




TD 2014/D10 - Income tax: does forex realisation event 4 happen to the debtor under subsection 775-55(1) of the Income Tax Assessment Act 1997 on repayment of a loan taken out prior to the effective date of a choice to use the applicable functional currency and denominated in the same non-AUD currency that later becomes the applicable functional currency?

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 This document has been withdrawn.

 This document has changed over time. This is a consolidated version of the ruling which was published on *23 April 2014*



Draft Taxation Determination

Income tax: does forex realisation event 4 happen to the debtor under subsection 775-55(1) of the *Income Tax Assessment Act 1997* on repayment of a loan taken out prior to the effective date of a choice to use the applicable functional currency and denominated in the same non-AUD currency that later becomes the applicable functional currency?

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Ruling

1. Yes. Forex realisation event (FRE) 4 happens to the debtor under subsection 775-55(1) of the *Income Tax Assessment Act 1997*¹ on repayment of a loan taken out prior to the effective date of a choice to use the applicable functional currency and denominated in the same non-AUD currency that later becomes the applicable functional currency. The repayment of the loan represents the cessation of an obligation to pay 'foreign currency' (paragraph 775-55(1)(a)) that was incurred in return for receiving an amount of Australian or 'foreign currency' (subparagraph 775-55(1)(b)(ix)).
2. As a result of FRE 4 happening, the debtor will make a forex realisation gain or loss under subsection 775-55(3) or (4) respectively, to the extent that any shortfall or excess between the proceeds of assuming the obligation² and the amount paid in respect of FRE 4 happening is attributable to a currency exchange rate effect.³

¹ All legislative references are to the *Income Tax Assessment Act 1997*.

² Section 775-95.

³ Section 775-105.

Example: US dollar denominated loan with US dollar applicable functional currency⁴

3. Debtor Co is an Australian resident entity that is required to prepare financial reports under section 292 of the Corporations Act 2001. Debtor Co keeps its accounts, within the meaning in subsection 960-70(4), predominantly in US dollars (US\$) and has an income year ending 30 June.
4. On 1 June 2010, Debtor Co borrows US\$100 from Creditor Co and incurs an obligation to repay US\$100 to Creditor Co. Assume that at this time, US\$100 is equivalent to Australian Dollars (A\$)85.
5. On 1 April 2012, Debtor Co makes a choice to use the applicable functional currency under item 1 of the table in subsection 960-60(1). Debtor Co's applicable functional currency, within the meaning of subsection 960-70(1), is US\$. The choice to use the applicable functional currency takes effect on 1 July 2012 (being the start of Debtor Co's 2013 income year). Assume that at this time, US\$100 is equivalent to A\$100.
6. On 31 July 2013, Debtor Co repays the US\$100 loan to Creditor Co. Assume that at this time, US\$100 is equivalent to A\$90.
7. The repayment of the US\$100 loan represents the cessation of an obligation to pay foreign currency (paragraph 775-55(1)(a)) which was incurred in return for receiving an amount of foreign currency (subparagraph 775-55(1)(b)(ix)).
8. As a result of the repayment, FRE 4 happens to Debtor Co under subsection 775-55(1). Debtor Co will make a forex realisation gain or loss under subsection 775-55(3) or (4), respectively, to the extent that the amount it paid in respect of FRE 4 happening falls short of, or exceeds, the proceeds of assuming the obligation and the shortfall or excess is attributable to a currency exchange rate effect as defined in section 775-105.
9. The amount Debtor Co paid in respect of FRE 4 happening is the US\$100 it paid to Creditor Co on 31 July 2013. This amount is in the applicable functional currency and therefore does not require translation under subparagraph (a)(i) of item 1 of the table in subsection 960-80(1). The AUD value of this amount is not relevant.
10. Debtor Co's proceeds of assuming the obligation are US\$85. This amount is worked out by translating the US\$100 that Debtor Co received when the loan was taken out (subparagraph 775-95(a)(i)) firstly to Australian currency at the exchange rate applicable at that time (US\$100 = A\$85), and then to the applicable functional currency at the exchange rate applicable when the choice took effect (A\$85 = US\$85).⁵
11. The amount Debtor Co paid in respect of FRE 4 happening (US\$100) exceeds the proceeds of assuming the obligation (US\$85) by US\$15. The US\$15 excess is attributable entirely to a currency exchange rate effect as defined in paragraph 775-105(1)(a). Accordingly, Debtor Co makes a forex realisation loss in its 2014 income year of US\$15 under subsection 775-55(5) as a result of the repayment of the US\$100 loan.

⁴ All currency exchange rates used in this example are illustrative only.

⁵ These translations are made in accordance with item 1 of the table in subsection 960-85(1). They are required because the US\$100 amount Debtor Co received when it took out the loan is not an amount that is in the applicable functional currency for the purposes of subparagraph (a)(i) of item 1 of the table in subsection 960-80(1) (see Taxation Ruling TR 2007/5 *Income tax: functional currency – when is an amount not in the 'applicable functional currency'?*, paragraph 34).

Date of effect

12. When the final Determination is issued, it is currently proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

13. In view of the fact that a number of private rulings expressing a contrary views to those in this draft Determination have been made, submissions are sought on whether the final Ruling should apply only from a certain date, and, if so, what that date should be.

Commissioner of Taxation23 April 2014

Appendix 1 – Explanation

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

Background

FRE 4

14. Under subsection 775-55(1), FRE 4 happens (amongst other circumstances) if an entity ceases to have all or part of an obligation, to pay foreign currency that it incurred in return for receiving an amount of money (Australian or foreign currency).⁶

15. Absent a choice under subsection 960-60(1) to use the applicable functional currency, the term 'foreign currency' is defined in subsection 995-1(1) to mean 'a currency other than Australian currency'. Absent such a choice, FRE 4 will therefore happen to a debtor on repayment of a non-AUD denominated loan, as the repayment represents the cessation of an obligation to pay 'foreign currency' (the loan obligation) which was incurred in return for receiving an amount of Australian or foreign currency (the loan proceeds).

16. A question however arises as to the application of FRE 4 where a debtor incurs an obligation to repay a loan denominated in a foreign currency, then makes a choice under subsection 960-60(1) to use that currency as their applicable functional currency which takes effect prior to the debtor repaying that debt.

Functional currency election

17. Items 1 to 5 in the table in subsection 960-60(1) allow certain entities, or parts of entities that keep their accounts solely or predominantly in a foreign currency to choose to use that currency (the applicable functional currency) to work out their relevant annual net amounts⁷ (such as their taxable income or tax loss), which are then translated into Australian currency.⁸ The choice to use the applicable functional currency is intended as a compliance cost saving measure for these entities, which otherwise would be required to translate all their foreign currency denominated transactions into Australian dollars under the core translation rules in Subdivision 960-C, from which to then calculate their annual net amounts.⁹

⁶ See paragraph 775-55(1)(a) and subparagraph 775-55(1)(b)(ix).

⁷ The relevant annual net amounts are listed in column 3 of items 1 to 5 of the table in subsection 960-60(1) as: taxable income or tax loss (for certain Australian resident entities, and Australian or foreign resident entities carrying on an activity or business at or through a permanent establishment), 'assessable OB income' and 'allowable OB deductions' (for an offshore banking unit), and 'attributable income' (for an attributable taxpayer of a CFC and a transferor trust).

⁸ The relevant annual net amounts listed in column 3 of items 1 to 5 of the table in subsection 960-60(1) are translated into Australian currency under paragraph (b) of column 3 of the corresponding item in the table in subsection 960-80(1).

⁹ Section 960-59.

18. When a choice to use the applicable functional currency is in effect, the translation rules in subsection 960-80(1) apply. Relevantly, column 3 of items 1 to 5 in the table in subsection 960-80(1) provide that for the purpose of working out an entity's annual net amount:

- (a) ...
 - (ii) the definition of foreign currency in subsection 995-1(1) does not apply; and
 - (iii) the applicable functional currency is taken not to be a foreign currency; and
 - (iv) Australian currency and any other currency (except the applicable functional currency) are taken to be foreign currencies; and

19. Taken together, these provisions constitute a modified definition of 'foreign currency' that applies for the purpose of working out an entity's annual net amount when a choice to use the applicable functional currency is in effect.

20. The specific question that arises in light of the modified definition of 'foreign currency' in subsection 960-80(1) is whether a loan obligation incurred prior to the date of effect of an applicable functional currency choice and denominated in the same non-AUD currency that later becomes the applicable functional currency is an obligation to pay 'foreign currency' for the purpose of paragraph 775-55(1)(a).

Principles of statutory interpretation

21. It is well settled that the task of statutory interpretation must begin with a consideration of the statutory text in the context in which it appears.¹⁰ In that regard, the word 'context' is used in its broadest sense and includes legislative history and extrinsic materials, the light thrown on its meaning by surrounding provisions, and the mischief (if any) the provision was designed to overcome.¹¹ Further, context should be considered at the outset and not merely at a later stage when ambiguity is thought to arise.¹²

22. The modern approach to statutory interpretation makes it clear, even without provisions such as section 15AA of the *Acts Interpretation Act 1901* (Cth), that the interpretation to be preferred where possible is that which will give effect to the intention of Parliament as found in the legislation itself or where it may appear from the relevant extrinsic materials.¹³

¹⁰ *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46; [2009] HCA 41 at 47, *Federal Commissioner of Taxation v. Consolidated Media Holdings Ltd*, 2012 ATC 20-361 at 39; (2012) 87 ALJR 98 at 107; (2012) 84 ATR 1 at 11; [2012] HCA 55 at 39.

¹¹ *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; (1997) 71 ALJR 312 at 324, (1997) 141 ALR 618 at 634-5, *Chaudhri v. Commissioner of Taxation* (2001) 109 FCR 416 at 418-419; [2001] FCA 554 at 6, *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 200; [2006] HCA 43 at 91, *Federal Commissioner of Taxation v. Consolidated Media Holdings Ltd* 2012 ATC 20-361 at 39; (2012) 87 ALJR 98 at 107; (2012) 84 ATR 1 at 11; [2012] HCA 55 at 39.

¹² *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; (1997) 71 ALJR 312 at 324; (1997) 141 ALR 618 at 634-5.

¹³ *Jeffrey James Prebble Pty Ltd v. Commissioner of Taxation* (2003) 131 FCR 130 at 137-138; [2003] FCAFC 165 at 24.

Subsection 775-55(1)

23. Starting first with the words of FRE 4, subsection 775-55(1) relevantly provides:

775-55 Ceasing to have an obligation to pay foreign currency—forex realisation event 4

Forex realisation event 4

(1) **Forex realisation event 4** happens if:

(a) you cease to have an obligation, or a part of an obligation, to pay * foreign currency; and

(b) any of the following applies:

...

(ix) you incurred the obligation, or the part of the obligation, in return for receiving an amount of Australian currency or foreign currency;

24. In relation to loan obligations, subparagraph 775-55(1)(b)(ix) forms part of the statutory context in which paragraph 775-55(1)(a) must be construed. When read together, it becomes apparent that in the context of loans paragraph 775-55(1)(a) is not concerned with an 'obligation to pay...foreign currency' in any unqualified sense of those words. Rather, paragraph 775-55(1)(a) is concerned with an 'obligation to pay...foreign currency', being 'the obligation' that was 'incurred in return for receiving an amount of Australian currency or foreign currency'.

25. Subparagraph 775-55(1)(b)(ix) is important because it defines the subject matter in respect of which paragraph 775-55(1)(a) applies, that is, the particular obligation incurred in return for receiving an amount of money. By adopting the verb 'incurred', the subparagraph directs attention to the creation of the obligation.

Section 960-85

26. Section 960-85 provides relevant context. It contains a special two step translation rule that applies where an 'amount'¹⁴ that is 'attributable to an event that happened, or a state of affairs that came into existence'¹⁵ at a time before the date of effect of a choice to use the applicable functional currency (a 'pre-choice' amount) is required to be translated into the applicable functional currency under subparagraph (a)(i) of items 1 to 5 in the table in subsection 960-80(1).¹⁶ The two step translation rule in section 960-85 is of broad application because it applies even in relation to 'pre-choice' amounts denominated in the same non-AUD currency as the applicable functional currency.¹⁷

¹⁴ Subsection 960-80(2).

¹⁵ Refer to TR 2007/5 at paragraphs 29 to 40 for when an amount is considered to be attributable to an event that happened, or a state of affairs that came into existence at a time before the date of effect of a choice to use the applicable functional currency.

¹⁶ Refer to subsection 960-85(1) and subsection 960-85(2).

¹⁷ For the reasons given in TR 2007/5 at paragraphs 100-102 (see also paragraph 34 of that Ruling).

27. Where no previous applicable functional currency choice was in effect at the event time, section 960-85 applies firstly, to translate the relevant 'pre-choice' amount to Australian currency at the exchange rate applicable at the event time, and then to translate this amount to the applicable functional currency at the exchange rate applicable when the current applicable functional currency choice took effect. The process is the same where a previous applicable functional currency choice has been made, except that the amount is translated firstly to the previous applicable functional currency.¹⁸

28. It is apparent from its operation that the purpose of section 960-85 is to ensure that relevant 'pre-choice' amounts are translated into the prevailing applicable functional currency in such a way that changes in the Australian dollar (or previous applicable functional currency, as relevant) value of those amounts as a result of currency exchange rate fluctuations between the event time and the date of effect of the applicable functional currency choice (the 'intervening period') are embedded in the translated applicable functional currency value of those amounts. In this way, any unrealised gains or losses as a result of currency exchange rate fluctuations over the intervening period are factored into the calculation of the entity's annual net amount under the relevant provisions of the Act that apply when the transactions to which those 'pre-choice' amounts relate are finalised.

29. The Explanatory Memorandum which accompanied the New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1) 2003 which when enacted introduced section 960-85 into the Act (the Explanatory Memorandum) confirms the interpretation of the object and purpose of section 960-85 as outlined above. Relevantly, paragraphs 3.79 and 3.84 of the Explanatory Memorandum provide:

How are events happening before a functional currency choice treated?

3.79 The need for a constant unit of account, combined with the ability to choose an applicable functional currency, raises the question of how to address events which straddle the time of choice. For example, an entity which has chosen to use a functional currency may sell an asset acquired prior to the choice, the cost of which was originally accounted for in A\$. A special translation rule deals with these cases. **[Schedule 4, item 59, section 960-85]**

...

3.84 The 2-stage translation process ensures that any unrealised gain or loss at the time of the election is made, does not escape taxation simply because the election is made. Such an unrealised gain or loss is not brought to account at the time of the choice taking effect but will be brought to account when the asset is ultimately realised...[emphasis added]

30. Example 3.7 of the Explanatory Memorandum demonstrates the operation of section 960-85 to ensure that changes in the Australian dollar value of a relevant 'pre-choice' amount over the intervening period as a result of currency exchange rate fluctuations are factored into the tax consequences on realisation of that amount, even when the relevant 'pre-choice' amount is denominated in the same non-AUD currency that later becomes the applicable functional currency:

Example 3.7: Sale of assets acquired prior to a functional currency choice

Airotciv Inc (Airotciv), a non-resident corporation operates through a PE in Australia. Airotciv transacts predominantly in ¥ and in the year ended 30 June year 1 it elects to use ¥ as its functional currency. The election will apply for the year commencing 1 July year 2.

¹⁸ See item 2 in the table in subsection 960-85(1) and subsection 960-85(2).

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In the year ended 30 June year 3, Airotciv sells a tourist resort for ¥600 million, which it had purchased prior to year 1 for ¥500 million.

As Airotciv's functional currency is ¥ the capital gain or capital loss will be calculated in ¥. However, as ¥ was not the functional currency at the time the asset was acquired, the ¥ cost is converted to A\$ at the exchange rate prevailing at the time the cost was incurred. The A\$ amount is then converted to ¥ at the exchange rate prevailing at the time the choice to use ¥ as the functional currency took effect.

Assume that the exchange rates were:

| | |
|---------------------------------------|-----------------|
| At the time of purchase of the asset: | A\$1.00:¥68.50; |
| At the time the choice took effect: | A\$1.00:¥62.00. |

The cost base for the purposes of calculating the capital gain or loss on the disposal of the asset is:

$$\begin{aligned}
 & (\text{¥}500,000,000 / 68.50) * 62.00 \\
 & = \$\text{A}7,299,270 * 62.00 \\
 & = \text{¥}452,554,744
 \end{aligned}$$

The capital gain, calculated in Airotciv's functional currency, is:

| | |
|-----------------|--------------|
| Sale proceeds: | ¥600,000,000 |
| Less: Cost base | ¥452,554,744 |
| Gain | ¥147,445,256 |

31. What emerges clearly both from the language of section 960-85 and the comments and example from the Explanatory Memorandum set out above, is that in relation to transactions which straddle the date of effect of a choice to use the applicable functional currency, Parliament intended that any embedded but unrealised gains and losses as a result of currency exchange rate fluctuations over the intervening period would be captured under the Act. It was not intended that they escape taxation by virtue of the making of a choice to use the applicable functional currency. Moreover, the clear intention was that this value is to be recognised for tax purposes upon completion (or realisation) of the relevant transaction, and not necessarily at the time the choice takes effect.

32. There is nothing in the context of sections 960-80 or 960-85 to suggest that unrealised gains and losses in respect of loan obligations denominated in the same non-AUD currency that later becomes the applicable functional currency should, contrary to the treatment of gains and losses of the kind in Example 3.7 of the Explanatory Memorandum, either escape recognition under the Act or have their recognition brought forward to the time a choice to use the applicable functional currency takes effect.

Section 960-70

33. The modified definition of ‘foreign currency’ in subsection 960-80(1) hinges on the meaning of the term applicable functional currency. With the exception of the not currently relevant subsection 960-70(3A), section 960-70 defines the applicable functional currency depending on the kind of entity, or part of entity that the choice to use the applicable functional currency applies to. Subsection 960-70(1) typifies how the applicable functional currency is defined under the relevant provisions¹⁹ of section 960-70, it provides:

960-70 What is the applicable functional currency?

Australian resident required to prepare financial reports under section 292 of the Corporations Act 2001

- (1) If you make a choice under item 1 of the table in subsection 960-60(1) with effect from the start of a particular income year, your **applicable functional currency** for:
- (a) that income year; and
 - (b) each later income year for which the choice is in effect;

is the sole or predominant * foreign currency in which you kept your accounts at the time when you made the choice.

34. From the language of subsection 960-70(1) and the other relevant provisions of section 960-70, it is clear that an entity, or part of the entity, only has an applicable functional currency from the start of the relevant income year or accounting period if it makes a choice under subsection 960-60(1) to use it. Absent a valid choice, there is no ‘applicable functional currency’. Taxation Ruling TR 2007/5 *Income tax: functional currency – when is an amount not in the ‘applicable functional currency’?* (TR 2007/5) explains this as follows:

33. ...The concept of ‘applicable functional currency’ in this respect is purely an income tax law one. In the absence of a valid choice under subsection 960-60(1) to use this currency, there is no ‘applicable functional currency’...

35. It follows from the definition of applicable functional currency that under the scheme of Subdivision 960-D, there is a subtle yet important distinction between the non-AUD currency that later becomes the applicable functional currency and the non-AUD currency that is the applicable functional currency. The subtlety of the distinction is in the fact that both concepts involve only a single unit of currency which, prior to the date of effect of a choice to use the applicable functional currency is a currency other than the applicable functional currency (for the applicable functional currency does not exist at that time), and from the date of effect of a choice to use the applicable functional currency is the applicable functional currency.

36. The temporal limitations inherent in the definition of applicable functional currency are fundamental to the scheme of Subdivision 960-D. They support the intended operation of section 960-85 in respect of all ‘pre-choice’ amounts denominated in the same non-AUD currency that later becomes the applicable functional currency by ensuring that those amounts are not in the applicable functional currency for the purposes of subparagraph (a)(i) of items 1 to 5 in the table in subsection 960-80(1).²⁰

¹⁹ The relevant provisions are subsection 960-70(1), subsection 960-70(2) and subsection 960-70(3).

²⁰ Refer to Example 3.7 in the Explanatory Memorandum, above.

Conclusion

37. In light of the wider statutory context examined above, it is considered that a loan obligation incurred prior to the date of effect of an applicable functional currency choice and denominated in the same non-AUD currency that later becomes the applicable functional currency is an obligation to pay 'foreign currency' within the meaning of paragraph 775-55(1)(a).

38. This is because under the scheme of Subdivision 960-D, there is no applicable functional currency prior to the date of effect of a choice to use it. Consequently, a loan obligation incurred prior to the date of effect of an applicable functional currency choice is an affair of a currency other than the applicable functional currency. In terms of subparagraph (a)(iv) of the modified definition of 'foreign currency' in subsection 960-80(1), it is an obligation to pay 'any other currency (except the applicable functional currency)'. Accordingly, it is an obligation to pay 'foreign currency' under that definition.

39. FRE 4 happens to the debtor under subsection 775-55(1) on repayment of the loan obligation because the repayment represents the cessation of an obligation to pay 'foreign currency' (paragraph 775-55(1)(a)) that was incurred in return for receiving an amount of Australian or 'foreign currency' (subparagraph 775-55(1)(b)(ix)).

40. This approach is supported by section 15AA of the *Acts Interpretation Act 1901* which provides that an interpretation that would best achieve the purpose or object of the Act (as is evident both from the language of section 960-85 and the comments and example from the Explanatory Memorandum set out above) is to be preferred to one that does not.

Appendix 2 – Alternative views

❶ *This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.*

Alternative views

41. It has been suggested that a loan obligation incurred prior to the date of effect of an applicable functional currency choice and denominated in the same non-AUD currency that later becomes the applicable functional currency is not an obligation to pay 'foreign currency' for the purposes of paragraph 775-55(1)(a) because it is denominated in the same non-AUD currency as the applicable functional currency, which is taken not to be a foreign currency under the modified definition of 'foreign currency' in subsection 960-80(1).

42. However, as the relevant authorities²¹ show, it is impermissible when construing a statutory provision or passage to disassemble it into its constituent words, select each word's meaning, divorced from the statutory context in which they appear, and then reassemble the provision or passage to discover its meaning. Likewise, the question of whether the relevant loan obligation is an obligation to pay 'foreign currency' for the purpose of paragraph 775-55(1)(a) is not to be answered solely by reference to paragraph 775-55(1)(a) construed in light of the prevailing definition of 'foreign currency' at the time the obligation ceases.

43. As stated in paragraphs 21 and 22 of this determination, the task of statutory interpretation must begin with a consideration of the statutory text in its context. Provided it is an interpretation which the words of the provisions may reasonably bear, the interpretation to be preferred is that which gives effect to the intention of Parliament as ascertained from that context.

44. If loan obligations that straddle the date of effect of a choice to use the applicable functional currency are considered to cease to be obligations to pay 'foreign currency' under the modified definition of 'foreign currency' in subsection 960-80(1) when a choice to use the applicable functional currency takes effect, FRE 4 would be triggered at that time and any embedded by unrealised currency exchange gains²² which accrued over the intervening period would be recognised then.

45. The legislative context and policy as revealed by the provisions themselves and the Explanatory Memorandum make it clear that the consequences of such an approach, including the acceleration of the taxing point and the failure to recognise any embedded currency exchange losses which have accrued over the intervening period, would not have been intended.

²¹ *Lorimer v. Smail* (1911) 12 CLR 504 at 510; [1911] HCA 44 at 4, *St George Bank Ltd v. Federal Commissioner of Taxation* (2009) 176 FCR 424 at 28; [2009] FCAFC 62 at 28, *Cooper Brookes (Wollongong) Pty Limited v. Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; 81 ATC 4292 at 4305; (1981) 11 ATR 949 at 961.

²² A forex realisation loss could not arise in these circumstances as no amount is paid in respect of the event happening. For instance, in the example set out in this draft Taxation Determination, no loss would arise if the obligation to pay foreign currency was taken to cease when the functional currency election took effect on 1Jul y2012. At that time Debtor Co's proceeds of assuming the obligation would still be US\$85, but it would have not paid any amount to cease to have that obligation so there would be no relevant excess within the meaning of subsection 775-55(5).

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46. For the reasons stated in the Explanation section of this determination, it is considered that a loan obligation incurred prior to the date of effect of an applicable functional currency choice and denominated in the same non-AUD currency that later becomes the applicable functional currency is an obligation to pay 'foreign currency' for the purpose of paragraph 775-55(1)(a) under the modified definition of 'foreign currency' in subsection 960-80(1).

47. Accordingly, FRE 4 does not happen to such an obligation on the date of effect of a choice to use the applicable functional currency. Instead, because the loan obligation is an obligation to pay foreign currency, incurred in return for receiving an amount of Australia or foreign currency, FRE 4 happens to the debtor under subsection 775-55(1) on repayment of the loan.

Appendix 3 – Your comments

48. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

49. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

| | |
|-------------------------|---|
| Due date: | 23 May 2014 |
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References*Previous draft:*

Not previously issued as a draft

- Acts Interpretation Act 1901 15AA
- Corporations Act 2001 292

Related Rulings/Determinations:

TR 2006/10; TR 2007/5

Subject references:

- applicable functional currency
- foreign currency obligations
- foreign currency translation
- foreign exchange gains and losses
- forex realisation event
- functional currency
- functional currency choice

Legislative references:

- ITAA 1997 Div 775
- ITAA 1997 775-55(1)
- ITAA 1997 775-55(1)(a)
- ITAA 1997 775-55(1)(b)(ix)
- ITAA 1997 775-55(3)
- ITAA 1997 775-55(4)
- ITAA 1997 775-55(5)
- ITAA 1997 775-95
- ITAA 1997 775-95(a)(i)
- ITAA 1997 775-105
- ITAA 1997 775-105(1)(a)
- ITAA 1997 Subdiv 960-C
- ITAA 1997 Subdiv 960-D
- ITAA 1997 960-59
- ITAA 1997 960-60(1)
- ITAA 1997 960-70
- ITAA 1997 960-70(1)
- ITAA 1997 960-70(2)
- ITAA 1997 960-70(3)
- ITAA 1997 960-70(4)
- ITAA 1997 960-80
- ITAA 1997 960-80(1)
- ITAA 1997 960-85
- ITAA 1997 960-85(1)
- ITAA 1997 960-85(1)(a)
- ITAA 1997 960-85(1)(b)
- ITAA 1997 960-85(2)
- ITAA 1997 995-1(1)

Case references:

- Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41; (2009) 2009 ATC 20-134; (2009) 73 ATR 256
- Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue (Vic) (2006) 228 CLR 168; [2006] HCA 43; 2006 ATC 4610; (2006) 63 ATR 220
- Chaudhri v. Commissioner of Taxation 109 FCR 416; [2001] FCA 554; (2001) 47 ATR 126; (2001) 2001 ATC 4214
- CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2; (1997) 71 ALJR 312; 141 ALR 618
- Cooper Brookes (Wollongong) Pty Limited v. Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26; 81 ATC 4292; (1981) 11 ATR 949
- Federal Commissioner of Taxation v. Consolidated Media Holdings Ltd [2012] HCA 55; 2012 ATC 20-361; 84 ATR 1
- Jeffrey James Prebble Pty Ltd v. Commissioner of Taxation (2003) 131 FCR 130; [2003] FCAFC 165; 2003 ATC 4770; (2003) 53 ATR 513
- Lorimer v. Smail (1911) 12 CLR 504; [1911] HCA 44
- St George Bank Ltd v. Federal Commissioner of Taxation (2009) 176 FCR 424; [2009] FCAFC 62; (2009) 2009 ATC 20-103; (2009) 73 ATR 148

Other references:

- Explanatory Memorandum to the New Business Tax System (Taxation of Financial Arrangements) Bill (No.1) 2003

ATO references

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