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Ruling Compendium – TD 2008/21

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2008/D4 – Income tax: is a Deferred Purchase Agreement warrant, an investment product offered by financial institutions, a traditional security for the purposes of sections 26BB and 70B of the *Income Tax Assessment Act 1936*?

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.	Entity/s commenting	Issue raised	Tax Office Response/Action taken
1.	Entity 1	Paragraph 21 of TD 2008/D4 provides that ‘...only those contracts that have debt like obligations will usually fall under paragraph (d) of the definition of ‘security’. To promote certainty, the final determination should be unqualified in stating the DPA warrants whose terms are consistent with paragraphs 11 and 12 are not ‘securities’ under paragraph (d).	Paragraph 21 of TD 2008/21 (paragraph 22 of TD 2008/D4) makes it clear and states that ‘A DPA warrant with the features set out in paragraphs 11 and 12 of this draft Determination is not considered to have sufficient ‘debt like obligations’ to be a contract to which paragraph (d) of the definition of security for the purposes of section 26BB and 70B of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936). No change.
2.	Entity 1	The ATO should provide greater guidance regarding the indicia of what it considers to be a ‘debt like instrument’. For example, does this concept link through to the debt/equity rules in Division 974 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997)? Is legal characterisation of the instrument as a ‘loan’ (or similar) required?	The matters raised are outside the scope of this Determination.

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Issue No.	Entity/s commenting	Issue raised	Tax Office Response/Action taken
3.	Entity 1	Paragraphs 30 and 31 of Taxation Ruling TR 96/14 (Traditional Securities), which currently states that paragraph (d) of the definition of 'security' is not limited to debt-like contracts, will need to be consequently amended in order to ensure consistency between the two rulings.	An addendum to Taxation Ruling TR 96/14 has been issued to amend it to ensure that it is consistent with this Determination.
4.	Entity 1	The ATO should review whether any other rulings (for example, ATO Interpretative Decisions) are affected.	Comments have been noted.
5.	Entity 1	The comment made in paragraph 24 of TD 2008/D4 that gains under a DPA warrant may in certain circumstances be on revenue account, should also refer to losses. It would also be very useful if the final determination provided a specific example of a situation where a DPA warrant was held on revenue account, or alternatively set out the specific factors that the ATO considers point to a revenue account characterisation.	This Determination has been amended to refer to losses. It is expected that a gain or loss on a DPA warrant with the features described in this Determination would generally be on capital account. Providing an example where a DPA warrant was held on revenue account would be misleading in this context.
6.	Entity 2	Paragraph 19 of TD 2008/D4 should be amended to state that: A DPA is a contract under which the Issuer undertakes to transfer the Delivery Asset at some future time and it has a form with differs from a contract which represents an 'other security' for the purposes of paragraph (a).	Paragraph 18 of TD 2008/21 (paragraph 19 of TD 2008/D4) makes it clear that the Tax Office view is that a DPA warrant does not fall within the words 'or other security' as it does not have the same debt like features as the other listed instruments. No change.

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Issue No.	Entity/s commenting	Issue raised	Tax Office Response/Action taken
7.	Entity 2	Reference to 'debt-like obligations' (paragraph 21 of TD 2008/D4) departs from the views outlined in paragraphs 30 and 31 of TR 96/14, which states that paragraph (d) covers any contract under which there is a liability to pay an amount. Paragraph 21 should be rewritten to say 'A DPA with the features set out in paragraphs 11 and 12 of this draft Determination is not considered to be a contract under which there is a liability to pay an amount'.	The Tax Office is of the view that there is a liability to pay an amount under a DPA warrant, and that DPA warrants do not fall within the definition of security under paragraph (d) as it does not have sufficient debt like features. An addendum to Taxation Ruling TR 96/14 has been issued to amend it to ensure that it is consistent with this Determination.
8.	Entity 3	Gains made on a DPA warrant should be assessed under section 15-15 of the ITAA 1997, except for coupons which should be assessed under section 6-5 of the ITAA 1997.	Paragraph 11 of TD 2008/21 (paragraph 12 of TD 2008/D4) states that coupon payments made under a DPA warrant as defined in the draft Determination are assessable under section 6-5 of the ITAA 1997. The Tax Office recognises that section 15-15 of the ITAA 1997 has limited application. The features of a DPA warrant as defined in this Determination supports a view that the gains or losses are generally returned on capital account. This Determination leaves open the possibility that, depending on the terms of the DPA warrant and/or personal circumstances of the investor, gains or losses may be on revenue account.