

CR 2019/81 - AXA Australia Employers - AXA SA 2019 Leveraged Plan share offer for Australian employees



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Class Ruling

AXA Australia Employers – AXA SA 2019 Leveraged Plan share offer for Australian employees

❶ Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out tax consequences of the AXA SA 2019 Leveraged Plan share offer (Leveraged Plan) presented by Eureka Funds Management Administration Pty Limited, XL Insurance Company SE (AU) and Catlin Australia Pty Ltd (together, the AXA Australia Employers) to their Australian employees.

2. Relevant details of the Leveraged Plan are set out in paragraphs 12 to 38 of this Ruling.

Note: By issuing this Ruling, the ATO is not endorsing this plan. Potential participants must form their own view about the plan.

Who this Ruling applies to

3. This Ruling applies to you if you are an Australian resident employed by the AXA Australia Employers who participates in the offer under the arrangement described in this Ruling.

4. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in relation to the scheme outlined in paragraphs 12 to 38 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

5. This Ruling applies from 1 July 2019 to 30 June 2025.

Ruling

6. When units in AXA Plan 2019 Global (the Fund) are issued to an Australian resident employee, the units constitute a fringe benefit as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). Fringe benefits are exempt from income tax in the hands of the employee under section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936).

7. Dividends received by the bank in relation to AXA SA shares held in the name of the Fund are not assessable to the Australian resident unit holders.

8. If an Australian resident unit holder redeems his or her units, or the unit holder's entitlements are transferred to the AXA SA 2019 Classic Plan Share Offer for Australian Employees (the Classic Plan), CGT event C2 occurs pursuant to section 104-25 of the ITAA 1997. A capital gain results if the capital proceeds exceed the cost base of the units. A capital loss occurs if the capital proceeds are less than the reduced cost base.

9. The capital proceeds with respect to CGT event C2 will be the cash amount received in consideration for the redemption. In the case of an Australian resident unit holder's entitlements being transferred to the Classic Plan, the capital proceeds consist of the market value of the units issued in the Classic Plan at the date of the transfer (subsection 116-20(1) of the ITAA 1997 applies).

10. The cost base or reduced cost base of the units redeemed or cancelled on transfer of entitlements to the Classic Plan consists of the amount invested by the unit holder that is his or her contribution to the Subscription Price (section 110-25 of the ITAA 1997 applies).

11. If an Australian resident unit holder makes a capital gain on redemption of his or her units or the transfer of his or her entitlements to the Classic Plan and the units were acquired 12 months or more prior to the CGT event C2 happening, the gain is a discount capital gain pursuant to Division 115 of the ITAA 1997.

Scheme

12. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

13. The Leveraged Plan is an arrangement under which Australian resident employees, together with other employees of the AXA Australia Employers, could invest in securities concerning a portfolio of AXA SA shares.

14. The Leveraged Plan was offered to Australian employees in conjunction with the Classic Plan. The tax consequences of the Classic Plan are provided in Class Ruling CR 2019/80 *AXA Australia Employers – AXA SA 2019 Classic Plan Share Offer for Australian employees*.

15. The Leveraged Plan involved the use of a collective shareholding savings vehicle, Fonds Commun de Placement D'Entreprise (FCPE), named 'Shareplan AXA Direct Global'.

Subscription to the Leveraged Plan was made directly to the 'AXA Plan 2019 Global' FCPE compartment.

16. Under the Leveraged Plan, for every AXA SA share subscribed by the FCPE with the funds received from an employee on subscription, the bank financed the subscription of nine additional shares to be subscribed for by the FCPE.

17. The Subscription Price for each unit under the Leveraged Plan was at a discount of 4.99% to the Reference Price.

18. The Reference Price was an average of the trading prices of AXA SA shares (VWAP)¹ on the Paris Stock Exchange over the 20 trading days preceding 17 October 2019.

19. The Leveraged Plan had a reservation period from 27 August 2019 to 10 September 2019 during which employees were invited to submit reservation orders.

20. After the Subscription Price was determined, from 17 October 2019 to 21 October 2019 (Retraction/Subscription Period) employees could revoke their reservation orders or, only if they have not reserved, submit new subscriptions.

21. There was no minimum subscription for the Leveraged Plan. The maximum amount of an employee's total investment under the Leveraged Plan, together with any subscription in the Classic Plan, must not have exceeded 25% of their estimated gross annual compensation for 2019, taking into account the bank contributions under the Leveraged Plan. For an employee who submitted a subscription order during the Retraction/Subscription Period, the maximum amount of the employee's total investment under the Leveraged Plan, including contributions made on their behalf by the bank, could not exceed 2.5% of their estimated gross annual remuneration for 2019.

22. Employees were allotted units in the Leveraged Fund in consideration for their investment. Each unit holder benefited from a co-ownership right on the assets of the Leveraged Fund that was proportional to the number of units they held. Employees received one unit in the FCPE equivalent to the Subscription Price for each AXA SA share paid by the employee to the FCPE. From that time the value of a unit will be the net asset value (NAV) as defined under the FCPE Regulations.

23. The NAV of the units will be calculated by dividing the net assets in the Leveraged Fund by the number of units issued. The calculation will usually be made on the 15th day (or the first preceding trading business day that is not a legal holiday in France if that 15th day is not a trading business day or is a legal holiday in France) and last trading day of each month.

24. The FCPE units will be locked up for a period of approximately five years from the date they are issued, ending on 3 July 2024 (Lock up Period), subject to certain exceptions for Australian member employees. Those exceptions are death, total and permanent disablement, and cessation of employment with the AXA Australia Employers.

25. Under the Leveraged Plan, unit holders waive their right to receive any sums equivalent to dividends paid on the AXA SA shares held by the FCPE custodian on behalf of the Fund. As dividends are received, the FCPE manager is required to pay the bank the equivalent amount of the dividends less any Fund expenses in AXA SA shares.

26. The FCPE Regulations will provide the employee with a Guaranteed Net Asset Value for each unit subscribed for in the Leveraged Fund. The guarantee ensures that upon redemption of units the employee has the right to participate in a portion of the increase in market value above the Reference Price of the 10 AXA SA shares. In addition, the employee benefits from a guarantee in Euros of their personal contribution to the Subscription Price.

¹ The 'volume-weighted average prices' is the arithmetical average of the average prices of the AXA SA shares exchanged in one trading day, weighted by the number of AXA SA shares exchanged for each price on Euronext Paris (excluding the opening and closing prices).

27. Employees will effectively trade the discount, the dividends, if any, and a portion of the capital gain on their investment, if any, in exchange for a guaranteed minimum return.

28. The bank will guarantee to the Leveraged Fund that where units are presented for redemption the NAV shall be equal to the defined Guaranteed Net Asset Value. If the NAV happens to be less, then the bank will pay to the Leveraged Fund a sum representing an amount equal to the difference.

29. At the expiration of the Lock up Period (or on early redemption, where relevant), the International Swap Agreement will be settled and unit holders may redeem their units for cash.

30. In addition, upon the expiration date, the bank is entitled to receive the difference (where such difference is positive) between the total value of the Fund's assets and the aggregate Guaranteed Net Asset Value to which unit holders are entitled at that date. In effect, the payment to the bank would include:

- the amount initially provided by the bank, that is, 90% of the Subscription Price
- the difference between the Subscription Price and the Reference Price, and
- a specified portion of any excess of the value of the Leveraged Plan shares over the Reference Price.

31. The bank is entitled to receive this amount in return for its contribution to the subscription payable by the FCPE manager and for guaranteeing the unit holder's entitlements.

32. If the market value of AXA SA shares rises above the Reference Price, it may be expected that the value of the obligations under the International Swap Agreement will also increase. However, the NAV should also increase and unit holders are entitled to a specified percentage of the increase in value of all shares subscribed for by the Fund on their behalf.

33. The final value of the investment will be equal to the sum of the employee's personal investment and the performance. The Final Price corresponds to the arithmetic average of the 52 closing share prices recorded each week from 14 June 2023 (inclusive). If the Final Price is not higher than the Reference Price, the performance is zero.

34. If the Final Price is higher than the Reference Price, the performance will be calculated in accordance with the following formula:

$$\left[\frac{\text{Personal Investment}}{\text{Subscription price}} \right] \times \left[\frac{\text{Leverage effect (10 x Percentage of Participation x Reference Price)}}{0.5 \times \text{Final Price} = 0.5 \times \text{Reference Price}} \right] \times (\text{Final Price} - \text{Reference Price})$$

↓
Number of units
↓
Variable multiple
↓
Share price appreciation

35. The Reference Price and the Participation Percentage may be adjusted upward or downward, within the conditions described in the Fund regulation. A Participation Percentage of 75% was determined with regard to the relevant laws and regulations.

36. In the absence of redemption by the employee at the end of the Lock up Period, the FCPE Regulations provide for the assets to be transferred to the Classic Plan of the same FCPE, invested in AXA SA shares, and to no longer benefit from the guarantee from the bank nor be subject to a lock-up period. This will result in a cancellation of the units held and issuance of new Classic Plan units. The employee may continue to hold the FCPE units or redeem them at any time thereafter.

37. Subscription to the Leveraged Plan is separate from the employee's employment contract and is in no way a part of it. The decision to participate in the plan shall not have any favourable or unfavourable effect on the employee's employment within the AXA Australia

Employers. Subscription to the Leveraged Plan does not increase the expected payments from the redemption of units acquired through the plan so that the redemption payments will not reflect or are not related to the employee's performance and/or their contribution to the profit of the AXA Australia Employers or their associates.

38. The employment contracts or agreements of eligible employees do not guarantee or provide any other undertakings about the value of the redemption payments from the Leveraged Plan regardless of the value of the FCPE units or the underlying AXA shares.

Commissioner of Taxation11 December 2019

Appendix – Explanation

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

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Provision of units is a fringe benefit

39. A fringe benefit is defined in subsection 136(1) of the FBTAA as a benefit that is provided by an employer or associate of the employer, to an employee or an associate of the employee, in respect of the employment of the employee. The provision of the units in the Fund, as outlined in paragraphs 12 to 38 of this Ruling is a 'benefit' as defined in relation to the employee's employment by the AXA Australia Employers.

40. The fringe benefit is classified as an external property fringe benefit, the taxable value of which falls for determination under section 43 of the FBTAA.

41. In accordance with section 23L of the ITAA 1936, Australian resident employees acquiring units in the Fund are exempt from income tax on the benefit obtained.

Benefit is not exempted

42. Subsection 136(1) of the FBTAA details a number of exceptions to what would otherwise constitute the provision of a fringe benefit. The most relevant exceptions in this situation are contained in paragraphs (f), (h) and (ha) of the definition of 'fringe benefit' in the FBTAA.

Not exempted by paragraph (f)

43. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (f) of the definition of 'fringe benefit' in the FBTAA as it is not a payment of salary or wages or a payment that would be salary or wages if salary or wages included exempt income for the purposes of the ITAA 1936. Subscription to the Leveraged Plan is separate from the employee's employment contract and is in no way a part of it.

Not exempted by paragraph (h)

44. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (h) of the definition of 'fringe benefit' in the FBTAA as it is not a benefit constituted by the acquisition by a person of an employee share scheme (ESS) interest under an employee share scheme (within the meaning of the ITAA 1997) to which Subdivision 83A-B or 83A-C of that Act applies.

45. Under subsection 83A-10(1) of the ITAA 1997, an ESS interest in a company is either a beneficial interest in a share in the company, or a right to acquire a beneficial

interest in a share in the company. In this regard the unit holder's interest under the Fund regulations (a chose in action) is not identical with the inherent or underlying interests that the unit holder may have in shares that are part of the net assets.

46. The FCPE is a contractual arrangement formed with the intention of creating a situation of common ownership of an investment portfolio.

47. The unit holder's interest under the Fund's regulations is, in essence, a fractional interest in net assets with rights to a share of reinvested income. This interest (a chose in action) is not identical with the inherent or underlying interest that the unit holder may have in shares that are part of the net assets. It is considered that, even if under French law the unit holders may be regarded as co-owners, the interest in shares cannot be severed and dealt with separately for the purpose of the application of the Australian taxation law.

48. The FCPE concept, being a collective investment vehicle that is neither a separate legal entity nor a trust according to French law, is analogous in some respects to a partnership, although it is not actually a partnership.

49. The unit holder's interest is comparable to the interest of a partner in a partnership. In this regard, the dicta of the majority in *Taxation, Commissioner of (Cth) v Everett* [1980] HCA 6 lends support to the view expressed in paragraph 48 of this Ruling:

...the partner's fractional interest [in the partnership] is an entire chose in action; it is capable of division by assignment into further fractions, but it is not capable of division by assignment so that the right to participate in partnership profits which is inherent to the interest is hived off from the rest of that interest. Consequently, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.

50. Accordingly, the property right that a unit holder may have in particular assets, for example shares, cannot be substituted for the entire chose. In other words, the relevant interest is that arising from the provision of the units, not a benefit associated with any inherent or underlying property.

51. An FCPE is not a trust for the purpose of section 83A-320 of the ITAA 1997 which ensures employees with a beneficial interest in an employee share trust are taxed as though they are the legal owners of those shares. As stated in paragraphs 48 and 49 of this Ruling, an FCPE is not a trust according to French law and the unit holder's interest is comparable to the interest of a partner in a partnership. Paragraph 1.279 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 indicates FCPE units are beyond the scope of section 83A-320 of the ITAA 1997, stating:

These rules apply to both Australian trusts and to foreign entities that are treated in a consistent manner to Australian trusts. Entities that have similar characteristics to employee share scheme trusts but are treated in a manner more consistent with a different Australian entity are not covered by these rules.

52. The FCPE unit is also not an indeterminate right for ESS purposes as defined by section 83A-340 of the ITAA 1997 as the FCPE unit is either redeemable for cash or is transferred to the Classic Plan so it will never convert into an ESS interest.

Not exempted by paragraph (ha)

53. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) of the definition of 'fringe benefit' in the FBTAA as it is not a benefit constituted by the acquisition of money or property by an employee share trust (within the meaning of the ITAA 1997). The FCPE is not an employee share trust as defined by subsection 130-85(4) of the ITAA 1997 as it does not provide any ESS interests to employees.

Dividends not assessable income

54. Dividend income received with respect to AXA SA shares held in the name of the Fund will not be assessable income of Australian resident unit holders as they have waived their right to receive the dividends and are not entitled to that income. Under the terms of the offer the bank is entitled to the amount of any dividends.

Redemption or cancellation of units subject to capital gains tax

55. The general capital gains tax rules under Parts 3-1 to 3-3 of the ITAA 1997 apply to CGT events in relation to the interests in net assets of the Fund represented by units and shares acquired via redemption of units. The units are not units in a unit trust and Taxation Determination TD 2000/32 *Income tax: capital gains: for capital gains purposes is the unit held by a unit holder in a unit trust the relevant CGT asset?* does not apply.

56. Section 104-25 of the ITAA 1997 provides that CGT event C2 happens if ownership of an intangible CGT asset ends by it being redeemed or cancelled. Accordingly when an Australian resident unit holder redeems his or her units there will be a CGT event.

57. The capital proceeds with respect to CGT event C2 will be the cash amount received in consideration for the redemption.

58. Under Division 110 of the ITAA 1997, the cost base or reduced cost base of units acquired by subscription consists of the Subscription Price paid by the employee.

59. For the purposes of Division 115 of the ITAA 1997 (discount capital gains) the time of acquisition of units will be the date that the units were subscribed for by the unit holder.

60. If an Australian resident unit holder does not redeem his or her units on the maturity date of 3 July 2024, the unit holder's entitlements will be transferred from the Leveraged Plan to the Classic Plan. This involves a transfer made on the basis of the NAV for units under the two Plans at that time. The unit holder will then receive an allocation of units in the Classic Plan in satisfaction of rights under the Leveraged Plan. This results in CGT event C2 occurring under section 104-25 of the ITAA 1997.

61. The capital proceeds will include the market value of the units received in the Classic Plan at the date of the transfer of the Australian resident unit holder's entitlements (refer subsection 116-20(1) of the ITAA 1997). The cost base or reduced cost base in relation to this CGT event will be as indicated in paragraph 60 of this Ruling.

References*Previous draft:*

Not previously issued as a draft

Related Rulings/Determinations:

CR 2019/28; CR 2019/29;
CR 2019/80; TD 2000/32

Legislative references:

- ITAA 1936 23L
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-320
- ITAA 1997 83A-340
- ITAA 1997 104-25
- ITAA 1997 Div 110
- ITAA 1997 110-25
- ITAA 1997 Div 115
- ITAA 1997 116-20(1)

- ITAA 1997 130-85(4)
- ITAA 1997 Pt 3-1
- ITAA 1997 Pt 3-3
- ITAA 1997 Div 230
- FBTA 43
- FBTA 136(1)
- TAA 1953

Case references:

- Taxation, Commissioner of (Cth) v
Everett [1980] HCA 6; 143 CLR
440; 80 ATC 407; 610 ATR 608

Other references:

- Explanatory Memorandum to the Tax
Laws Amendment (2009 Budget
Measures No.2) Bill 2009

ATO references

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