (including SMSFs) are contained in Division 295 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Section 295-85 of the ITAA 1997 makes the CGT rules the primary code for determining the tax treatment of the gains or losses generated on the disposal of an asset by a complying superannuation fund.

Paragraph 295-85(2)(a) of the ITAA 1997 modifies the normal CGT rules so that a CGT event happening to a CGT asset of the Fund is not affected by the following provisions:

- section 6-5 of the ITAA 1997 (ordinary income),
- section 8-1 of the ITAA 1997 (amounts you can deduct), and
- sections 15-15 and 25-40 of the ITAA 1997 (profit-making undertakings or plans);

An exception to this treatment is contained in paragraph 295-85(3)(b) of the ITAA 1997 for CGT assets of the Fund that are:

- debenture stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- a deposit with a bank, building society or other financial institution;
- a loan (secured or not); or
- some other contract under which an entity is liable to pay an amount (whether the liability is secured or not).

Therefore, unless a futures contract also falls within one of these exceptions, the CGT provisions will be the only provisions to apply.

A futures contract is not a deposit or a loan. Neither is it one of the specifically listed instruments in subparagraph 295-85(3)(b)(i) of the ITAA 1997.

The phrase 'other security' in subparagraph 295-85(3)(b)(i) of the ITAA 1997 which is drafted to cover the same instruments as paragraph 159GP(1)(a) of the *Income Tax Assessment Act 1936* (ITAA 1936), will only cover securities that are generally recognised as debt instruments (Taxation Ruling TR 96/14; ATO Interpretative Decision 2009/110; ATO Interpretative Decision 2009/111).

As can be seen by the listed instruments in subparagraph 295-85(3)(b)(i) of the ITAA 1997, securities that are generally recognised as debt instruments are issued by a particular entity and represent a debtor/creditor relationship between that entity and another entity or entities.

By contrast, a futures contract is an agreement to buy or sell a specified quantity of something at a specified price on a specified future delivery date. An index futures contract is an agreement to buy or sell the underlying index at maturity. ASX Mini Futures are issued by the ASX, with standardised terms, conditions and pricing calculations set by the ASX.

Such a futures contract may be bought or sold as part of a hedging strategy to protect a physical shareholding or to speculate in the movements of the share market or particular market sectors. It is not issued by an entity as part of a financing transaction.

Therefore an index futures contract is not a debt instrument and is not considered to be an 'other security' for the purposes of subparagraph 295-85(3)(b)(i) of the ITAA 1997.

Subparagraph 295-85(3)(b)(iv) of the ITAA 1997 is broader than subparagraph 295-85(3)(b)(i) of the ITAA 1997. However, like paragraph 159GP(1)(d) of the ITAA 1936 on which it is based, subparagraph 295-85(3)(b)(iv) includes

only those contracts that have 'debt-like obligations' (TR 94/16; ATO ID 2009/110; ATO ID 2009/111).

While a futures contract is a legally binding agreement creating contractual obligations for both parties, those obligations are not 'debt-like' as required by TR 96/14.

An index futures contract is cash settled. Under the contract the Fund may from time to time be called on to pay amounts (i) as margins through the life of the contract and (ii) at the end of the contract via the settlement process.

Taxation Determination TD 2006/25 states that margin payments represent contributions of capital set aside to provide for future contingencies rather than being outgoings incurred in meeting contingencies. Therefore, the Fund is not entitled to a deduction for any margin payments made.

Being contributions of capital rather than deductible outgoings, the investor's obligation to make such margin payments will not have sufficient 'debt-like' characteristics as required by TR 96/14.

As the cash settlement amount paid or received by the Fund is determined based on opening prices of stocks and is passed on net of any previous margin payments, it does not represent a sufficiently 'debt-like' obligation as required by TR 96/14.

Therefore an index futures contract will not fall within any of the exclusions in paragraph 295-85(3)(b) of the ITAA 1997.

Further, a futures contract is not trading stock (Income Tax Ruling IT 2228). Therefore, the exception for trading stock in subsection 295-85(4) of the ITAA 1997 will not apply.

As none of the exceptions in either of subsections 295-85(3) or 295-85(4) of the ITAA 1997 apply, any gains or losses made by the Fund in relation to its dealings in futures contracts will be determined under the CGT provisions.

**Date of decision:** 10 November 2009

**Year of income:** Year ended 30 June 2010

#### **Legislative References:**

*Income Tax Assessment Act 1936*

subsection 159GP(1)

paragraph 159GP(1)(d)

*Income Tax Assessment Act 1997*

section 295-85

paragraph 295-85(2)(a)

paragraph 295-85(3)(b)

subparagraph 295-85(3)(b)(i)

subparagraph 295-85(3)(b)(iv)

subsection 295-85(4)

#### **Related Public Rulings (including Determinations)**

Income Tax Ruling IT 2228

Taxation Ruling TR 96/14

Taxation Determination TD 2006/25

#### **Related ATO Interpretative Decisions**

ATO ID 2009/110

ATO ID 2009/111

#### **Other References**

ASX Introduction to Index Futures and Options

ASX Futures Contract Specifications

#### **Keywords**

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