



PR 2014/13 - Income tax: CommInsure Protection - Split TPD Cover

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 September 2015*



Product Ruling

Income tax: CommInsure Protection – Split TPD Cover

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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.

[**Note:** This is a consolidated version of this document. Refer to the Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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 provisions 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 involves the purchase and holding of a CommInsure Protection product referred to as Split TPD Cover issued by The Colonial Mutual Life Assurance Society Limited (CMLA) and offered under the CommInsure Protection Combined Product Disclosure Statement (PDS) and Policy dated 11 May 2014 (the PDS).
3. This Product Ruling does not:
 - address any tax consequences that arise in respect of any CommInsure Protection product available under the PDS other than the consequences that arise under Split TPD Cover
 - address any tax consequences that arise in relation to the proceeds of a claim in respect of any Split TPD Cover under which the policy owner of the Total Care Plan policy is not the Split TPD Life Insured or a relative thereof
 - apply to any optional extras available at an additional cost in connection with any Split TPD Cover, and
 - address the tax consequences upon the transfer of ownership of Split TPD Cover to another entity.
4. Subject to paragraph 3 of this Product Ruling, this Ruling addresses the taxation consequences associated with Split TPD Cover:
 - as a stand-alone benefit, and
 - as a rider to Life Care under either a SMSF Plan policy or a Total Care Plan Super policy (a Super Policy).

Class of entities

5. 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.

6. The class of entities who can rely on the Ruling section of this Product Ruling consists of those entities that are Australian residents for taxation purposes and are:

- the Colonial Super Retirement Fund, in its capacity as policy owner of a Total Care Plan Super policy issued on or after 1 July 2014 and on or before 30 June 2017 and to which Split TPD Cover applies
- a self managed superannuation fund (SMSF) within the meaning of section 17A of the *Superannuation Industry (Supervision) Act 1993* (SISA) which is a complying superannuation fund within the meaning of section 45 of that Act, in its capacity as policy owner of a SMSF Plan policy issued on or after 1 July 2014 and on or before 30 June 2017 and to which Split TPD Cover applies
- an individual (not acting in a trustee capacity) who is the policy owner of a Total Care Plan policy issued on or after 1 July 2014 and on or before 30 June 2017 and to which Split TPD Cover applies
- an individual (not acting in a trustee capacity) who is the Split TPD Life Insured under both Split TPD Policies issued on or after 1 July 2014 and on or before 30 June 2017, and a member of the relevant superannuation fund holding the Split Super Policy, or
- a Nominated Beneficiary or deceased estate, entitled to receive a death benefit upon the death of the Split TPD Life Insured under the Split TPD Policies issued on or after 1 July 2014 and on or before 30 June 2017.

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

- are not Australian residents for taxation purposes, or
- are not at least one of the entities listed in paragraph 6 of this Product Ruling.

Superannuation Industry (Supervision) Act 1993

8. This Product Ruling does not address the provisions of the SISA. The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. 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

9. 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 35 of this Ruling.

10. 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.

Date of effect

11. This Product Ruling applies from 1 July 2014. It therefore applies only to the specified class of entities that enter into the scheme from 1 July 2014 until 30 June 2017, 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 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.

Ruling

16. Subject to paragraph 3 and the assumptions in paragraph 35 of this Ruling:

Split TPD Cover held by a superannuation fund

- (a) A SMSF that is a complying superannuation fund and holds a SMSF Plan policy to which Split TPD Cover applies as a stand-alone benefit will be entitled to a tax deduction under section 295-465 for the whole of the premiums (including the policy fee) it pays to CMLA for the policy in the income year in which the premiums are paid.
- (b) A complying superannuation fund (including a SMSF that is a complying superannuation fund) that holds a Split Super Policy as a rider to Life Care will be entitled to a tax deduction under section 295-465 for the whole of the premiums (including the policy fee) it pays to CMLA for the policy in the income year in which the premiums are paid.
- (ba) Any capital gain or capital loss made by a complying superannuation fund (including a SMSF that is a complying superannuation fund) resulting from the payment of the proceeds of a claim to them under a Split Super Policy is disregarded under section 118-300.
- (c) The proceeds of a claim under a Split Super Policy held by a complying superannuation fund (including a SMSF that is a complying superannuation fund), when on-paid by that fund as a 'disability superannuation benefit' to the Split TPD Life Insured, may be assessable to the Split TPD Life Insured, non-assessable to the Split TPD Life Insured and/or carry a tax offset entitlement to the extent determined under the rules in Division 301. The extent to which Division 301 applies (and therefore whether the amount in question is assessable, non-assessable and/or carries an entitlement to a tax offset) can only be determined at the time the proceeds of the claim are on-paid to the Split TPD Life Insured.
- (d) The proceeds of a claim under a Split Super Policy held by a complying superannuation fund (including a SMSF that is a complying superannuation fund), when on-paid by that fund as a 'superannuation death benefit' to the Split TPD Life Insured's Nominated Beneficiary or deceased estate, as applicable, may be assessable to the relevant recipient, non-assessable to the recipient and/or carry a tax offset entitlement to the extent determined under the rules in Division 302. The extent to which Division 302 applies (and therefore whether the amount in question is assessable, non-assessable and/or carries an entitlement to a tax offset) can only be determined at the time the proceeds of the claim are on-paid to the relevant recipient.

Split TPD Cover not held by a superannuation fund

- (e) The policy owner of a Total Care Plan policy to which Split TPD Cover applies will not be entitled to a deduction under section 8-1 for premiums it pays to CMLA for the policy.
- (f) The proceeds of a claim under a Total Care Plan policy to which Split TPD Cover applies will not be included in the assessable income of the policy owner or, in the case of a deceased policy owner, the policy owner's estate or Nominated Beneficiary in any year of income under section 6-5.
- (g) The proceeds of a claim under a Total Care Plan policy to which Split TPD Cover applies will not be included in the assessable income of the policy owner or, in the case of a deceased policy owner, the policy owner's estate or Nominated Beneficiary in any year of income under section 6-10.

Division 230

- (h) Split TPD Cover Benefit or death benefit paid under a Split Super Policy or Total Care Plan policy are exempted from the application of Division 230 because the policies are life insurance policies that satisfy subsection 230-460(5) and are not qualifying securities for the purposes of Division 16E of the *Income Tax Assessment Act 1936* (ITAA 1936).

Anti-avoidance provisions

- (i) Provided the scheme ruled on is entered into and carried out as described in this Product Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to an entity referred to in paragraph 6 of this Ruling.

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 information received on 22 May 2014 and 10 June 2014, and
- CommInsure Protection Combined Product Disclosure Statement (PDS) and Policy dated 11 May 2014.

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. 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 entity referred to in paragraph 6 of this Ruling, or any associate of such entity, will be a party to, which are a part of the scheme. Capitalised terms have the meaning provided in the PDS.

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

Overview

20. In its capacity as a life assurance company and under the trading name 'CommInsure', CMLA issues a range of insurance products which make up CommInsure Protection including life insurance policies that provide Split TPD Cover in accordance with the PDS referred to in paragraph 17 of this Product Ruling. Split TPD is an arrangement under which TPD Cover is split inside and outside of superannuation across two separate policies.

21. The policy held inside superannuation, the Split Super Policy held by the trustee of a superannuation fund, provides 'any occupation' TPD Cover over the life of a member of the relevant fund (the Split TPD Life Insured). The Split Super Policy may be a Total Care Plan Super policy to which Split TPD Cover applies or a SMSF Plan policy to which Split TPD Cover applies. Any Total Care Plan Super policy is owned by the trustee of the Colonial Super Retirement Fund, a complying superannuation fund within the meaning of section 45 of the SISA. Any SMSF Plan policy is owned by the trustee of a SMSF.

22. The policy held outside superannuation, the Total Care Plan policy held by an individual or a company that is not a superannuation fund trustee, provides separate Own Occupation TPD Cover over the life of the Split TPD Life Insured. The Life Insured under both Split TPD Policies is the same member of the relevant superannuation fund.

23. Split TPD Cover may be held as a stand-alone benefit or held as a rider to Life Care held under a Split Super Policy. Where the Split Super Policy is a Total Care Plan Super policy, the Split TPD Cover must always be held as a rider to Life Care under that policy. Life Care provides death and terminal illness cover.

24. Split TPD Cover ends on the Policy Anniversary Date before the Split TPD Life Insured's 65th birthday. Split TPD Policies do not have a surrender or cash-in value.

Premiums and fees

25. Separate premiums apply for each Split TPD Policy and are paid for by the relevant policy owner. The payment of premiums relating to a Split Super Policy must be sourced from superannuation moneys and it is the relevant superannuation fund trustee's responsibility to ensure this happens. Premiums for the Total Care Plan policy must not be paid from moneys within the relevant superannuation fund.

26. Only one policy fee will be paid in relation to Split TPD Cover and that will be on the applicable Split Super Policy. That policy fee forms part of the applicable Split Super Policy premium.

Amount of cover

27. Split TPD cover pays a lump sum (the Split TPD Cover Benefit) where the Split TPD Life Insured becomes Totally and Permanently Disabled, subject to the TPD conditions set out in the PDS.

28. The amount of Split TPD Cover provided under the applicable Split Super Policy must be the same as the level of Split TPD Cover provided under the Total Care Plan policy. Thus, where the level of cover is changed under one Split TPD Policy, it is also changed in respect of the linked policy. Similarly, where Split TPD Cover under one Split TPD Policy ends (for any reason), the cover under the linked policy automatically ends.

29. Where Split TPD Cover is held as a rider to Life Care under a Split Super Policy, any Split TPD Cover Benefit paid on either the applicable Split Super Policy or the Total Care Plan policy will reduce the Life Care Benefit by the amount paid.

30. Where the Split TPD Cover is not held as a rider to Life Care under a Split Super Policy (that is, it is held as a stand-alone benefit), the Split TPD Cover also includes a death benefit of \$10,000 payable upon the Split TPD Life Insured's death and where a Split TPD Cover Benefit isn't paid.

Claims

31. Split TPD claims are always assessed under the applicable Split Super Policy first. Where a Split TPD claim is assessed as satisfying the criteria for a claim under a Split Super Policy (which by definition, will also satisfy the criteria for a claim under the Total Care Plan policy), the Split TPD Cover Benefit will be paid on the Split Super Policy to the applicable policy owner. No Split TPD claim is then payable under the Total Care Plan policy.

32. Where a Split TPD claim is assessed as satisfying the criteria for a claim under the Total Care Plan policy after not having satisfied the criteria for a claim under a Split Super Policy, the Split TPD Cover Benefit will be paid on the Total Care Plan policy. A claim under the Total Care Plan policy is not otherwise payable. Where a Split TPD claim is paid on the Total Care Plan policy, no Split TPD claim is then payable under the Split Super Policy.

33. Under the Split TPD Cover, the full Split TPD Cover Benefit will only ever be paid under one of the two policies. Once the full Split TPD Cover Benefit is paid, the Split TPD Cover under each of the policies ends.

34. Although not an explicit policy term, the criteria for a Split TPD claim includes the requirement for two medical certifications that the Split TPD Life Insured is Totally and Permanently Disabled, as described in the PDS.

Assumptions

35. This Ruling is made on the basis of the following assumptions:

- (a) each of the entities referred to in paragraph 6 of this Ruling is an Australian resident for taxation purposes
- (b) the policy owner of a SMSF Plan policy to which Split TPD Cover applies is a complying superannuation fund within the meaning of section 45 of the SISA and a SMSF within the meaning of section 17A of the SISA
- (c) the payment of premiums for the relevant Split Super Policy will be sourced from the relevant superannuation fund's superannuation moneys
- (d) the payment of premiums for the Total Care Plan policy to which Split TPD Cover applies will not be sourced from superannuation moneys
- (e) the policy owner of a Split Super Policy will not choose, pursuant to subsection 295-465(4), to determine its deduction entitlement under section 295-470 for premiums paid
- (f) the trust deed or fund rules of the relevant Split Super Policy will not impose limitations on the ability of the relevant complying superannuation fund to provide disability superannuation benefits or superannuation death benefits, as applicable. To that end, the proceeds of a claim under a Split Super Policy will be on-paid in full by the holder of that policy to the Split TPD Life Insured or their Nominated Beneficiary or deceased estate, as applicable

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- (g) the policy owner of the Total Care Plan policy to which Split TPD Cover applies is the Split TPD Life Insured or a relative of the Split TPD Life Insured within the meaning of 'relative' in subsection 995-1(1)
- (h) all dealings between any of the entities referred to in paragraph 6 of this Ruling and CMLA will be at arm's length, and
- (i) the scheme will be executed in the manner described in the Scheme section of this Ruling and the scheme documentation referred to in paragraph 17 of this Ruling.

Commissioner of Taxation

2 July 2014

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.*

Split TPD Cover inside super

Deductibility of premiums under subsection 295-465(1)

36. Subsection 295-465(1) sets out the requirements for determining a deduction for premiums paid by a complying superannuation fund for insurance policies. Subsection 295-465(1) provides that:

A *complying superannuation fund can deduct the proportions specified in this table of premiums it pays for insurance policies that are (wholly or partly) for current or contingent liabilities of the fund to provide benefits referred to in section 295-460 for its members. It can deduct the amounts for the income year in which the premiums are paid.

37. Item 5 of the table in subsection 295-465(1) states that a complying superannuation fund can deduct that part of a premium that is specified in the policy as being wholly for the liability to provide benefits referred to in section 295-460. Item 6 of the same table allows a complying superannuation fund to deduct so much of other insurance premiums not dealt with by earlier items of the table as are attributable to the liability to provide benefits referred to in section 295-460.

38. Section 295-460 sets out the benefits for which insurance premium deductions are available. Relevantly, it lists a superannuation death benefit and a disability superannuation benefit at paragraphs (a) and (b) of that section respectively.

39. A 'disability superannuation benefit', as referred to in subsection 295-460(b), is defined by subsection 995-1(1) as meaning a superannuation benefit if:

- (a) the benefit is paid to an individual because he or she suffers from ill-health (whether physical or mental); and
- (b) 2 legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the individual can ever be gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.

40. A 'superannuation death benefit', as referred to in paragraph 295-460(a), is defined in subsection 307-5(1) in the context of a superannuation fund payment to mean:

A payment to you from a superannuation fund, after another person's death, because the other person was a fund member.

41. The terms of a Split Super Policy held by a complying superannuation fund provide for, subject to exclusions:

- a lump sum benefit (the Split TPD Cover Benefit) where the Split TPD Life Insured is Totally and Permanently Disabled (which is increased if the Total and Permanent Disability is of a type considered to cause severe hardship), and
- where Split TPD Cover is not held as a rider to Life Care, a \$10,000 lump sum death benefit upon the death of the Split TPD Life Insured.

42. Total and Permanent Disablement may be established on any one of a number of alternative bases as described in the PDS. Under each of those bases for a Super Policy it is a requirement that:

- as a result of injury, sickness or loss of independent existence, the Life Insured is either unable to engage in any occupation for which he/she is reasonably suited by education, training or experience or unable to perform domestic duties, and
- it is likely that the Life Insured will be so disabled for life.

43. Supporting certifications to that effect need to be provided by at least two medical practitioners in order to make a TPD claim (including a Split TPD claim) as part of CMLA's claim process.

44. The addition of the requirement for two medical certifications that the Life Insured is Totally and Permanently Disabled under the claim process, although not a policy term, is regarded as sufficient to allow the payment to be considered as a disability superannuation benefit. In support of this, Taxation Ruling TR 2012/6¹ says at paragraphs 168 and 169:

168. It is not necessary for the definition of insured events in a TPD insurance policy to exactly align with the definition of a 'disability superannuation benefit' in subsection 995-1(1) in order for a deduction to arise under subsection 295-465(1). For example, the conditions of the policy may use different terms in regard to the certification required from medical practitioners. However, it is expected that the tests will be at least equivalent to those in the definition of a 'disability superannuation benefit'.

169. Where an insurance policy does not mandate the need for two medical certificates, in practice it is expected that a life insurance company would not payout on a claim without having sought the advice of at least two medical practitioners, or applied a commercially equivalent process. For the purpose of determining whether a deduction is available within subsection 295-465(1) the Commissioner accepts that the processes specified in the insurance policy do not need to mandate the provision of two medical certificates in order for the insurance policy to be considered to be in respect of a 'disability superannuation benefit'.

¹ Income tax: deductibility under subsection 295-465(1) of the *Income Tax Assessment Act 1997* of premiums paid by a complying superannuation fund for an insurance policy providing Total and Permanent Disability cover in respect of its members.

45. When on-paid by the relevant superannuation fund to the Split TPD Life Insured, a Split TPD Cover Benefit will be a disability superannuation benefit as defined in subsection 995-1(1). When on-paid by the relevant superannuation fund to the deceased Split TPD Life Insured's estate or Nominated Beneficiary, a death benefit referred to in paragraph 41 of this Product Ruling will be a superannuation death benefit as defined in subsection 307-5(1).

46. Therefore it is considered that:

- (a) a SMSF Plan policy to which Split TPD Cover applies as a stand-alone benefit, held by a SMSF that is a complying superannuation fund, is wholly for current or contingent liabilities of the fund to provide disability superannuation benefits and superannuation death benefits referred to in section 295-460, and as such the whole of the premiums paid by the complying superannuation fund will be tax deductible to the fund under item 6 of the table in subsection 295-465(1), and
- (b) a Split Super Policy held by a complying superannuation fund as a rider to Life Care is wholly for current or contingent liabilities of the fund to provide disability superannuation benefits referred to in section 295-460, and as such the whole of the premiums paid by the complying superannuation fund will be tax deductible to the fund under item 5 of the table in subsection 295-465(1).

47. As the Split Super Policy and the Total Care Plan policy are separate policies, they are considered individually, rather than jointly. Therefore apportionment of the deductibility of the total premium for the two policies is not required in accordance with Regulation 295-465.01 of the *Income Tax Assessment Regulations 1997*. Likewise, for any linked Life Care policy held by the relevant superannuation fund.

Capital gain or loss from payments disregarded

47A. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property. The contractual rights of the policy owner under a Split Super Policy to which Split TPD Cover applies are legally enforceable rights and therefore a CGT asset according to the definition in subsection 108-5(1).

47B. Where CMLA makes a payment of the Split TPD Cover Benefit or death benefit, as relevant, in satisfaction of the policy owner's contractual rights under the Split Super Policy, their ownership of those rights is discharged or satisfied. The discharge or satisfaction of the contractual rights gives rise to CGT event C2 (paragraph 104-25(1)(b)).

47C. The policy owner makes a capital gain from this CGT event if their capital proceeds from the ending of the ownership of their asset are more than the asset's cost base or a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

47D. Item 7 of the table in subsection 118-300(1) provides that a capital gain or capital loss made from a CGT event happening in relation to a CGT asset that is an interest in rights under a policy of insurance against an individual suffering an illness or injury (such as a total and permanent disability) is disregarded where that CGT event happens to the trustee of a complying superannuation entity for the income year in which the CGT event happened.

47E. The trustee of the Colonial Super Retirement Fund (as policy owner of a Total Care Plan Super policy) and the trustee of a SMSF which is a complying superannuation fund (as policy owner of a SMSF Plan policy) are trustees of a complying superannuation entity. Such policy owners of a Split Super Policy will therefore be entitled under item 7 in the table in subsection 118-300(1) to disregard any capital gain or capital loss they make under section 104-25 from the receipt of the Split TPD Cover Benefit or death benefit from CMLA, as appropriate under the circumstances discussed at paragraph 41 of this Product Ruling.

Assessability of on-paid benefits

48. Division 301 sets out the tax treatment of superannuation member benefits that are paid from complying superannuation funds to members. This treatment varies depending on a number of factors as set out in the Division, including the age of the member when they receive the benefit. When on-paid by a complying superannuation fund to the Split TPD Life Insured as a disability superannuation benefit, a Split TPD Cover Benefit may be assessable to the Split TPD Life Insured, non-assessable to the Split TPD Life Insured and/or carry a tax offset entitlement to the extent determined under the rules in Division 301.

49. Division 302 sets out the tax treatment of superannuation death benefits that are paid from complying superannuation funds. This treatment varies depending on a number of factors as set out in the Division, including whether the recipient was a dependant of the deceased). When on-paid by a complying superannuation fund to the Split TPD Life Insured's deceased estate or Nominated Beneficiary as a superannuation death benefit, a death benefit referred to in paragraph 41 of this Product Ruling may be assessable to the relevant recipient, non-assessable to the recipient and/or carry a tax offset entitlement to the extent determined under the rules in Division 302.

50. As the Split Super Policy and the Total Care Plan policy are separate policies, they are considered individually, rather than jointly. Therefore a benefit paid out of one policy should not be apportioned and treated in part as paid out under the other policy.

Split TPD Cover outside super

Deductibility of premiums under section 8-1

51. Generally, the question of whether a premium is deductible is answered by reference to whether the benefits, when paid, would become assessable. In *Federal Commissioner of Taxation v DP Smith* (1981) 147 CLR 578; 81 ATC 4114; 11 ATR 538 (DP Smith), the High Court was unanimous on this point. In discussing the operation of subsection 51(1) of the ITAA 1936 (being the equivalent of section 8-1 of the ITAA 1997), Gibbs, Stephen, Mason, and Wilson JJ held at CLR 585; ATR 542; ATC 4117 that:

What is incidental and relevant in the sense mentioned falls to be determined not by reference to the certainty or likelihood of the outgoing resulting in the generation of income but to its nature and character, and generally to its connection with the operations which more directly gain or produce the assessable income. It is true that the payment of the premium in June 1978 did not result in the generation of any income in that year, but there is a sufficient connection between the purchase of the cover against the loss of ability to earn and the consequent earning of assessable income to bring the premium within the first limb of s 51(1).

52. Murphy J delivered a separate judgment but concurred with the view of the majority of their Honours and stated at CLR 587; ATR 543; ATC 4118:

In general, if receipts under such a policy would be treated as income, the premiums should be treated as allowable expenditure, and if the receipts would be treated as capital the premiums should not be allowable expenditure.

53. As any Split TPD Cover Benefit or death benefit paid under a Total Care Plan policy to which Split TPD Cover applies is not intended to compensate for the loss of earnings of the Split TPD Life Insured but is intended to compensate for the loss of earning capacity of the Split TPD Life insured they are treated as capital (see paragraph 56 of this Product Ruling). The premiums payable by the policy owner for the Total Care Plan policy in this respect are not incurred in gaining or producing assessable income and therefore are not deductible under section 8-1. Premiums that are not deductible under section 8-1 are included in the first element of the cost base or reduced cost base of the CGT asset referred to in paragraph 60 of this Product Ruling (subsections 110-25(2) and 110-55(2)).

Benefits not assessable as ordinary income under section 6-5

54. Section 6-5 includes income according to ordinary concepts (ordinary income) in assessable income.

55. Ordinarily, the receipt of insurance proceeds in the form of a lump sum would not come within the term of ordinary income where the payment has been made in the event of death or for deprivation or impairment of earning capacity: *Federal Commissioner of Taxation v. Slaven* (1984) 1 FCR 11; 15 ATR 242; 84 ATC 4077. The exception, however, is where the insurance proceeds have been received to replace lost earnings (DP Smith).

56. Any Split TPD Cover Benefit or death benefit paid under a Total Care Plan policy to which Split TPD Cover applies is not intended to compensate the policy owner (or the Split TPD Life Insured's estate or Nominated Beneficiary, as applicable) for the loss of earnings but for the loss of earning capacity of the Split TPD Life Insured (due to their injury or illness suffered or sustained, or their death). Accordingly, the relevant benefit will be a capital receipt and will not be assessable under section 6-5 as ordinary income.

Benefits not assessable as ordinary income under section 6-10

57. Section 6-10 includes statutory income in assessable income (that is, amounts that are not ordinary income but are included in assessable income by another provision).

Section 15-30

58. Section 15-30 is one such provision which operates to include in an insured's assessable income an amount received by way of insurance or indemnity for the loss of an amount if the lost amount would have been included in the insured's assessable income and the amount received is not assessable as ordinary income under section 6-5.

59. As per paragraph 56 of this Product Ruling, any Split TPD Cover Benefit or death benefit paid under a Total Care Plan policy to which Split TPD Cover applies are made for the loss of the Split TPD Life Insured's earning capacity, as distinct from the loss of income which would have been assessable income if the loss had not occurred. A person's earning capacity is a capital asset. Therefore, any payment received to compensate for the loss of that capital asset is a capital receipt and is not assessable under section 15-30.

Capital gain or loss from payments disregarded

60. The contractual rights of the policy owner, the Split TPD Life Insured's estate or the Nominated Beneficiary under a Total Care Plan policy to which Split TPD Cover applies are legally enforceable rights and therefore a CGT asset according to the definition in subsection 108-5(1).

61. Where CMLA makes a payment of the Split TPD Cover Benefit or death benefit, as relevant, in satisfaction of the applicable entity's contractual rights under the Total Care Plan policy, their ownership of those rights is discharged or satisfied. The discharge or satisfaction of the contractual rights gives rise to CGT event C2 (paragraph 104-25(1)(b)).

62. The policy owner or, in the event of the policy owner's death where they are the Split TPD Life Insured, the Split TPD Life Insured's estate or the Nominated Beneficiary, makes a capital gain from this CGT event if their capital proceeds from the ending of the ownership of their asset are more than the asset's cost base or a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

63. Section 118-37 disregards a capital gain or capital loss made by an individual relating to compensation or damages received by that individual as a result of any wrong, injury or illness they or their relative suffered personally.

64. A receipt of an amount under an insurance policy for a non-death benefit such as Total and Permanent Disablement constitutes a form of compensation or damages covered by subparagraph 118-37(1)(a)(ii) where the amount is received for a wrong, injury or illness suffered personally by the recipient or the recipient's relative.

65. Subsection 995-1(1) defines a 'relative' of a person as:

- (a) the person's *spouse; or
- (b) the *parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or *adopted child of that person, or of that person's spouse; or
- (c) the spouse of a person referred to in paragraph (b).

66. Accordingly, any capital gain or capital loss the policy owner makes under section 104-25 upon payment of the Split TPD Cover Benefit under a Total Care Plan policy to which Split TPD Cover applies in respect of the total and permanent disablement suffered by the Split TPD Life Insured will be disregarded under subparagraph 118-37(1)(a)(ii) where the Split TPD Life Insured is:

- (a) the policy owner (that is, where the policy owner has suffered the wrong, injury or illness personally); or
- (b) a relative of the policy owner (that is, where the wrong, illness or injury has been suffered personally by a relative of the policy owner).

67. Section 118-300 exempts certain capital gains and losses made in respect of a policy of insurance on the life of an individual. The meaning to be given to the expression 'policy of insurance on the life of an individual' includes, but is not limited to, life insurance policies within the common law meaning of that term. It can apply to other life insurance policies as defined in subsection 995-1(1) but only to the extent that those policies provide for a sum of money to be paid if an event happens that results in the death of an individual (Taxation Determination TD 2007/4).²

68. Item 4 of the table in subsection 118-300(1) provides that a capital gain or capital loss that an insured has made from a CGT event happening in relation to a CGT asset that is an interest in rights under a life insurance policy is disregarded where that CGT event happens to an entity that acquired the interest in the policy for no consideration.

69. A Nominated Beneficiary or the Split TPD Life Insured's estate, as applicable, would be taken, on the death of the policy owner who is also the Split TPD Life Insured, to have acquired rights under a Total Care Plan policy to which Split TPD Cover applies for no consideration. The Nominated Beneficiary or the Split TPD Life Insured's estate will therefore be entitled under item 4 in the table in subsection 118-300(1) to disregard any capital gain or capital loss they make under section 104-25 from the receipt of a death benefit from CMLA in these circumstances.

Division 230 - taxation of financial arrangements

70. Subject to exceptions under Subdivision 230-H, gains made from a financial arrangement are included in assessable income under subsection 230-15(1) and are not (to any extent) to be included in assessable income pursuant to any other taxing provision of the *Income Tax Assessment Act* (subsection 230-20(4), including section 27H of the ITAA 1936).

71. However, where the rights and/or obligations under an arrangement are the subject of an exception under section 230-460, Division 230 does not apply in relation to gains or losses from a financial arrangement for any income year (subsection 230-460(1)). Subsection 230-460(5) provides a specific exception as follows:

A right or obligation under a *life insurance policy is the subject of an exception unless:

- (a) you are not a *life insurance company that is the insurer under the policy; and
- (b) the policy is an annuity that is a *qualifying security.

² Taxation Determination TD 2007/4 *Income tax: capital gains tax: is a 'policy of insurance on the life of an individual' in section 118-300 of the Income Tax Assessment Act 1997 limited to a life insurance policy within the common law meaning of that expression?*

72. As the Split Super Policy and the Total Care Plan Policy are life insurance policies (as defined in subsection 995-1(1)) that are not qualifying securities (as defined in subsection 159GP(1) of the ITAA 1936), the exception in subsection 230-460(5) applies and Division 230 does not apply to any Split TPD Cover Benefit or death benefit paid under such policies.

73. The policies are not considered to have sufficient debt like obligations to be contracts to which paragraph (d) of the definition of security in subsection 159GP(1) of the ITAA 1936 applies, nor do they fall within paragraphs (a), (b) or (c) of that definition. Therefore, the policies do not meet the definition of security under subsection 159GP(1) and, as such, are not qualifying securities for the purposes of Division 16E of the ITAA 1936.

Part IVA – anti-avoidance

74. 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.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2007/4; TR 2012/6

Subject references:

- financial products
- insurance policy
- product rulings
- public rulings
- taxation administration

Legislative references:

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- ITAA 1936 Pt III Div 16E
- ITAA 1936 27H
- ITAA 1936 159GP
- ITAA 1936 159GP(1)
- ITAA 1997
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- ITAA 1997 6-10
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- Federal Commissioner of Taxation v. DP Smith (1981) 147 CLR 578; (1981) 11 ATR 538; 81 ATC 4114
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