



# ***CR 2004/90 - Income tax: employer reimbursement of interest incurred by employees of Macquarie Bank Limited or its subsidiaries on borrowings used to acquire notes relating to a Land Transport Facilities Borrowing Agreement***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2004*



## Class Ruling

# Income tax: employer reimbursement of interest incurred by employees of Macquarie Bank Limited or its subsidiaries on borrowings used to acquire notes relating to a Land Transport Facilities Borrowing Agreement

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### **Preamble**

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

## **What this Class Ruling is about**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

### **Tax law(s)**

2. The tax laws dealt with in this Ruling are:
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - subsection 23L(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 51AH of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

## Class of persons

3. The class of persons to which this Ruling applies are employees ('the Employees') of Macquarie Bank Limited ('MBL') or its wholly-owned subsidiaries who:

- are residents of Australia;
- have borrowed, or will borrow, to invest in Notes issued by Adelaide Airport Limited ('AAL') which relate to a Land Transport Facilities ('LTF') Borrowings Agreement as described in Division 396 of the ITAA 1997; and
- receive, from their employer, a reimbursement of interest incurred from time to time on the borrowing.

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 10 and 11 of this Ruling.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## **Date of effect**

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8. This Class Ruling applies to the:
- 2004 – 2005 income year;
  - 2005 – 2006 income year;
  - 2006 – 2007 income year;
  - 2007 – 2008 income year; and
  - 2008 – 2009 income year.

## **Withdrawal**

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9. This Class Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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10. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for a Class Ruling dated 20 April 2004 received from MBL;
- Draft LTF Facilitation Agreement dated 2 April 2004;
- Draft Note Deed Poll dated 2 April 2004;
- Draft Note Subscription Agreement dated 2 April 2004;
- Draft Bank Loan and Option Deed dated 2 April 2004;
- Draft Payment Directions Deed dated 2 April 2004;
- Draft Deposit and Set Off Agreement dated 5 February 2004;
- Draft Intercreditor Deed dated 5 February 2004; and
- Draft Investor Loan, Option and Security Deed dated 5 February 2004.

11. The details and aspects of the arrangement subject to this Ruling are summarised as follows.

- (a) MBL will subscribe for notes ('the Notes') issued by Adelaide Airport Limited ('AAL'). The funds raised by AAL from the issue of the Notes will be used for the construction of a Multi User Integrated Terminal at Adelaide Airport. Interest paid on the Notes is at commercial rates and constitutes 'LTF Interest' for the purposes of Division 396 of ITAA 1997.
- (b) MBL will then on sell the Notes to certain Employees ('Initial Employee Investors'). The total price for the transfer of the Notes from MBL to the initial employee investors will be equal to the face value of the Notes, that is, an amount equal to the amount subscribed by MBL.
- (c) MBL may later reacquire the Notes from the initial employee investors. Where this occurs, MBL may subsequently resell some or all of the reacquired Notes to other Employees ('future employee investors').
- (d) To obtain finance for the purchase of these Notes, the Employees will enter into a loan arrangement ('the Investor Loan') with MBL. The Employees will be liable to pay interest on these loans at commercial rates.
- (e) The employer of an Employee, being MBL or one of its wholly-owned subsidiaries, will fully reimburse the Employee for the interest he or she incurs on the Investor Loan.

**Note:** certain information received from MBL has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

## Ruling

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12. Subject to the assumptions in paragraph 13 of this Ruling, it is confirmed that:

- (a) the reimbursement by MBL, or one of its wholly owned subsidiaries, of the interest incurred by the Employees in respect of monies borrowed from MBL to purchase the Notes will not be assessable income of the Employees by virtue of subsection 23L(1) of the ITAA 1936;
- (b) but for the fact that MBL, or one of its wholly owned subsidiaries, is reimbursing the Employees, the interest incurred in respect of monies borrowed by Employees to fund the acquisition of the Notes is deductible under section 8-1 of the ITAA 1997;

- (c) any deduction allowable under section 8-1 of the ITAA 1997 for the interest incurred by the Employees is reduced to the extent to which the interest is reimbursed by the Employee's employer (being MBL or one of its wholly owned subsidiaries) under section 51AH of the ITAA 1936; and
- (d) Part IVA does not apply to the arrangement.

## Assumptions

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13. This ruling is made on the basis of the following assumptions:
- (a) The Minister for Transport and Regional Services approves AAL as a borrower and approves the construction of the Multi User Integrated Terminal at Adelaide Airport as a project under section 396-70 of the ITAA 1997.
  - (b) Each Employee will provide a declaration to his or her employer before the declaration date (as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)) in a form approved by the Commissioner in respect of the expenditure, as stipulated in paragraph 24(1)(e) of the FBTAA 1986.
  - (c) Each Employee will comply with TD 1999/33. TD 1999/33 requires a LTF lender to be in a cash positive position (inclusive of the amount of tax offset), that is, the interest received from the Notes plus the amount of the tax offset must exceed the funding costs.

## Explanation

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### Subsection 23L(1) of the ITAA 1936

14. The reimbursement by MBL, or one of its wholly owned subsidiaries, to the Employees of interest incurred by the Employees in relation to the Investor Loan, constitutes a 'fringe benefit' as defined in subsection 136(1) of the FBTAA 1986. The reimbursement is a benefit that is paid by the employer to an Employee in respect of the employment of the Employee and the benefit is not a benefit that is specifically excluded from being classed as a fringe benefit by paragraphs 136(1)(f) to (r) of the definition of 'fringe benefit'.

15. Subsection 23L(1) of the ITAA 1936 provides that where the taxpayer derives income by way of the provision of a fringe benefit within the meaning of the FBTAA 1986, the income is non-assessable non-exempt income.

16. Accordingly, as the reimbursement constitutes a fringe benefit and the receipt of such benefits are non-assessable non-exempt income by virtue of subsection 23L(1), the reimbursement paid to the Employees in respect of the interest incurred by the Employees in relation to the Investor Loan, will not form part of the assessable income of the Employees.

### **Section 8-1 of the ITAA 1997**

17. Section 8-1 provides that a taxpayer can deduct from assessable income any outgoing to the extent it is incurred in gaining or producing assessable income, unless the outgoing is capital, private or domestic in nature or a provision of this Act prevents the taxpayer from deducting it.

18. The cost (or interest paid) of a borrowing used to acquire income producing assets such as the Notes is generally treated as deductible under section 8-1 where it is expected that interest or other assessable income would be derived from the investment (see Taxation Ruling TR 95/33).

19. No part of the interest is capital, private or domestic in nature. Therefore the Employees would be entitled to a deduction for the interest under section 8-1, but for the fact that MBL, or one of its wholly owned subsidiaries, is reimbursing the Employees and thereby bringing into operation section 51AH of the ITAA 1936.

### **Section 51AH of the ITAA 1936**

20. Paragraph 8-1(2)(d) of the ITAA 1997 provides that an outgoing that would be deductible under section 8-1, will not be deductible if a provision of the ITAA 1997 prevents the deduction.

21. Section 51AH of the ITAA 1936 reduces the amount of a deduction that would be allowable in respect of an outgoing by the amount of a reimbursement, provided that the reimbursement constitutes a fringe benefit and is not included in the taxpayer's assessable income under paragraph 26(eaa) of the ITAA 1936. As discussed in paragraph 14, the reimbursement does constitute a fringe benefit. Further, paragraph 26(eaa) of the ITAA 1936 has no application because the reimbursement does not relate to a car expense.

22. Accordingly, any deduction for interest that the Employees would be entitled to under section 8-1 of the ITAA 1997 will be reduced by any amounts of interest reimbursed by his or her employer, being MBL or one of its wholly owned subsidiaries.

**Part IVA**

23. Provided that the arrangement ruled on is entered into and carried out as disclosed (see the **Arrangement** part of this Ruling), it is accepted that the arrangement is a normal commercial transaction and Part IVA will not apply.

24. In the Commissioner's opinion there is no apparent feature(s) of the arrangement that would presently invite a consideration of Part IVA. However, the question of any future consideration of Part IVA would depend upon the nature of the particular outcome(s) enabled by the transaction documents and the precise manner in which they are achieved. If the arrangement is not carried out in accordance with the transaction documents, consideration of Part IVA could not be dismissed. In such circumstances the arrangement would no longer be evident and it would be another arrangement to which Part IVA would be considered.

**Detailed contents list**

25. Below is a detailed contents list for this Class Ruling:

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# CR 2004/90

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

CR 2001/1; TR 92/1; TR 95/33;  
TR 97/16; TD 1999/33

*Subject references:*

- arrangement
- class of persons
- interest
- reimbursement
- fringe benefits

*Legislative references:*

- ITAA 1936 23L(1)
- ITAA 1936 26(eaa)
- ITAA 1936 51AH
- ITAA 1936 Pt IVA
- ITAA 1997 8-1

- ITAA 1997 8-1(2)(d)
- ITAA 1997 Div 396
- FBTAA 1986 24(1)(e)
- FBTAA 1986 136(1)
- FBTAA 1986 136(1)(f)
- FBTAA 1986 136(1)(g)
- FBTAA 1986 136(1)(h)
- FBTAA 1986 136(1)(i)
- FBTAA 1986 136(1)(j)
- FBTAA 1986 136(1)(k)
- FBTAA 1986 136(1)(l)
- FBTAA 1986 136(1)(m)
- FBTAA 1986 136(1)(n)
- FBTAA 1986 136(1)(o)
- FBTAA 1986 136(1)(p)
- FBTAA 1986 136(1)(q)
- FBTAA 1986 136(1)(r)
- TAA 1953 Pt IVAAA
- Copyright Act 1968

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ATO references

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