

PR 2012/21 - Income tax: tax consequences of investing in a Macquarie Step Facility Deferred Purchase Agreement

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Product Ruling

Income tax: tax consequences of investing in a Macquarie Step Facility Deferred Purchase Agreement

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📌 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 Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section apply to the defined class of entities, who take part in the scheme to which this 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 referred to as the Macquarie Step Facility or the Facility, offered by Macquarie Bank Limited (Macquarie).
3. This Product Ruling does not address:
 - the tax consequences of borrowing funds to acquire a deferred purchase agreement (DPA), including the deductibility of interest on funds borrowed to acquire a DPA;
 - the tax consequences of a transfer of a DPA;
 - the tax consequences of an Early Withdrawal of all or some of a DPA;
 - the tax consequences of an Early Termination of a DPA;
 - the tax consequences of an Adjustment Event in respect of a Reference Asset or Reference Asset Constituent for a DPA;
 - the tax consequences associated with the holding of a Beneficial Fraction, including the receipt of a Beneficial Fraction Value; and
 - whether the DPA constitutes a financial arrangement for the purposes of Division 230 (Taxation of financial arrangements).

Class of entities

4. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. In this Product Ruling, those entities that can rely on the Ruling section are referred to as Investors.
5. The class of entities who can rely on the Ruling section of this Product Ruling consists of those entities:
 - that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made;

- whose rights and obligations under the DPA Terms will commence on a relevant Issue Date, being an Issue Date on or between 30 May 2012 and 30 May 2014; and
- that have a purpose of staying in the scheme until it is completed (that is, being a party to the DPA Terms until their term expires), and deriving assessable income in the form of capital gains from this involvement.

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

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income in the form of a capital gain from it;
- are accepted into this scheme other than on a relevant Issue Date (see paragraph 5 of this Product Ruling);
- are non-residents for Australian taxation purposes;
- participate in the scheme through offers made other than through the Macquarie Step Facility Product Disclosure Statement (PDS); or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way;
- trade in financial instruments or securities and are treated for taxation purposes as trading in Deliverable Securities and/or DPAs, carrying on a business of investing in the Deliverable Securities and/or DPAs, or holding the Deliverable Securities and/or DPAs as trading stock or as revenue assets; or
- are subject to Division 230 in respect of this scheme.

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 18 to 22 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.

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Date of effect

11. This Product Ruling applies prospectively from 30 May 2012, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme on a relevant Issue Date (see paragraph 5 of this Product Ruling). This Product Ruling provides advice to the specified class of entities for the income years up to 30 June 2014 being its period of application. Where relevant, this Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into on a relevant Issue Date.

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 this Product 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.

Goods and Services Tax

16. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as an Investor) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice and the expenditure incurred by the Investor must qualify as a creditable acquisition.

Ruling

Application of this Ruling

17. Subject to paragraph 3 and the assumptions in paragraph 22 of this Ruling:

A DPA

- (a) The Investor's legally enforceable rights under a DPA are, in their totality, a CGT asset under subsection 108-5(1);
- (b) Upon delivery of the Deliverable Parcel to the Investor or to Macquarie (or its nominee) on behalf of the Investor, the Investor's ownership of the contractual rights under the DPA comes to an end by reasons of those rights being discharged or satisfied. A CGT event C2 happens under section 104-25 at this time;
- (c) Where the Investor is subject to Physical Settlement, their capital proceeds under section 116-20 will be equal to the market value of the Deliverable Parcel received on the Delivery Date, as well as any Rounding Amount received from Macquarie (if any);

- (d) Where the Investor elects to accept delivery through the Sale Facility, their capital proceeds under section 116-20 will be equal to the market value of the Deliverable Parcel on the DSP Determination Date, as well as any Rounding Amount calculated (if any);
- (e) The cost base or reduced cost base of the Investor's contractual rights under a DPA includes the Investment Amount and the Establishment Fee (if any) (subsections 110-25(2), 110-25(3) and 110-55(2));
- (f) Any capital gain realised by an Investor as a result of the satisfaction of the Investor's rights under a DPA will be treated as a discount capital gain pursuant to section 115-5 where the Investor is an individual, a complying superannuation entity, or a trust and has held the DPA for at least 12 months. The CGT asset comprising the Investor's contractual rights under a DPA is taken to have been acquired on the Issue Date, i.e. when the Investor enters into the DPA (subsection 109-5(1));
- (g) The DPA is not a traditional security as defined in subsection 26BB(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).
- (h) The DPA is not a qualifying security as defined in subsection 159GP(1) of the ITAA 1936;
- (i) Division 775 will not apply to an Investor in respect of any gains or losses arising in connection with a DPA; and
- (j) Division 230 will not apply to any gains or losses from a DPA held by Investors excepted from the Division applying to this scheme pursuant to section 230-455.

The Deliverable Securities

- (k) Each Deliverable Security received by the Investor under Physical Settlement, or by Macquarie (or its nominee) on behalf of the Investor under the Sale Facility, is a CGT asset under subsection 108-5(1). Any subsequent disposal of a Deliverable Security by way of sale by the Investor or by Macquarie (or its nominee) on behalf of the Investor will give rise to a CGT event A1 under section 104-10;
- (l) The Investor's capital proceeds under section 116-20 will be the amount they receive, or are entitled to receive, from the disposal. Under the Sale Facility, this amount will be the Sale Proceeds;

- (m) The cost base or the reduced cost base of the Investor's Deliverable Securities is their market value on the date of delivery to the Investor or Macquarie to be held on behalf of the Investor, plus any incidental costs incurred by the Investor in acquiring the Deliverable Securities (sections 110-25, 110-55 and 112-20); and
- (n) Any capital gain realised by an Investor from the disposal of a Deliverable Security acquired under Physical Settlement will be treated as a discount capital gain pursuant to section 115-5 where the Investor is an individual, a complying superannuation entity, or a trust and has held the Deliverable Security for at least 12 months. Each Deliverable Security is taken to have been acquired by the Investor at the time it is delivered (subsection 109-5(1)). Capital gains realised by an Investor from the disposal of a Deliverable Security acquired under the Sale Facility will not be treated as a discount capital gain under section 115-5.

Anti-avoidance provisions

- (o) Provided the scheme ruled on is entered into and carried out as described in this Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to an Investor in respect of an investment in a DPA offered under the Facility.

Scheme

18. 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 information received on 19 April 2012, 1 May 2012 and 16 May 2012; and
- PDS, including the DPA Terms, dated 10 November 2011 and the Supplementary Product Disclosure Statement (SPDS) referred to in paragraph 21(i) of this Product Ruling.

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

19. For the purposes of describing the scheme to which this 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.

20. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

21. The details of the Macquarie Step Facility are summarised as follows:

- (a) An Investor can apply to establish a Facility by submitting a completed Application Form. On acceptance of an Investor's Application for the Facility, the Investor can apply for entry into one or more DPAs from one or more Series by submitting a completed Series Form attached to the relevant Term Sheet between the relevant Offer Open Date and Offer Close Date;
- (b) On acceptance of an Investor's Series Form for a DPA and payment by the Investor of the Investment Amount for that DPA to Macquarie by or on the Issue Date, the PDS, including the DPA Terms therein, the Application Form, the Term Sheet and the Series Form, form the agreement between the Investor and Macquarie that constitutes the DPA. A separate DPA is entered into for each Series;
- (c) An Investor is required to pay a minimum Investment Amount of \$20,000 per Series, with increments of \$1,000 per Series thereafter;
- (d) Where the Investor has agreed for their adviser to receive an Upfront Adviser Fee of up to 2.2% of the Investment Amount, Macquarie may charge the Investor an equal Establishment Fee, payable at the same time as the Investment Amount on or prior to the Issue Date. The Upfront Adviser Fee is paid by Macquarie to the Investor's adviser shortly after the Issue Date;
- (e) Each DPA constitutes an agreement by the Investor to purchase from Macquarie and for Macquarie to delivery to the Investor the Deliverable Parcel in accordance with clause 4 of the DPA Terms, as well as an entitlement to an equitable interest in a fraction of one Security (Beneficial Fraction) in accordance with clause 1.4 of the DPA Terms;

- (f) The Deliverable Parcel will contain a whole number of Deliverable Securities. The number of Deliverable Securities in the Investor's Deliverable Parcel at maturity will be equal to the Final Value divided by the Deliverable Security Price (the price per unit of the Deliverable Security paid by Macquarie to acquire the Deliverable Security on the DSP Determination Date for delivery to the Investor), rounded down to the nearest whole number. Unless substituted by Macquarie in accordance with clause 6.2 of the DPA Terms, the Deliverable Securities in each Deliverable Parcel will be ordinary shares in BHP Billiton Limited;
- (g) The Final Value of a DPA is determined on the Maturity Date and is the sum of the Protected Value and Performance Value, where the Performance Value is any gain referable to the performance of the relevant Reference Asset and the Protected Value is the part of the Investor's Investment Amount (up to a maximum of 100%) that is protected if the Investor holds their investment to maturity, regardless of the performance of the Reference Asset;
- (h) Information regarding each Series will be provided on Macquarie's website (www.macquarie.com.au/step). The features of each Series will be described in a Term Sheet which includes:
- (i) the underlying asset(s) or equity index/indices which the DPA provides exposure to the performance of (Reference Asset – see paragraph 21(i) of this Ruling);
 - (ii) the Performance Value (see paragraph 21(j) of this Ruling);
 - (iii) the term of the DPA (Term), ranging between 13 months and 7 years;
 - (iv) the percentage of the Investment Amount which the Investor is guaranteed to receive back at maturity (Protection Percentage);
 - (v) the level of the Reference Asset that must be attained before the Performance Value can be greater than zero (Hurdle);
 - (vi) the limit, if any, to the exposure to the performance of the Reference Asset above the Hurdle (Performance Cap);
 - (vii) the percentage representing the extent to which the Investor participates in the performance of the Reference Asset (Participation Rate); and
 - (viii) if in other than Australian dollars, the Performance Currency.

- (i) Each DPA available under the Facility will provide exposure to a Reference Asset which will be comprised of one or more underlying assets. The underlying assets or equity indices that may form all or part of a Reference Asset include the following:

Underlying asset/index	Description
S&P/ASX 200 Index	200 leading companies by market capitalisation listed on the Australian Securities Exchange (ASX) at the relevant time.
S&P 500 Index	500 leading companies by market capitalisation listed on either the New York Stock Exchange or NASDAQ at the relevant time.
Hang Seng H-Share Index ETF	An exchange-traded fund seeking to provide investment returns closely matching the performance of the Hang Seng China Enterprises Index.
Tracker Fund of Hong Kong	An exchange-traded fund seeking to provide investment returns closely matching the performance of the Hang Seng Index.
MSCI Taiwan Index	A market capitalisation-weighted index of the Taiwanese equity market.
KOSPI 200 Index	A market capitalisation-weighted index of the Korean equity market.
MSCI Singapore Index	A market capitalisation-weighted index of the Singaporean equity market.
PIMCO Total Return Bond Fund	An actively-managed fund that aims to maximise total return while minimising risk by investing in intermediate-term, investment grade securities.
Commodities	Any commodity traded on a spot market as at the date the relevant DPA is offered.
Australian listed securities	Any security listed on the ASX as at the date the relevant DPA is offered.
International listed securities	Any internationally-listed security as at the date the relevant DPA is offered.
Winton Global Alpha Fund	A fund investing in futures, forwards and cash or cash equivalents.

Exposure to the Winton Global Alpha Fund is to be provided under the Facility pursuant to a SPDS. This Product Ruling will apply to a DPA providing exposure to this Fund to the extent that a relevant SPDS, which includes this underlying asset, issues.

- (j) The Performance Values offered under the Facility, only one of which can apply to a particular Series, are as follows:
 - (i) Uncapped – provides exposure to the performance of a Reference Asset above the Hurdle (subject to a Participation Rate). There is no Performance Cap limiting the Investor's potential gain;
 - (ii) Capped – provides exposure to the performance of a Reference Asset above the Hurdle (subject to a Participation Rate), with a Performance Cap placed on the performance of the Reference Asset, limiting the Investor's potential gain at maturity;
 - (iii) Constituent Capped – provides exposure to the performance of a basket Reference Asset (that is, a Reference Asset with multiple underlyings) above the Hurdle (subject to a Participation Rate), with a Performance Cap placed on the individual performance of each underlying in the Reference Asset, limiting the Investor's potential gain at maturity; and
 - (iv) Short Capped – provides beneficial exposure to the performance of a Reference Asset below the Hurdle (subject to a Participation Rate), meaning the Investor will benefit if the Reference Asset decreases in value. A Performance Cap also applies to the performance of the Reference Asset, limiting the Investor's potential gain at maturity.
- (k) A DPA does not pay any distributions, coupons or other amounts during its Term;
- (l) The Investor may deliver a Sell Instruction Form to Macquarie prior to the Maturity Date, in which the Investor elects to use the Sale Facility. Where the Investor elects to use the Sale Facility, Macquarie agrees to:
 - (i) arrange for the Deliverable Parcel to be delivered to Macquarie to be held on behalf of the Investor;
 - (ii) purchase from the Investor on the DSP Determination Date (that is, the first ASX Business Day after the Maturity Date), each of their Deliverable Securities at the applicable Deliverable Security Price on that date; and
 - (iii) pay the Sale Proceeds to the Investor on the Delivery Date (that is, five CHES Business

Days after the DSP Determination Date) together with any applicable Rounding Amount, less any applicable costs (clause 4.2 of the DPA Terms).

- (m) Where the Investor has not supplied a validly completed Sell Instruction Form at least 10 Business Days prior to the Maturity Date of the DPA, the Investor will be subject to Physical Settlement for that DPA. Where the Investor is subject to Physical Settlement of the Deliverable Parcel, Macquarie must transfer the Deliverable Parcel and pay any applicable Rounding Amount to the Investor on the Delivery Date (clause 4.1 of the DPA Terms);
- (n) Macquarie will advise the Investor of the market value of the Deliverable Securities as at the date of their delivery under either Physical Settlement or the Sale Facility;
- (o) Upon Physical Settlement or payment of the Sale Proceeds and any Rounding Amount to the Investor under the Sale Facility, Macquarie's obligations to the Investor in respect of a DPA will be satisfied and discharged and the DPA, including the Investor's equitable interest in the relevant Beneficial Fraction, will be terminated and discharged (clause 4.3 of the DPA Terms);
- (p) The DPAs will not be listed for quotation on the Australian Securities Exchange, but an Investor may transfer the whole of a DPA pursuant to clause 16.11 of the DPA Terms. This Ruling does not consider the tax consequences of such a transfer;
- (q) Pursuant to clause 3 of the DPA Terms, the Investor may by written notice to Macquarie request an Early Withdrawal (that is, the completion of the deferred purchase of all or some of the Deliverable Securities prior to the Maturity Date). Macquarie reserves the right to reject the request in its discretion. This Ruling does not consider the tax consequences of an Early Withdrawal; and
- (r) Macquarie may, in its discretion, elect that Early Termination will occur in respect of a DPA if it determines that an Early Termination Event in respect of the DPA occurs at any time during the term of the DPA (clause 5 of the DPA Terms). This Ruling does not consider the tax consequences of an Early Termination.

Assumptions

22. This Ruling is made on the basis of the following assumptions:
- (a) all of the Investors are Australian residents for taxation purposes, including individuals, companies, trusts and complying superannuation funds;
 - (b) the Investors are not traders in financial instruments or securities and are not treated for taxation purposes as trading in Deliverable Securities and/or DPAs, carrying on a business of investing in the Deliverable Securities and/or DPAs, or holding the Deliverable Securities and/or DPAs as trading stock or as revenue assets;
 - (c) a purpose of the Investors in entering into the scheme is to make a capital gain from their investment in a DPA;
 - (d) the scheme will be executed in the manner described in the Scheme section of this Ruling and the scheme documentation mentioned in paragraph 18 of this Ruling; and
 - (e) all dealings between the Investors and Macquarie will be at arm's length.

Commissioner of Taxation30 May 2012

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.*

Application of the CGT provisions to a DPA

Section 108-5: CGT asset

23. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property.

24. The rights of an Investor under a DPA are legally enforceable rights and therefore, in their totality, a CGT asset according to the definition in subsection 108-5(1).

Section 109-5: acquisition of CGT asset

25. The CGT asset comprising the Investor's contractual rights under a DPA is taken to have been acquired when the Investor enters into the DPA, that is, the Issue Date (subsection 109-5(1)).

Section 104-25: CGT event C2

26. Consideration as to whether a CGT event C2 happens as a result of the satisfaction of an investor's rights under a Deferred Purchase Agreement warrant by the delivery of Delivery Assets is set out in Taxation Determination TD 2008/22, with regard to the specific features of a Deferred Purchase Agreement warrant in TD 2008/22.

27. Where the Deliverable Parcel is delivered to the Investor or to Macquarie (or its nominee) on behalf of the Investor at maturity, the Investor's ownership of the contractual rights under a DPA are discharged or satisfied. This discharge or satisfaction of the contractual rights gives rise to CGT event C2 (paragraph 104-25(1)(b)).

28. The Investor will make a capital gain from this CGT event if the capital proceeds from the ending of the Investor's ownership of the asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

29. The Investor's capital proceeds under either a Physical Settlement or the Sale Facility will be equal to the market value of the Deliverable Securities received on the date of delivery, as well as any further cash amount (the Rounding Amount) payable by Macquarie (if any) (section 116-20).

30. At the time of entering into the DPA the Investor acquires a CGT asset with a cost base or reduced cost base that includes, as its first element, the Investment Amount (subsections 110-25(2) and 110-55(2)). The cost base or reduced cost base of the Investor's rights under the DPA also includes, as its second element, the Establishment Fee, if any (subsections 110-25(3) and 110-55(2)).

Section 115-5: discount capital gains

31. Division 115 allows a taxpayer a discount on capital gains in certain circumstances. In accordance with section 115-5, any capital gain realised by an Investor as a result of the satisfaction of the Investor's rights under a DPA will be treated as a discount capital gain where the Investor is an individual, a complying superannuation entity, or a trust and has held those rights under the DPA for at least 12 months (excluding the days of acquisition and disposal).

A DPA is not a traditional security

32. Consideration as to whether a Deferred Purchase Agreement warrant is a traditional security for the purposes of section 26BB and 70B of the ITAA 1936 is set out in Taxation Determination TD 2008/21, with regard to the specific features of a Deferred Purchase Agreement warrant in TD 2008/21.

33. A traditional security, in relation to a taxpayer, is defined in subsection 26BB(1) of the ITAA 1936. That definition requires a consideration as to whether the taxpayer holds a security, defined in subsection 26BB(1) as having the same meaning as in Division 16E of the ITAA 1936.

34. Under subsection 159GP(1) of Division 16E of the ITAA 1936, 'security' means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) a deposit at bank or other financial institution;
- (c) a secured or unsecured loan; or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

35. A DPA offered under the Facility is not considered to have sufficient debt like obligations to be a contract to which paragraph (d) of the definition of security in subsection 159GP(1) of the ITAA 1936 applies, nor does it fall within paragraphs (a), (b) or (c) of that definition. Therefore, such DPAs do not meet the definition of security under subsection 159GP(1) and, as such, are not a traditional security for the purposes of sections 26BB and 70B of the ITAA 1936.

A DPA is not a qualifying security

36. A qualifying security is defined in subsection 159GP(1) of Division 16E of the ITAA 1936. For the purposes of determining whether an arrangement is a qualifying security, that arrangement must be a security, also defined in subsection 159GP(1) (see paragraph 34 of this Ruling).

37. For reasons set out in paragraph 35 of this Ruling, a DPA offered under the Facility does not meet the definition of security under subsection 159GP(1) of the ITAA 1936 and, therefore, is not a qualifying security for the purposes of Division 16E of the ITAA 1936.

Division 775: forex gains and losses

38. Division 775 operates to include in assessable income or allow as a deduction, a forex realisation gain or loss which results from a forex realisation event (FRE) happening.

39. FRE 1 happens when an entity disposes of foreign currency, or a right, or part of a right, to receive foreign currency (subsection 775-40(1)). FRE 2 happens when an entity ceases to have a right, or part of a right, to receive foreign currency which is created or acquired in return for paying an amount of Australian currency or foreign currency (subsection 775-45(1)).

40. A right to receive foreign currency includes a right to receive an amount calculated by reference to a currency exchange rate effect (subsection 775-135(1)). A currency exchange rate effect includes any currency exchange rate fluctuations (subsection 775-105(1)(a)).

41. Where a DPA includes a Performance Currency that is not Australian dollars (AUD), there is no right to receive an amount of foreign currency or an amount calculated by reference to a currency exchange rate effect. Any amount calculated by reference to the performance of a Reference Asset is only determined at maturity and is converted, where required, to AUD at the Conversion FX (that is, the exchange rate on the Last Exposure End Date) in order to determine the Performance Value. A FRE does not therefore happen in respect of an Investor's DPA.

Division 230: taxation of financial arrangements

42. Division 230 sets out the tax treatment of gains or losses from a 'financial arrangement'.

43. Where an arrangement is not a qualifying security for the purposes of Division 16E of the ITAA 1936 and an election under section 230-455 to have Division 230 of the ITAA 1997 apply to financial arrangements has not been made, then pursuant to section 230-455 of the ITAA 1997, Division 230 of the ITAA 1997 does not apply in relation to gains or losses from a financial arrangement held by:

- (a) an individual;
- (b) a superannuation entity, a managed investment scheme or an entity substantially similar to a managed investment scheme under foreign law with assets of less than \$100 million;
- (c) an ADI, a securitisation vehicle or other financial sector entity with an aggregated turnover of less than \$20 million; or
- (d) another entity with an aggregated turnover of less than \$100 million, financial assets of less than \$100 million and assets of less than \$300 million.

Application of the CGT provisions to the Deliverable Securities

Section 108-5: CGT asset

44. Deliverable Securities received by the Investor under Physical Settlement, or by Macquarie (or its nominee) on behalf of the Investor under the Sale Facility, are CGT assets according to the definition in subsection 108-5(1).

Section 109-5: acquisition of CGT asset

45. Each Deliverable Security is taken to have been acquired by the Investor at the time it is delivered to the Investor or Macquarie (or its nominee) to be held on behalf of the Investor (subsection 109-5(1)).

Section 104-10: CGT event A1

46. A sale of a Deliverable Security by the Investor after Physical Settlement or by Macquarie (or its nominee) on behalf of the Investor under the Sale Facility gives rise to a CGT event A1 (section 104-10).

47. The Investor will make a capital gain from this CGT event if the capital proceeds from the disposal of the Investor's asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the asset's reduced cost base (subsection 104-10(4)).

48. The Investor's capital proceeds will be the amount they receive, or are entitled to receive, from the disposal. The cost base or the reduced cost base of a Deliverable Security is its market value on the date of its delivery to the Investor or Macquarie (or its nominee) to be held on behalf of the Investor, plus any incidental costs incurred by the Investor in acquiring the Deliverable Security (sections 110-25, 110-55 and 112-20).

49. The Investor will realise a capital gain or loss under the Sale Facility where the market value of their Deliverable Securities on the date of delivery to Macquarie (or its nominee) to be held on behalf of the Investor differs to the amount of the cash proceeds from their subsequent sale by Macquarie (or its nominee) on the Investor's behalf.

Section 115-5: discount capital gains

50. Division 115 allows a taxpayer a discount on capital gains in certain circumstances. In accordance with section 115-5, any capital gain realised by an Investor as a result of the sale of the Deliverable Securities will be treated as a discount capital gain where the Investor is an individual, a complying superannuation entity, or a trust and has held those Deliverable Securities for at least 12 months (excluding the days of acquisition and disposal).

Part IVA – anti-avoidance

51. Provided that the scheme ruled on is entered into and carried out as disclosed in this Ruling, it is accepted that the scheme is an ordinary commercial transaction and Part IVA of the ITAA 1936 will not apply in relation to a DPA offered under the Facility.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2008/21; TD 2008/22

Subject references:

- capital gains tax
- deferred purchase agreements
- financial products
- product rulings
- public rulings
- qualifying securities
- tax avoidance
- taxation administration
- traditional securities

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