

PR 2012/2 - Income tax: tax consequences of investment in units in the Westpac Enhance Trust issued on or before 30 June 2014 - limited recourse borrowings

 This cover sheet is provided for information only. It does not form part of *PR 2012/2 - Income tax: tax consequences of investment in units in the Westpac Enhance Trust issued on or before 30 June 2014 - limited recourse borrowings*



Product Ruling

Income tax: tax consequences of investment in units in the Westpac Enhance Trust issued on or before 30 June 2014 – limited recourse borrowings

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	11
Ruling	16
Scheme	17
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	22
Appendix 2:	
Detailed contents list	60

❶ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling apply to the defined class of entities who participate in the scheme to which this Product Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling the scheme is an investment in the units of the Westpac Enhance Trust, issued by Westpac RE Limited (as responsible entity of the Westpac Enhance Trust) that is financed by way of a Limited Recourse Investment Loan, offered by Westpac Banking Corporation (Westpac).
3. This Ruling does not deal with the taxation consequences of:
 - terminating the investment prior to the maturity date;
 - fees paid by the Westpac Enhance Trust; or
 - fees paid to the Responsible Entity.

Class of entities

4. This part of the Product Ruling specifies which entities:
 - are subject to the taxation obligations; and
 - can rely on the taxation benefits, set out in the Ruling section of this Product Ruling.
5. The class of entities who can rely on this Product Ruling consists of those entities:
 - who enter into the scheme described in paragraphs 17 to 21 of this Product Ruling and execute the relevant agreements mentioned in paragraph 17 of this Product Ruling:
 - on or after the date this Product Ruling is published, being (Date), and on or before 30 June 2014;and, at the time of entering into the scheme:
 - they must have a purpose of staying in the scheme until it is completed (that is being a party to the relevant agreements until their term expires); and
 - they must have a realistic expectation of deriving assessable income from the investment that exceeds the expenditure incurred from this involvement.

These entities are referred to as Investor/s.

6. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- do not hold their units for the full term, or who do not intend to derive assessable income from the investment that exceeds the deductible expenditure that they incur in order to invest in the scheme;
- are accepted to participate in the scheme specified below and who execute relevant Agreements mentioned in paragraph 17 of this Ruling before this Ruling is published or after 30 June 2014; or
- are subject to Division 230 in respect of this scheme. Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.

Superannuation Industry (Supervision) Act 1993

7. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of SISA.

Qualifications

8. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 21 of this Ruling.

9. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

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

10. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Copyright Law Branch
Attorney-General's Department
National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/ccca>

Date of effect

11. This Product Ruling applies prospectively from 7 March 2012, the date it is published. It therefore applies to the specified class of entities that enter into the scheme from 7 March 2012 to 30 June 2014 being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

12. However, the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

13. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of the Ruling and, to that extent, this Product Ruling will have no effect.

14. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Ruling

16. Subject to paragraph 3 of this Ruling and the assumptions in paragraph 30 of this Ruling:

- (a) income distributions by the Westpac Enhance Trust are included in the assessable income of an Investor, in accordance with Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (b) An amount equal to the interest charged on the Limited Recourse Investment Loan, reduced by an amount reasonably attributable to the capital protection worked out under the method statement in subsection 247-20(3), will be deductible under section 8-1.

- (c) Under the method statement in subsection 247-20(3), the amount reasonably attributable to the capital protection for an income year is the amount by which the interest charged on the Limited Recourse Investment Loan exceeds:
- where the interest rate charged by Westpac is a fixed rate for all or part of the term of the loan, and that fixed rate is applicable to the loan for all or part of the income year, the amount of the loan multiplied by the Adjusted Loan Rate (being the Reserve Bank of Australia's Indicator Lending Rate for Standard Variable Housing Loans at the time when the interest charge is first incurred in any income year during the term of the loan, or the relevant part of the term, plus 100 basis points) (subsections 247-20(4) and 247-20(5)); and
 - where the interest rate charged by Westpac is a variable rate for all or part of the term of the loan, and a variable rate is applicable to the loan for all or part of the income year, the amount of the loan multiplied by the average of the Adjusted Loan Rates applicable during those parts of the income year when the loan is at a variable rate (subsection 247-20(5A)).
- (d) The amount reasonably attributable to the cost of capital protection under Division 247, as worked out under subparagraph 17(b) of this Ruling, is treated as the cost of a 'deemed' put option (Put Option) granted by Westpac to the Investor under subsection 247-20(6). This amount is not deductible under section 8-1
- (e) where an Investor enters into a Limited Recourse Investment Loan and a full recourse Interest Loan, Division 247 will not apply to the Interest Loan;
- (f) an amount equal to the expense incurred for interest on the Interest Loan will be deductible under section 8-1;
- (g) section 51AAA of the ITAA 1936 will not apply to deny an Investor a deduction for the interest expense allowable under section 8-1 of the ITAA 1997;
- (h) section 82KL of the ITAA 1936 will not apply to deny deductibility of the interest expense allowable under section 8-1 of the ITAA 1997;

- (i) section 82KZMF of the ITAA 1936 will not apply to set the amount and timing of deductions for the prepaid interest allowable under section 8-1 of the ITAA 1997 in respect of borrowings under a Limited Recourse Investment Loan;
- (j) section 82KZM of the ITAA 1936 will not apply to deny an Investor immediate deductibility of the prepaid interest on a Limited Recourse Investment Loan allowable under section 8-1 of the ITAA 1997 where at least one of the following applies for the year of income:
 - the Investor is a small business entity (as defined in subsection 328-110(1) of the ITAA 1997) that has not chosen to apply section 82KZMD of the ITAA 1936; or
 - the Investor is an individual who does not incur that expenditure in carrying on a business;
- (k) sections 82KZMA and 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for prepaid interest on borrowings under a Limited Recourse Investment Loan that is allowable under section 8-1 of the ITAA 1997 to an Investor (other than a small business entity for the year of income that has not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure) who is a taxpayer that is not an individual and does not carry on a business;
- (l) The total cost of the Put Option will be included in the first element of the cost base (under subsection 110-25(2)) and the reduced cost base (under subsection 110-55(2)) of the Put Option.
- (m) An Investor will be taken to exercise the Put Option if they redeem their units in the Westpac Enhance Trust, and the redemption proceeds will not fully repay the balance of the Limited Recourse Investment Loan. If the Investor exercises the Put Option, the Investor will include the payment they are deemed to have made to acquire the Put Option in the second element of the cost base and the reduced cost base of their units in the Westpac Enhance Trust pursuant to item 2 of the table in subsection 134-1(1). Any capital gain or capital loss the Investor makes from exercising the Put Option will be disregarded under subsection 134-1(4).
- (n) If an Investor does not exercise the Put Option, the Put Option will expire (subsection 247-30(2)). CGT event C2 will happen under section 104-25 if the Put Option expires. The Investor will make a capital loss that is equal to the reduced cost base of the Put Option under subsection 104-25(3).

- (o) The units in the Westpac Enhance Trust will be acquired by an Investor at the time when the contract is entered into. This is the Issue Date, when the Responsible Entity of the Westpac Enhance Trust accepts an Investor's application and issues the units (item 3 of the table in section 109-10).
- (p) The Security Trustee will hold legal title to the units which are acquired by Investors who are the trustees of superannuation funds. Under section 106-50, each Investor who is the trustee of a superannuation fund will be absolutely entitled to those units as against the Security Trustee. The CGT provisions will apply to an act done by the Security Trustee in relation to the units as if the Investor (who is the trustee of a superannuation fund) had done it. Therefore, like the other Investors, the units in the Westpac Enhance Trust held by the Security Trustee for Investors who are the trustees of superannuation funds will be acquired by the latter at the Issue Date (item 3 of the table in section 109-10).
- (q) An Investor's cost base and reduced cost base of the units in the Westpac Enhance Trust will include the money paid to acquire the units (subsections 110-25(2) and 110-55(2)) – being the amount of the Limited Recourse Investment Loan – and the incidental costs incurred by an Investor (subsections 110-25(3) and 110-55(2)).
- (r) If an Investor redeems their units at any time, CGT event C2 will happen under section 104-25. The Investor will make a capital gain equal to the capital proceeds less the cost base of the units. However, if an Investor exercises the Put Option (because the proceeds of the redemption of the units leave a shortfall in the balance of the Limited Recourse Investment Loan), the Investor's cost base and reduced cost base in the units will be reduced by the amount of the shortfall under subsections 110-45(3) and 110-55(6).
- (s) A capital gain made by an Investor on the redemption of the units may qualify as a discount capital gain under subsection 115-25(1), provided the other conditions in Subdivision 115-A are satisfied, where the Investor is an individual, a trust or a complying superannuation fund and has held the units for at least 12 months (excluding the day of acquisition and the day of redemption).

- (t) The commercial debt forgiveness rules in Division 245 will not reduce the tax attributes of an Investor as a result of the debt forgiveness that occurs when the limited recourse provisions of the Limited Recourse Investment Loan come into effect if they redeem their units in the Westpac Enhance Trust, and the redemption proceeds do not fully repay the balance of the loan.
- (u) Investors are deemed under subsection 272-5(3) of Schedule 2F to the ITAA 1936 to have fixed entitlements to all of the income and capital of the Westpac Enhance Trust;
- (v) the Loan Establishment Fee paid, if applicable, is deductible under section 25-25;
- (w) A Unit in the Fund is not a 'security' as defined under subsection 159GP(1) of the ITAA 1936; and
- (x) the anti-avoidance provisions in Part IVA of the ITAA 1936 will not be applied to deny the deductibility of the interest incurred by the Investor in respect of borrowings under a Limited Recourse Investment Loan or an Interest Loan.

Scheme

17. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling as constituted by documents and correspondence received on 5 December 2011;
- **Product Disclosure Statement (PDS)** dated 2 February 2012 for the Westpac Enhance Trust, which included the terms of the Limited Recourse Investment Loan prepared by Westpac RE Limited as responsible entity (Responsible Entity or RE);
- **Constitution for the Westpac Enhance Trust (the Constitution), dated 2 December 2011;**
- Swap Agreements; and
- Security Trust Deed.

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

18. The documents referred to in paragraph 17 of this Ruling are those that an Investor will enter into or be affected by. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor (or any associate of an Investor) will be a party to, which are a part of the scheme.

19. All requirements imposed by the Australian Securities and Investment Commission (ASIC) have been, or will be, complied with for the term of the agreements.

Overview

20. The details of the product are summarised:

- (a) Investors can invest in one or more of the following Classes of Units in the Westpac Enhance Trust (the Fund), an Australian unit trust registered as a managed investment scheme:

Investment	Units Class	Term	Distributions	Distribution frequency
S&P/ASX 200 Classes Linked to the performance of Australian equity market through the S&P/ASX 200 Index (the S&P/ASX 200 Index)	Australia A Units	1 year	Variable	Annually
	Australia B Units	3 years	Variable	Annually
China Classes Linked to the performance of the trading price of units in the Hang Seng H-share index exchange traded fund (ETF), which has an investment objective to track (before fees and expenses) the performance of the Hang Seng China Enterprises Index (the HSCE Index)	China A Units	1 year	Variable	Annually
	China B Units	3 years	Variable	Annually

- (b) Units will be issued at a Unit price of \$1 per Unit.
- (c) each Class of Units has the potential for a distribution for each year of its term.
- (d) the amount of the distribution for a Class for a year will reflect the Annual Swap Payment the Fund receives for the Class which will be determined by reference to the performance of the Relevant Underlying for the Class over the year, being the S&P/ASX 200 Index or the HSCE Index.

- (e) for all Classes, it is expected that the Unit redemption proceeds at the Maturity Date will be \$1 per Unit (subject to certain circumstances described below).
- (f) each Class has different return and risk features. However, for each Class the performance of Units is linked to the performance of the relevant Index.
- (g) the entire proceeds of the Offer in respect of each Class will be invested by the Responsible Entity in Swaps with Westpac. The Swaps are derivative transactions. The Swaps for each Class are fully funded and 100% capital protected at the Maturity Date for the Class, which means that the final payment to the Fund under the Swaps at the Maturity Date for each Class will equal \$1 for each Unit in the Class on issue at the Maturity Date. This capital protection at the Maturity Date is provided to the Fund through the Swaps. It is not provided directly to Investors.
- (h) Investors will not receive the benefit of capital protection if:
 - the Fund is subjected to an abnormal cost or liability and the Responsible Entity reduces the investment in the Swaps in respect of each Class to meet that cost or liability;
 - Investors redeem their Units before their Maturity Date;
 - the Swaps are terminated before the Maturity Date; or
 - Westpac does not perform its obligations under the Swaps.
- (i) depending on which Class the Investor chooses, the term of their investment in Units will be either one or three years (as outlined above).
- (j) for Classes with a three year term (i.e. B Units), Investors will be entitled to a distribution each year of their term, which will reflect the Annual Swap Payment (if any) the Fund receives for the Class determined by reference to the performance of the relevant Index for the Class over the year.
- (k) for Classes with a one year term (i.e. A Units), Investors will be entitled to a single distribution around the Maturity Date for their Class (the amount of that distribution will also be dependant on the performance of the relevant underlying over the one year term).

- (l) to invest in the Fund, Investors will be required to take out an Investment Loan from Westpac equal to the amount of their investment. That is, the full amount of the Investor's investment in Units will be funded by the Investment Loan which will be applied to pay the Unit price.
- (m) the Investment Loan can be either Full Recourse (available to Investors who are not Superannuation Investors, and mandatory for Investors who acquire B units) or Limited Recourse. Investors who are Superannuation Investors may only enter into the Limited Recourse Investment Loan. **This Product Ruling only applies to Investors who take out a Limited Recourse Investment Loan.**
- (n) as security for an Investor's obligations, a Mortgage will be granted to Westpac over the Secured Property which includes the Units that the Investor holds.
- (o) the Limited Recourse Investment Loan will be limited recourse for Westpac in respect of the principal owing under the loan. Accordingly, any amount payable by an Investor to Westpac in respect of the principal is limited to the Investor's units and their redemption proceeds
- (p) Investors may also apply for a Full Recourse Interest Loan that is available to fund an interest payment on the Investment Loan on the Interest Payment Date. The interest on the Interest Loan is prepaid annually on the Interest Payment Date. The principal is repaid in 12 monthly instalments over the year.
- (q) A Loan Establishment Fee of up to 2.2% of the Investment Loan amount may be payable to Westpac on or around the Investment Loan Drawdown Date where Investors agree to a commission being paid to their advisor.
- (r) The Security Trustee will hold the Units acquired by a Superannuation Investor on a separate trust for each Superannuation Investor. There will be no pooling of the units of different Superannuation Investors

Assumptions

21. This Ruling is made on the basis of these assumptions:
- (a) the Investor is an Australian resident for taxation purposes;
 - (b) the dominant purpose of the Investor in entering into and carrying out the scheme is to derive an amount of assessable trust income from the investment that exceeds the total expenses incurred;

- (c) the Investor is not a trader in investments and is not treated for taxation purposes as trading in interests in the Westpac Enhance Trust, carrying on a business of investing in the Westpac Enhance Trust, or holding their interests in the Westpac Enhance Trust as trading stock or as a revenue asset;
- (d) in respect of any interest amounts paid in advance under the Limited Recourse Investment Loan, these may be prepaid, but only in relation to a payment period of 12 months or less that ends on or before the last day of the income year following the expenditure year;
- (e) the scheme will be executed in the manner described in the scheme documentation and in the Scheme section of this Ruling;
- (f) all dealings between the Investor and the Westpac group of companies will be at arm's length;
- (g) at the time of the prepayment the Westpac Enhance Trust will have at least 300 unit holders;
- (h) the Investor will not repay or partially repay the Limited Recourse Investment Loan prior to its relevant term or terminate the scheme prior to the Maturity Date; and
- (i) the Investors will not enter into the scheme with the intention to terminate their participation in the scheme early.

Appendix 1 – Explanation

❶ *This Appendix 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.*

Section 8-1 and Division 247

22. Interest paid on a borrowing used to acquire income producing assets such as shares or units is generally treated as deductible under section 8-1 where it is expected that dividends or other assessable income will be derived from the investment (see Taxation Ruling TR 95/33 which relates to subsection 51(1) of the ITAA 1936, the predecessor of section 8-1 of the ITAA 1997). Investors in the Fund will derive assessable income in the form of variable distributions. The assessable income from their investments is expected to be in excess of the expenditure they incurred.

23. Division 247 applies to the scheme as a capital protected borrowing. An Investor uses the Limited Recourse Investment Loan to acquire units in the Fund (being units of a widely held unit trust). Where units are redeemed by the Investor, the Investor is protected against a fall in the market value of the units through the limited recourse provisions of the loan. The amount payable by the Investor to Westpac in respect of the principal is limited to the proceeds of the redeemed units.

24. Division 247 sets out a methodology for reasonably attributing a cost to the capital protection obtained by a borrower under a capital protected borrowing. Division 247 ignores any amount which is not in substance for capital protection or interest, in calculating the cost of capital protection (subsection 247-20(3)).

25. Under the scheme, the amount reasonably attributable to the cost of capital protection afforded by the limited recourse provisions of the loan is worked out according to the method statement in subsection 247-20(3) as set out in subparagraph 16(c) of this Ruling. This amount is treated as the cost of the Investor's Put Option under subsection 247-20(6).

26. For an Investor in the scheme, the Put Option is a capital asset. As the cost of capital protection is the cost of the Investor's Put Option, this expense is capital in nature. The interest charged on the Limited Recourse Investment Loan will be deductible under section 8-1 only to the extent that it does not constitute the cost of capital protection.

Section 51AAA

27. Under the scheme, it is contemplated that over the period of an Investor's involvement there will be assessable income derived by way of distributions of the net income of the Fund. As interest will be deductible under section 8-1 of the ITAA 1997, section 51AAA of the ITAA 1936 has no application to an Investor.

Section 82KL

28. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

Subdivision H of Division 3 of Part III

29. Subdivision H of Division 3 of Part III of the ITAA 1936 (Subdivision H) deals with the timing of deductions for certain advance expenditure incurred under an agreement in return for the doing of a thing under that agreement that will not be wholly done within the same year of income. Separate rules apply depending on whether the expenditure is incurred in carrying on a business, whether the Investor is a 'small business entity', whether the Investor is an individual and whether the Investor is not an individual and incurs the expenditure otherwise than in carrying on a business. This Subdivision does not apply to 'excluded expenditure', which is defined in subsection 82KZL(1) to include amounts of less than \$1,000 or amounts of expenditure that are of a capital nature.

Subdivision 328-C – small business entities for the purposes of Subdivision H

30. Under section 328-110, an Investor carrying on a business in an income year will be a small business entity for that year (the current year) if:

- (a) the Investor carried on a business in the previous income year and the aggregated turnover for that year was less than \$2 million;
- (b) the aggregated turnover for the current year is likely to be less than \$2 million and, where the Investor carried on a business in each of the two previous income years, the aggregated turnover for each of those income years was less than \$2 million; or
- (c) the aggregated turnover for the current year, worked out as at the end of the year, is less than \$2 million.

The eligible service period for the purposes of Subdivision H

31. The prepaid interest charges on the Limited Recourse Investment Loan allowable under section 8-1 of the ITAA 1997 are in relation to a prepayment of loan interest for a period that is 12 months or less. Paragraph 82KZL(2)(a) of the ITAA 1936 provides that a payment of interest that is made in return for the making available of a loan principal is to be taken, for the purposes of Subdivision H, to be expenditure incurred under an agreement in return for the doing of a thing under the agreement for the period to which the interest payment relates. The eligible service period in relation to a payment of loan interest is determined by reference to the period to which the interest relates, which is 12 months, and not to the period of the loan.

Sections 82KZME and 82KZMF – prepaid expenditure and tax shelter arrangements

32. The rules in sections 82KZME and 82KZMF of the ITAA 1936 apply, subject to the exceptions in section 82KZME, where expenditure is incurred in relation to a 'tax shelter' arrangement for the doing of a thing that is not to be wholly done within the expenditure year.

33. For the purposes of section 82KZME of the ITAA 1936, 'agreements' are broadly defined to include an entire arrangement of which a contract may form part. Under subsection 82KZME(4), the relevant 'agreement' includes all the contractual arrangements and activities associated with the participation in the agreement, including the financing and management arrangements.

34. Exception 1, as contained in subsection 82KZME(5) of the ITAA 1936, applies to exclude the interest deductible under section 8-1 of the ITAA 1997 incurred on borrowings under the Limited Recourse Investment Loan, from the operation of section 82KZMF of the ITAA 1936 as:

- the documents and facts described in the scheme at paragraphs 17 to 21 of this Ruling establish that Investors have fixed entitlements to all of the income and capital of the Fund. Therefore, the prepaid interest deductible under section 8-1 of the ITAA 1997 is incurred in respect of money borrowed to acquire units in a widely held unit trust as described in subparagraph 82KZME(5)(b)(iii) of the ITAA 1936;
- the Investor can reasonably expect to obtain trust income from the investment;
- the Investor will not obtain any other kind of assessable income from the investment, except for capital gains; and
- all aspects of the scheme will be conducted at arm's length.

35. Deductibility of expenditure must therefore be considered under the prepayment rules outlined in paragraphs 36 to 41 of this Ruling.

Section 82KZM – prepaid expenditure incurred by small business entities and individuals incurring non-business expenditure

36. Section 82KZM of the ITAA 1936 operates to spread over more than one income year a deduction for prepaid expenditure incurred by a taxpayer that is either:

- a small business entity for the year of income that has not chosen to apply section 82KZMD to the expenditure; or
- a taxpayer that is an individual and the expenditure is not incurred in carrying on a business.

37. The expenditure must not be excluded expenditure and must be incurred otherwise than in carrying on a business. Section 82KZM of the ITAA 1936 applies if the eligible service period for the expenditure is longer than 12 months, or the eligible service period for the expenditure is 12 months or shorter but ends after the last day of the year of income after the one in which the expenditure was incurred and the expenditure would otherwise be immediately deductible under section 8-1 of the ITAA 1997.

38. As the eligible service period in relation to a deductible interest payment under a Limited Recourse Investment Loan is not longer than 12 months and does not end after the last day of the year of income after the one in which the expenditure was incurred, section 82KZM of the ITAA 1936 will have no application to Investors who are small business entities for the year of income, or to Investors who are individuals and the expenditure is not incurred in carrying on a business. Investors who satisfy these tests will be able to claim an immediate deduction for the interest allowable under section 8-1 of the ITAA 1997 that is incurred under a Limited Recourse Investment Loan.

Sections 82KZMA and 82KZMD – prepaid non-business expenditure incurred by non-individuals and non-small business entities

39. Sections 82KZMA and 82KZMD of the ITAA 1936 set the amount and timing of deductions for expenditure for a taxpayer (other than a small business entity for the year of income that has not chosen to apply section 82KZMD to the expenditure) that is not an individual and does not incur the expenditure in carrying on a business.

40. The expenditure must not be excluded expenditure and must be incurred in return for the doing of a thing under an agreement that is not wholly done within the expenditure year.

41. For these Investors, the deduction for prepaid interest on the Limited Recourse Investment Loan will be apportioned over the relevant interest payment period.

Division 110 – cost base of the Put Option

42. The cost of capital protection is not deductible to an Investor under section 8-1. Under the terms of the Limited Recourse Investment Loan and the Product Disclosure Statement, an Investor only has the unconditional right to invoke the capital protection at the Maturity Date. Therefore, the income tax legislation applies as if there was a single Put Option for the period ending at the Maturity Date (subsection 247-25(2)). The Put Option constitutes a CGT asset, and is separate and in addition to the other rights created under the scheme as described in this Ruling.

43. The total cost of capital protection under Division 247 will be included in the first element of the cost base (under subsection 110-25(2)) and the reduced cost base (under subsection 110-55(2)) of the Put Option.

44. An Investor will be taken to exercise the Put Option if they redeem their units in the Westpac Enhance Trust, and the redemption proceeds will not fully repay the balance of the Limited Recourse Investment Loan. The limited recourse provisions of the loan will then come into effect, which will amount to invoking the capital protection (subsection 247-30(1)). If the Investor exercises the Put Option, the Investor will include the payment they are deemed to have made to acquire the Put Option in the second element of the cost base and the reduced cost base of their units in the Westpac Enhance Trust pursuant to item 2 of the table in subsection 134-1(1). Any capital gain or capital loss the Investor makes from exercising the Put Option will be disregarded under subsection 134-1(4).

45. The limited recourse provisions of the loan mean that Westpac will have no recourse against the Investor to recover the shortfall between the redemption proceeds and the balance of the Limited Recourse Investment Loan. In this circumstance, the Investor will need to reduce the cost base (under subsection 110-45(3)) and the reduced cost base (under subsection 110-55(6)) of their units by the amount of the shortfall. The combined effect will be to give rise to a capital loss equal to, at the very least, the reduced cost base of the Put Option.

46. If an Investor does not exercise the Put Option, the Put Option will be taken to have expired (subsection 247-30(2)). An Investor will be taken to have not exercised the Put Option where they redeem their units and the redemption proceeds will fully repay the balance of the Limited Recourse Investment Loan.

47. Where the Put Option expires, CGT event C2 will happen (paragraph 104-25(1)(c)). The capital proceeds on the expiry of the Put Option will be nil. Therefore, an Investor will make a capital loss from CGT event C2 that is equal to the reduced cost base of the Put Option.

Commercial debt forgiveness

48. The Limited Recourse Investment Loan is a commercial debt under section 245-10.

49. Where the limited recourse provisions of the Limited Recourse Investment Loan come into effect, an Investor is not required to repay the shortfall between the loan balance and the redemption proceeds of the units. This will result in the forgiveness of a commercial debt at that time, under paragraph 245-35(a).

50. Under Division 245, where the forgiveness of a commercial debt results in the Investor having a positive 'net forgiven amount', the Investor will be required to reduce certain tax attributes that could otherwise reduce their taxable income (in the same or a later income year), to the extent of the net forgiven amount.

51. To calculate the net forgiven amount of a debt, it is first necessary to calculate the 'gross forgiven amount' of a debt. In the Investor's circumstances, Division 245 will have no practical effect as there will be no gross forgiven amount in respect of the Limited Recourse Investment Loan. The gross forgiven amount is equal to the value of the debt when it is forgiven less the amount (if any) that is offset against the value of the debt when it is forgiven.

52. The value of the Limited Recourse Investment Loan (being a debt owed by an Investor) when it is forgiven is worked out under subsection 245-60(1). Subsection 245-60(1) applies because, under subsection 245-60(2):

- (a) the Investor will have incurred the debt directly in respect of financing the acquisition of property by the Investor; and
- (b) the creditor's rights against the Investor in the event of default in the payment of the debt or interest will be, just before the debt is forgiven, limited to rights in respect of a mortgage or other security over the property.

53. Under subsection 245-60(1), the value of the Limited Recourse Investment Loan when it is forgiven is the market value at that time of the creditor's rights mentioned in paragraph 245-60(2)(b) (being the redemption price of the units at that time, which is based on the net asset value per unit for the relevant class of units). This is because the creditor has no right to recover the shortfall between the loan balance and the redemption proceeds of the units.

54. The Limited Recourse Investment Loan is a 'moneylending debt' (being a debt resulting from a loan of money in the ordinary course of a business of lending money carried on by the creditor, the Loan Provider) and neither of items 4 and 6 of the table in subsection 245-65(1) apply. Therefore, item 1 of the table in subsection 245-65(1) will apply.

55. The amount that is offset against the value of a debt when it is forgiven is the market value, at the time of the forgiveness, of each item of property (other than money) that the debtor (an Investor) has given as a result of, or in respect of, the forgiveness of the debt. The market value of this property (the Investor's interest in the units in the Westpac Enhance Trust) will be the redemption price of the units at the time of the forgiveness.

56. Therefore, as the value of the Limited Recourse Investment Loan when it is forgiven will be equal to the amount that is offset against the value of the loan when it is forgiven, there will be no gross forgiven amount in respect of the loan (subsection 245-75(2)).

57. Accordingly, the commercial debt forgiveness rules in Division 245 will not reduce the tax attributes of an Investor as a result of the debt forgiveness that occurs when the limited recourse provisions of the Limited Recourse Investment Loan come into effect.

Section 25-25 – Loan Establishment Fee

58. The Loan Establishment Fee, if applicable, incurred by an Investor upon successful application for a Limited Recourse Investment Loan will be an allowable deduction pursuant to section 25-25. The Loan Establishment Fee will be deductible on a straight line basis over the period of the shorter of:

- the term of the Limited Recourse Investment Loan; or
- five years.

Subsection 159GP(1) – a Unit in the Fund is not a ‘security’

59. Subsection 159GP(1) of the ITAA 1936 defines the term ‘security’. Units in a unit trust will not be a security under paragraphs (a), (b) or (c) of the definition in subsection 159GP(1). Furthermore, units in a unit trust will not fall within the definition in paragraph (d) of subsection 159GP(1) unless there is a contract between the ‘manager’ of the unit trust and the unit holder under which there is a liability to pay an amount, and on the facts, the contract is found to be debt like (see paragraphs 4(ii) and 34 to 39 of Taxation Ruling TR 96/14).

60. A unit in the Fund is not considered to be a contract between the Trustee and the unit holder, nor are the obligations between the Trustee and the unit holder considered to be debt like. Therefore, a unit in the Fund does not meet the definition of security under subsection 159GP(1) of the ITAA 1936.

Part IVA

61. Provided that the scheme ruled on is entered into and carried out in the manner described in the scheme documentation and in the Scheme section of this Ruling including the Assumptions (see paragraphs 17 to 21 of this Ruling), it is accepted that the scheme is an ordinary commercial transaction and that Part IVA of the ITAA 1936 will not apply.

Appendix 2 – Detailed contents list

62. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Class of entities	4
<i>Superannuation Industry (Supervision) Act 1993</i>	7
Qualifications	8
Date of effect	11
Changes in the law	13
Note to promoters and advisers	15
Ruling	16
Scheme	17
Overview	20
Assumptions	21
Appendix 1 – Explanation	22
Section 8-1 and Division 247	22
Section 51AAA	27
Section 82KL	28
Subdivision H of Division 3 of Part III	29
Subdivision 328-C – small business entities for the purposes of Subdivision H	30
The eligible service period for the purposes of Subdivision H	31
Sections 82KZME and 82KZMF – prepaid expenditure and tax shelter arrangements	32
Section 82KZM – prepaid expenditure incurred by small business entities and individuals incurring non-business expenditure	36
Sections 82KZMA and 82KZMD – prepaid non-business expenditure incurred by non-individuals and non-small business entities	39
Division 110 – cost base of the Put Options	42
Commercial debt forgiveness	48
Section 25-25 – Loan Establishment Fee	58
Subsection 159GP(1) – a Unit in the Fund is not a ‘security’	59
Part IVA	61
Appendix 2 – Detailed contents list	62

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 95/33; TR 96/14

Subject References:

- capital protected borrowing
- financial products
- interest expense
- interest income
- prepaid expenses
- product rulings
- public rulings
- taxation administration

Legislative References:

- ITAA 1936 51(1)
- ITAA 1936 51AAA
- ITAA 1936 82KL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZL(2)(a)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(5)
- ITAA 1936 82KZME(5)(b)(iii)
- ITAA 1936 82KZMF
- ITAA 1936 159GP(1)
- ITAA 1936 272-5(3)
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 Pt III Div 6
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 8-1
- ITAA 1997 25-25
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(c)
- ITAA 1997 109-10
- ITAA 1997 Div 110
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(4)
- ITAA 1997 110-25(4)(a)
- ITAA 1997 110-45(1B)
- ITAA 1997 110-55(2)
- ITAA 1997 110-55(3)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 134-1(1)
- ITAA 1997 134-1(4)
- ITAA 1997 Div 230
- ITAA 1997 Div 247
- ITAA 1997 247-10
- ITAA 1997 247-10(1)
- ITAA 1997 247-10(2)
- ITAA 1997 247-20(3)
- ITAA 1997 247-20(4)
- ITAA 1997 247-20(5)
- ITAA 1997 247-20(6)
- ITAA 1997 247-25(1)
- ITAA 1997 247-30(2)
- ITAA 1997 Subdiv 328-C
- ITAA 1997 328-110
- ITAA 1997 328-110(1)
- TAA 1953
- Copyright Act 1968
- SISA 1993

ATO references

NO: 1-3MWU3AF

ISSN: 1441-1172

ATOlaw topic: Income Tax ~~ Product ~~ finance