



# ***PR 2021/10 - Income tax: Morgan Stanley Option and Loan Facility***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *13 September 2023*



## Product Ruling

### Income tax: Morgan Stanley Option and Loan Facility

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#### **❗ Relying on this Ruling**

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

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

*[Note: This is a consolidated version of this document. Refer to the Legal database ([ato.gov.au/law](http://ato.gov.au/law)) 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) that 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 that participates in the

scheme to which this Ruling relates. All legislative references in this Product 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 Morgan Stanley Option and Loan Facility (MSOL Facility) offered by Morgan Stanley & Co International plc (MSIP), arranged and distributed by Morgan Stanley Australia Securities Limited (MSASL), and issued under the Morgan Stanley Option and Loan Facility Information Memorandum (IM).

3. This Product Ruling does not address:

- the taxation consequences of
  - the early termination of a Loan and/or an Option Transaction
  - a repayment of a Drawdown Amount before the relevant Repayment Date
  - an Event of Default
  - an Adjustment Event
  - extending the Maturity Date of a Loan and/or an Option Transaction, or otherwise varying the terms of a Loan and/or an Option Transaction
  - selling Options
  - buying Options other than a Put Option or Collar
  - buying an Index Put Option
  - buying a Quanto Option
  - buying an Option denominated in a currency other than Australian dollars
  - a Principal Loan that is a Callable Loan
  - a Principal Loan used to finance the exercise price of Executive Options
  - a Principal Loan drawn against Underlying Securities<sup>1</sup> that an investor already holds
  - a Principal Loan used to acquire Underlying Securities listed on an exchange outside of Australia (except where specifically addressed in the context of an investor's entitlement to a foreign income tax offset as per

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<sup>1</sup> Unless the contrary intention appears, a reference in this Product Ruling to 'Underlying Securities' includes a reference to a Basket and/or a Portfolio, as referred to in subparagraph 20(c) of this Product Ruling.

subparagraph 16(w), and paragraphs 59 and 60 of this Product Ruling)

- an advance of a Drawdown Amount immediately prior to Maturity in the circumstances contemplated by clause 10.9 of the Facility Terms
  - entering into a Distribution Agreement
  - entering into a Stock Borrow Agreement
  - entering into the Exercise and Sale Facility
  - a Supplementary Loan to the extent the Supplementary Loan is used for purposes other than to fund Interest on the Principal Loan
  - an assignment of the investor's rights under the MSOL Facility
  - income derived from the Underlying Securities (except where specifically addressed in subparagraph 16(v) and paragraph 58 of this Product Ruling), and
  - paying an Adviser Fee and any other fees and costs under the MSOL Facility (other than Interest, the Facility Adjustment Fee, the First Premium Amount and the Second Premium Amount)
- an investor's entitlement to franking credits
  - whether this scheme constitutes a financial arrangement for the purposes of Division 230 (taxation of financial arrangements)
  - whether an investor makes forex realisation gains and losses under Division 775, and
  - the application of foreign-resident capital gains withholding tax provisions under Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953*.

4. Subject to paragraph 3 of this Product Ruling, this Product Ruling addresses the taxation consequences associated with the following scenarios:

- the procurement of a Principal Loan without a Related Option
- the procurement of a Principal Loan with a Related Option (being a purchased Put Option or Collar), and
- the purchase of a Put Option or Collar without a Related Loan.

## 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. Those entities that can rely on the Ruling section are referred to as 'the investor'.

6. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities that are accepted to participate in the scheme specified in paragraphs 17 to 21 of this Product Ruling on or after 1 July 2021 and on or before 30 June 2024. They must have a purpose of remaining in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income (other than capital gains) from the investment that exceeds the deductible expenditure incurred in connection with the investment.

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

- are non-residents for Australian taxation purposes
- intend to terminate their investment in the scheme prior to its completion
- do not intend to derive assessable income (other than capital gains) from the investment that exceeds the deductible expenditure that they incur in connection with the investment
- are accepted to participate in the scheme described in paragraphs 17 to 21 of this Product Ruling before 1 July 2021 or after 30 June 2024
- acquire a Principal Loan in respect of Underlying Securities that an investor already holds, or use the Principal Loan to finance the exercise price of Executive Options
- participate in the scheme through offers made other than through the IM, or that 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 securities and are treated for taxation purposes as trading in securities, carrying on a business of investing in securities, or holding the Underlying Securities as trading stock or as revenue assets
- trade in options or collars and are treated for taxation purposes as trading in options or collars, carrying on a business of investing in options or collars, or holding a Put Option or Collar as trading stock or as a revenue asset, or

- are subject to Division 230 in respect of this scheme.

***Superannuation Industry (Supervision) Act 1993***

8. 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 the 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 21 of this Product 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
- may be withdrawn or modified.

**Date of effect**

11. This Product Ruling applies from 1 July 2021. It therefore applies only to the specified class of entities that enter into the scheme from 1 July 2021 until 30 June 2024, 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 that 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 Product Ruling and the assumptions in paragraph 21 of this Product Ruling:

- (a) Where the investor has a Principal Loan and does not acquire a Related Option
  - (i) the Interest incurred under the Principal Loan, reduced by an amount reasonably attributable to the cost of capital protection worked out under step 3 of the method statement in subsection 247-20(3), will be deductible under section 8-1
  - (ii) under subsection 247-20(3), the amount reasonably attributable to the cost of capital protection in an income year is the amount by which the total of any Facility Adjustment Fee paid during the income year and the Interest incurred under the Principal Loan for the income year exceeds
    - where Interest is charged on the Principal Loan at a fixed rate for all or part of the term of the Principal Loan and that fixed rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the sum of the Reserve Bank of Australia's Indicator Lending Rate for Standard Variable Housing Loans – Investor and 100 basis points (the 'adjusted loan rate') at the time when the Interest charge is first incurred during the term of the Principal Loan, or the relevant part of the term (subsections 247-20(4) and (5))

- where Interest is charged on the Principal Loan at a variable rate for all or part of the term of the Principal Loan and a variable rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the average of the adjusted loan rates applicable during those parts of the income year when the Principal Loan is at a variable rate (subsections 247-20(5) and (5A)), and
- (iii) the amount reasonably attributable to the cost of capital protection as worked out under sub-subparagraph 16(a)(ii) of this Product Ruling, is treated as part of the cost of a put option under subsection 247-20(6). This amount is not deductible under section 8-1.
- (b) Where the investor has a Principal Loan and acquires a Related Option that is a Put Option or Collar, and the cost of the Put Option or Collar is factored into the Interest Rate charged on the Principal Loan
  - (i) under subsection 247-20(3), the amount reasonably attributable to the cost of capital protection in an income year is the amount by which the total of any Facility Adjustment Fee paid during that income year and the Interest incurred under the Principal Loan for the income year exceeds
    - where Interest is charged on the Principal Loan at a fixed rate for all or part of the term of the Principal Loan and that fixed rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the adjusted loan rate at the time when the Interest charge is first incurred during the term of the Principal Loan, or the relevant part of the term (subsections 247-20(4) and (5))
    - where Interest is charged on the Principal Loan at a variable rate for all or part of the term of the Principal Loan and a variable rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the average of the adjusted loan rates applicable during those parts of the income year when the



Principal Loan is at a variable rate  
(subsections 247-20(5) and (5A))

- (ii) the amount reasonably attributable to the cost of capital protection as worked out under sub-subparagraph 16(b)(i) of this Product Ruling, reduced by any Facility Adjustment Fee paid, is treated as a further cost of the Put Option or Collar under subsection 247-20(6). For the purposes of this Product Ruling, this further cost of the Put Option or Collar is referred to as the 'additional amount'
  - (iii) the additional amount (if any) and any Facility Adjustment Fee paid are not deductible under section 8-1, and
  - (iv) an amount equal to the Interest incurred under the Principal Loan, reduced by the additional amount (if any), will be deductible under section 8-1.
- (c) Where the investor has a Principal Loan and acquires a Related Option that is a Put Option or Collar, and all or part of the cost of the Put Option or Collar (the First Premium Amount) is paid as an upfront lump sum
- (i) under subsection 247-20(3), the amount reasonably attributable to the cost of capital protection in an income year is the amount by which the total of the First Premium Amount paid during that income year, any Facility Adjustment Fee paid during that income year and the Interest incurred under the Principal Loan for the income year exceeds
    - where Interest is charged on the Principal Loan at a fixed rate for all or part of the term of the Principal Loan and that fixed rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the adjusted loan rate at the time when the Interest charge is first incurred during the term of the Principal Loan, or the relevant part of the term (subsections 247-20(4) and (5))
    - where Interest is charged on the Principal Loan at a variable rate for all or part of the term of the Principal Loan and a variable rate is applicable to the Principal Loan for all or part of the income year, the amount of the Principal Loan multiplied by the average of the

adjusted loan rates applicable during those parts of the income year when the Principal Loan is at a variable rate (subsections 247-20(5) and (5A))

- (ii) the amount reasonably attributable to the cost of capital protection as worked out under sub-subparagraph 16(c)(i) of this Product Ruling, reduced by the First Premium Amount and any Facility Adjustment Fee paid, is treated as a further cost of the Put Option or Collar under subsection 247-20(6) (also referred to as the additional amount)
  - (iii) the additional amount (if any), the First Premium Amount and any Facility Adjustment Fee paid are not deductible under section 8-1, and
  - (iv) an amount equal to the Interest incurred under the Principal Loan, reduced by the additional amount (if any), will be deductible under section 8-1.
- (d) Division 247 will not apply to the Supplementary Loan. An amount equal to the Interest incurred under the Supplementary Loan will be deductible under section 8-1 to the extent the Supplementary Loan is applied to fund Interest on the Principal Loan.
  - (e) Section 51AAA of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to deny deductibility of the Interest incurred under the Principal Loan and the Supplementary Loan (if applicable) that is allowable as a deduction under section 8-1.
  - (f) Section 82KL of the ITAA 1936 will not apply to deny deductibility of the Interest incurred under the Principal Loan and the Supplementary Loan (if applicable) that is allowable as a deduction under section 8-1.
  - (g) Section 82KZMF of the ITAA 1936 will not apply to set the amount and timing of deductions for any prepaid Interest incurred under the Principal Loan and the Supplementary Loan (if applicable) that is allowable as a deduction under section 8-1.
  - (h) Section 82KZM of the ITAA 1936 will not apply to deny the investor immediate deductibility of any part of any prepaid Interest incurred under the Principal Loan and the Supplementary Loan (if applicable) that is allowable as a deduction under section 8-1.
  - (i) Sections 82KZMA and 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for any prepaid Interest incurred under the Principal Loan

and the Supplementary Loan (if applicable) that is allowable as a deduction under section 8-1 to an investor (other than a small business entity, or an entity covered by subsection 82KZMA(2A) of the ITAA 1936, for the year of income that has not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure) that is not an individual and does not carry on a business.

- (j) For the purposes of the ITAA 1936 and the ITAA 1997 (other than the purposes set out in subsection 235-815(2)) and pursuant to the operation of section 235-820, Underlying Securities held on trust for the investor by the Nominee as security for the Principal Loan, Supplementary Loan and Related Option (as applicable) will be treated as being the investor's asset (instead of an asset of the trust), and any act done in relation to the Underlying Securities by the Nominee will be treated as if the act has been done by the investor (instead of the trustee).
- (k) The cost base and reduced cost base that an investor has in the Underlying Securities acquired by the investor under the MSOL Facility will include the amount of the Principal Loan used to finance the acquisition of the Underlying Securities, the investor's Capital Contribution (if any) towards the acquisition of the Underlying Securities, and incidental costs of acquisition and disposal of the Underlying Securities (sections 110-25 and 110-55).
- (l) If the investor procures a Principal Loan without a Related Option and the limited recourse provisions of the Principal Loan are invoked at Maturity
  - (i) CGT event A1 under section 104-10 will happen in relation to the Underlying Securities for the investor
  - (ii) pursuant to subsection 134-1(1), the cost base and reduced cost base of the Underlying Securities will include the amount reasonably attributable to the cost of capital protection (if any) calculated under sub-subparagraph 16(a)(ii) of this Product Ruling, and
  - (iii) any capital gain or capital loss made by the investor on exercise of the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling will be disregarded under subsection 134-1(4).

- (m) If the investor procures a Principal Loan without a Related Option and the limited recourse provisions of the Principal Loan are not invoked at Maturity
  - (i) CGT event C2 under paragraph 104-25(1)(c) will happen in relation to the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling for the investor, resulting in a capital loss equal to the reduced cost base of that put option under subsection 104-25(3), and
  - (ii) pursuant to section 110-55, the reduced cost base of the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling will include the amount reasonably attributable to the cost of capital protection (if any) calculated under sub-subparagraph 16(a)(ii) of this Product Ruling.
- (n) If the Closing Price of the Underlying Securities at Maturity is below the Strike Price and the investor's Put Option or Collar is exercised, under a Physical Settlement
  - (i) CGT event A1 under section 104-10 will happen in relation to the Underlying Securities for the investor
  - (ii) pursuant to subsection 134-1(1), the cost base and reduced cost base of the Underlying Securities will include any First Premium Amount paid, any Facility Adjustment Fee paid, and the additional amount (if any) calculated (as applicable) under sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling, and
  - (iii) any capital gain or capital loss made by the investor on exercise of the Put Option or Collar will be disregarded under subsection 134-1(4).
- (o) If the Closing Price of the Underlying Securities at Maturity is below the Strike Price and the investor's Put Option or Collar is Cash Settled
  - (i) CGT event C2 under paragraph 104-25(1)(e) will happen in relation to the Put Option or Collar for the investor, and
  - (ii) pursuant to sections 110-25 and 110-55, the cost base and the reduced cost base of the Put Option or Collar will include any First Premium Amount paid, any Facility Adjustment Fee paid, and the additional amount (if any) calculated (as applicable) under

sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling.

- (p) If the Closing Price of the Underlying Securities at Maturity is above or equal to the Strike Price but, in the case of a Collar, below the Cap Level, and the investor's Put Option or Collar expires unexercised
  - (i) CGT event C2 under paragraph 104-25(1)(c) will happen in relation to the Put Option or Collar for the investor, resulting in a capital loss equal to the reduced cost base of the Put Option or Collar under subsection 104-25(3), and
  - (ii) pursuant to section 110-55, the reduced cost base of the Put Option or Collar will include any First Premium Amount paid, any Facility Adjustment Fee paid, and the additional amount (if any) calculated (as applicable) under subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling.
- (q) If the Closing Price of the Underlying Securities at Maturity is above one or more Cap Levels and the investor's Collar expires unexercised
  - (i) CGT event C2 under paragraph 104-25(1)(c) will happen in relation to the Collar for the investor, resulting in a capital loss equal to the reduced cost base of the Collar under subsection 104-25(3), and
  - (ii) pursuant to section 110-55, the reduced cost base of the Collar will include any First Premium Amount paid, the Second Premium Amount paid, any Facility Adjustment Fee paid, and the additional amount (if any) calculated (as applicable) under subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling.
- (r) If the investor sells (or arranges for the sale of) the Underlying Securities to fund the repayment of the Principal Loan or any Second Premium Amount, CGT event A1 under section 104-10 will happen in relation to the Underlying Securities for the investor.
- (s) For CGT purposes pursuant to section 109-5, the investor's date of acquisition of Underlying Securities acquired under the MSOL Facility is the date the Underlying Securities are acquired with the Principal Loan.
- (t) Any capital gain realised by an investor on the sale of Underlying Securities or exercise of the Put Option or Collar under a Cash Settlement will be treated as a

discount capital gain under section 115-5 where the investor is an individual, a complying superannuation entity or a trust and the sale or exercise occurs more than 12 months after the date of acquisition of the Underlying Securities or the Trade Date of the Put Option or Collar (as applicable).

- (u) Division 230 will not apply to any gains or losses with respect to the MSOL Facility where the investor is excepted from the Division pursuant to section 230-455.
- (v) Any dividends or distributions paid on the Underlying Securities and applied to repay the investor's principal or pay the investor's Interest on the Principal and/or Supplementary Loan will be assessable to the investor under subsection 44(1) or paragraph 97(1)(a) of the ITAA 1936, as applicable.
- (w) Subject to the foreign income tax offset limit in section 770-75, the investor will be entitled to a foreign income tax offset under Division 770 in an income year for foreign income tax paid by the investor (or the Nominee) on an amount received by the investor under the MSOL Facility that is included, in part or whole, in the assessable income of the investor for that income year.
- (x) The anti-avoidance provisions contained in Part IVA of the ITAA 1936 will not apply to deny deductibility of the Interest incurred by the investor in respect of the Principal Loan or the Supplementary Loan.

## **Scheme**

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

- application for a Product Ruling as constituted by documents and information received on 17 May 2021, 21 July 2021 and 8 March 2023
- Morgan Stanley Option and Loan Facility Information Memorandum, including the Facility Terms, dated 13 January 2021
- Morgan Stanley Option and Loan Facility Information Memorandum, including the Facility Terms, dated 19 December 2022
- Morgan Stanley Private Wealth Management General Terms, dated 12 April 2022, and

- draft Morgan Stanley Security Trust Deed (Security Trust Deed), including the Nominee Deed, received on 17 May 2021.

**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 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. Unless otherwise defined, capitalised terms in this Product Ruling take their meaning as per the IM and Security Trust Deed referred to in paragraph 17 of this Product Ruling.

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

20. Following is a summary of the scheme:

- (a) MSOL Facility includes a Loan Facility and an Option Facility offered by MSIP. An investor may enter into a Transaction under either or both Facilities. Where an investor enters into both Facilities as Related Transactions, MSIP will be both the Lender under the Related Loan and Issuer under the Related Option. MSASL is the arranger and distributor of the Facility and under its Australian Financial Services Licence will arrange the issue of loans and options pursuant to paragraph 911A(2)(b) of the *Corporations Act 2001*. MSIP will issue the Loans and Options in accordance with the offer made by MSASL.
- (b) The investor must complete and sign the Application Form. Upon acceptance by MSIP of an investor's Application Form, the investor is bound by the Facility Terms and may request a Quote Sheet from MSIP in relation to a Transaction. The Quote Sheet is prepared on the basis of the investor's specified parameters and will set out the financial terms of a Transaction under the Loan Facility and/or the Option Facility. Where the investor wishes to proceed with a Transaction on the terms set out in the Quote Sheet, the investor (or the investor's designated Financial Adviser) must sign and return the Quote Sheet. By doing so the investor irrevocably offers to enter into the Transaction on those terms.
- (c) Under the Loan Facility, the investor can obtain a loan from MSIP (the Principal Loan) up to an agreed Facility Amount. The Principal Loan may be used by the investor, or the Nominee on behalf of an investor that enters into a Transaction in the capacity of a regulated

superannuation fund (referred to as a Superannuation Fund investor for the purposes of this Product Ruling), to finance up to 100% of the purchase price of a

- (i) parcel of identical Underlying Securities (that is, securities issued by the same issuing entity and with identical characteristics). In this Product Ruling, this Principal Loan is referred to as a Single Principal Loan
  - (ii) Portfolio (a number of different parcels of Approved Securities with each parcel comprising identical Approved Securities). This Principal Loan is referred to as a Portfolio Principal Loan. A portion of the Portfolio Principal Loan (the Allocated Portfolio Loan Amount) will be applied to acquire each parcel of Underlying Securities comprising the Portfolio, or
  - (iii) Basket (a number of different Approved Securities treated together as a single Underlying Security). This Principal Loan is referred to as a Basket Principal Loan. The total Basket Principal Loan will be applied to acquire a number of identical Baskets each comprising a number of different Approved Securities in varying proportions. The investor cannot deal with the components of the Basket separately.
- (d) Where the Principal Loan finances less than 100% of the relevant purchase price, the investor is required to make a Capital Contribution towards the purchase price equal to the difference between the total cost of purchasing the Underlying Securities, Portfolio or Basket and the amount of the Principal Loan.
- (e) The Underlying Securities are selected by the investor from a list of securities approved by MSIP (Approved Securities or Basket of Approved Securities). A Portfolio or a Basket will comprise two or more types of Approved Securities. Approved Securities are shares or trust units that are listed for quotation on an Approved Exchange (including units in a cash trust that are listed for quotation) or units in an Approved Cash Trust. An Approved Cash Trust is a cash trust that is a registered managed investment scheme whose units are specified by MSIP as eligible to be an Approved Security. The Underlying Securities purchased with a Single Principal Loan cannot be units in an Approved Cash Trust. An investor may select their own combination of Approved Securities to form a Portfolio or Basket, or may invest in a Portfolio or Basket selected by MSIP.



- (f) Interest on the outstanding Principal Loan Balance is payable in advance on each Interest Payment Date specified in the relevant Confirmation (unless agreed otherwise with MSIP). Principal Loans with a term of greater than one year are made up of multiple Interest Periods each of 12 months or less. Subject to drawing down at least the Minimum Initial Drawdown Amount, the investor is not obliged to drawdown their entire Principal Loan on the first Drawdown Date (to finance the purchase price of the Underlying Securities). Where the investor's Principal Loan Balance is less than the Facility Amount, Interest Amounts payable on the Principal Loan may be funded by a drawdown of the Principal Loan up to the Available Amount.
- (g) The Interest Rate applicable to a Single Principal Loan will be generally fixed and determined by MSIP taking into account a number of factors including market interest rates, the identity of the Underlying Securities and the Maturity Date. Different Interest Rates may apply to Single Principal Loans used to acquire different Underlying Securities.
- (h) The Interest Rate applicable to a Portfolio Principal Loan will be a single blended Interest Rate determined by MSIP taking into account, among other things, market interest rates, the identity of all of the Underlying Securities in the Portfolio, the size of each parcel of Underlying Securities and the Maturity Date. The inclusion in the Portfolio of listed cash trust units, or units in an unlisted Approved Cash Trust (that is, where an Allocated Portfolio Loan Amount is used to acquire such units) will lower the blended Interest Rate on the Portfolio Principal Loan.
- (i) The Interest Rate applicable to a Basket Principal Loan will be generally fixed and determined by MSIP taking into account, among other things, market interest rates, the type and size of the securities included in the Basket and the Maturity Date. The inclusion in a Basket of listed cash trust units, or units in an unlisted Approved Cash Trust will lower the Interest Rate on the Basket Principal Loan.
- (j) Each Principal Loan will be for a fixed term, as agreed with MSIP, and where it is part of a Related Transaction, will be repayable in full no later than two Business Days after the Maturity Date of the Related Option.
- (k) The currency that the Principal Loan is provided in must be the same as the Settlement Currency for any Related Option Transaction to which the Principal Loan relates or, in the absence of a Related Option

Transaction, the currency in which the Underlying Securities are denominated.

- (l) As security for the Principal Loan, Supplementary Loan and Related Option (as applicable), an investor other than a Superannuation Fund investor must grant a Security Interest to MSIP over the Secured Property, including the Underlying Securities acquired with the Principal Loan and any Related Option. As further security, the Nominee will hold legal title to the Secured Property as bare nominee on behalf of the investor pursuant to the Facility Terms and until the Security Interest granted is released in respect of the Secured Property.
- (m) Underlying Securities acquired with a Principal Loan advanced to a Superannuation Fund investor will be acquired by the Nominee and will be subject to a Security Interest granted by the Nominee to MSIP over the Secured Property held by the Nominee. The Nominee will hold the Secured Property in a Separate Trust in accordance with the Facility Terms, the Security Trust Deed and the Nominee Deed to secure the due and punctual discharge of the Superannuation Fund investor's Secured Obligations relating to the Secured Property.
- (n) A Personal Guarantor may also guarantee the obligations of an investor under the MSOL Facility.
- (o) The Principal Loan will be limited recourse at Maturity. Subject to subparagraph 20(q) of this Product Ruling, this means that MSIP's right of recourse against the investor (other than a Superannuation Fund investor) for repayment of the Principal Loan Balance on the Maturity Date is limited to the amount which MSIP can obtain by enforcing its rights in respect of the Secured Property securing the Principal Loan Balance. MSIP's rights of recourse against an investor (other than a Superannuation Fund investor) are not limited in respect of the investor's obligation to pay Interest Amounts or any other amounts under the Principal Loan, or at any time prior to the Maturity Date. There is no limitation on MSIP's rights of recourse where the investor or a Personal Guarantor of the investor breaches the Facility Terms or in certain other circumstances stated in the Facility Terms.
- (p) Subject to subparagraph 20(q) of this Product Ruling, MSIP's rights of recourse against a Superannuation Fund investor in respect of all of the Superannuation Fund investor's obligations under a Principal Loan is limited to the amount MSIP can obtain by enforcing its

rights in respect of the Secured Property securing the Principal Loan.

- (q) Under a Portfolio Principal Loan, MSIP's recourse for repayment of each Allocated Portfolio Loan Amount on the Maturity Date (and for a Superannuation Fund investor, other obligations under the Principal Loan) is limited to the amount MSIP can obtain by enforcing its rights in respect of the Secured Property securing the Allocated Portfolio Loan Amount. This means there will be no offsetting of gains from one parcel of Underlying Securities in the Portfolio against losses from another parcel of Underlying Securities. Under a Basket Principal Loan, MSIP's recourse for repayment of the entire Basket Principal Loan is limited to the entirety of the Basket. This means that gains from one Component Security will be offset by losses on another Component Security within the Basket.
- (r) Investors that are not Superannuation Fund investors may, subject to approval by MSIP and payment of a Facility Adjustment Fee, increase their Facility Amount after entering into a Principal Loan. As an alternative to charging a Facility Adjustment Fee, MSIP may also approve an increase in the Facility Amount in consideration of MSIP charging a higher Interest Rate on any additional drawdowns under the Principal Loan and/or making adjustments to the Strike Price of any Related Options or increasing the amount of Secured Property provided to secure the Principal Loan.
- (s) Investors that are not Superannuation Fund investors may obtain, at MSIP's discretion, one or more Supplementary Loans from MSIP under the Loan Facility to pay for, among other costs associated with the MSOL Facility, all or part of the Interest Amount on the Principal Loan. The term of the Supplementary Loan will be less than or equal to the term of the relevant Principal Loan. The Interest Rate on the Supplementary Loan will be determined by MSIP at the time of drawdown of the particular Supplementary Loan. The Supplementary Loan is repayable by regular payments of principal as specified in the investor's Confirmation. Interest on the Supplementary Loan is payable in full upfront or in periodic instalments as specified by MSIP. MSIP's recourse to the investor for all amounts payable under the Supplementary Loan is not limited (it is a full recourse loan).
- (t) The investor will at all times hold the beneficial interest in the Underlying Securities and accordingly may, by agreement with MSIP, direct that dividends and distributions paid in respect of Underlying Securities be applied to repay principal (including the Allocated

Portfolio Loan Amount under a Portfolio Principal Loan) or Interest on the Principal Loan and/or Supplementary Loan.

- (u) An investor may request a Principal Loan together with either a Put Option or a Collar. The Principal Loan (including an Allocated Portfolio Loan Amount forming a portion of a Portfolio Principal Loan) and Put Option or Collar can be combined as Related Transactions and referred to as a Related Loan and Related Option respectively if the type of Underlying Securities for the Put Option or Collar is the same as the type of Underlying Securities securing the Principal Loan and the Principal Loan and Put Option or Collar are designated as related in the Confirmation. A Portfolio Principal Loan may have a number of Related Options (in respect of each Underlying Security in the Portfolio). Part of the cost of a Related Option may be factored into the determination of the Interest Rate payable on the Related Loan, which may alter the amount of the First Premium Amount.
- (v) Under the Option Facility, investors can acquire a Put Option or Collar over a range of Approved Securities which must be listed for trading on an Approved Exchange (unless it is part of a Basket and then it may include a unit in an Approved Cash Trust). For Superannuation Fund investors, where the Put Option or Collar has a Related Loan, the Put Option or Collar must be over a single Approved Security or a group of identical Approved Securities (or in the case of a Portfolio Principal Loan, over the Approved Securities corresponding to each Allocated Portfolio Loan Amount).
- (w) The acquired Put Option or Collar will provide the investor with the right to sell the Underlying Securities to MSIP at the Strike Price at Maturity. Where the Put Option or Collar is over a Basket, the Strike Price will be a single, aggregated Strike Price for the entire Basket.
- (x) Each Put Option or Collar acquired by the investor will have a Settlement Currency which will generally be the same as that in which the Underlying Securities are denominated.
- (y) The cost of a Put Option will be the First Premium Amount (if any). The cost of a Collar will be the sum of the First Premium Amount (if any) and the Second Premium Amount (if any). The First Premium Amount (if any) must be paid on the third Business Day after the Trade Date for the Put Option or Collar. The Second Premium Amount must be paid on the Option

Settlement Date if the Closing Price of the Underlying Security is above the Cap Level at Maturity.

- (z) The First Premium Amount (if any) will be determined by MSIP taking into account a number of factors and will be specified in the Confirmation. The Second Premium Amount will be equal to a fixed percentage of the excess of the Market Price of the Underlying Securities at Maturity over the Cap Level specified in the Confirmation. The fixed percentage will be determined as one minus the Participation Rate applicable to that Cap Level, as specified in the Confirmation. A Confirmation may specify that more than one Cap Level and Participation Rate apply in the calculation of the Second Premium Amount in respect of a single Collar.
- (aa) Where an investor other than a Superannuation Fund investor acquires a Put Option, pays any First Premium Amount for that Put Option in full and there is no Related Loan in respect of that Put Option, they do not have to provide collateral to MSIP or have the Nominee hold the Underlying Securities on their behalf. In contrast, where an investor other than a Superannuation Fund investor enters into a Collar with MSIP, full collateral must be provided in the form of the Underlying Securities. To that end, legal title to the Underlying Securities will be transferred to the Nominee and held by the Nominee on the investor's behalf as part of the Secured Property subject to the Security Interest granted to MSIP. Where a Superannuation Fund investor enters into a Collar with MSIP, the Underlying Securities must be acquired and held by the Nominee on their behalf subject to a Security Interest in favour of MSIP.
- (bb) At the Maturity Date, the Put Option or Collar can only be exercised by delivery of a valid Exercise Notice by the investor to MSIP, or if Automatic Exercise is specified in the Confirmation to apply. All Put Options (other than Quanto Options) and Collars over an Underlying Security will be physically settled when exercised at Maturity, unless MSIP exercises its rights under the Facility Terms to cash settle. If the investor does not provide an Exercise Notice prior to the Maturity Date for a Put Option or Collar that is In The Money, the Put Option or Collar may be Cash Settled at MSIP's discretion.
- (cc) Where the Put Option or Collar is exercised and Physical Settlement applies, the Underlying Securities will be transferred (sold) to MSIP. MSIP will pay to the investor an amount equal to the Strike Price for the Underlying Securities, less any costs incurred in

connection with the transfer. Where the investor has a Related Loan, MSIP will instead set off its obligation to pay an amount equal to the Strike Price against the investor's Principal Loan Balance.

- (dd) Where MSIP elects Cash Settlement in respect of a Put Option or Collar held by the investor that is In The Money, the investor will keep the Underlying Securities and, if applicable, will be required to pay all amounts owing on a Related Loan to MSIP (subject to the operation of the limited recourse terms). On the Cash Settlement Date MSIP will be required to pay to the investor a Cash Settlement Amount determined by MSIP in accordance with the Facility Terms.
- (ee) At the Maturity Date, the Put Option or Collar may expire unexercised and automatically lapse. If the Underlying Securities are subject to the Security Interest, MSIP may offer to acquire those securities at the Market Price or arrange for the sale of the Underlying Securities in the market on behalf of the investor at the Market Price. Under either of these circumstances, MSIP will apply the proceeds of the sale against the investor's obligation to pay any amount to MSIP under the Facility Terms. This may include a Second Premium Amount or any other amount owing under a Principal Loan (subject to the operation of the limited recourse terms). Any excess will be paid to the investor. Alternatively, the investor may retain the Underlying Securities and pay any amounts outstanding from their own funds.

### **Assumptions**

21. This Product Ruling is made on the basis of the following necessary assumptions:

- (a) The investor is an Australian resident for taxation purposes.
- (b) The Superannuation Fund investor is a trustee of a regulated superannuation fund (in accordance with section 19 of the SISA).
- (c) At all times during the scheme, where the Underlying Securities consist of shares, those shares satisfy the requirements of subparagraph 82KZME(5)(b)(ii) of the ITAA 1936.
- (d) At all times during the scheme, where the Underlying Securities consist of units in a trust, the trust satisfies the requirements of subparagraph 82KZME(5)(b)(iii) of the ITAA 1936.

- (e) At all times during the scheme, where the Underlying Securities consist of a stapled security, the stapled security comprises shares that satisfy the requirements of subparagraph 82KZME(5)(b)(ii) of the ITAA 1936 and/or units in a trust that satisfies the requirements of subparagraph 82KZME(5)(b)(iii) of the ITAA 1936, as applicable.
- (f) At all times during the scheme, where the Underlying Securities consist of units in an Approved Cash Trust, the Approved Cash Trust satisfies the requirement of subparagraph 235-835(1)(b)(ii).
- (g) The Underlying Securities are not ESS interests to which Subdivisions 83A-B or 83A-C (about employee share schemes) apply.
- (h) The investors will hold their interests in the Underlying Securities on capital account, are not traders in securities and are not treated for taxation purposes as trading in securities, carrying on a business of investing in securities, or holding the Underlying Securities as trading stock or a revenue asset.
- (i) The investors will hold the Put Option or Collar on capital account, are not treated for taxation purposes as trading in options or collars, carrying on a business of investing in options or collars, or holding the Put Option or Collar as trading stock or a revenue asset.
- (j) In respect of any Interest to be paid in advance under the Principal Loan or Supplementary Loan, these may be prepaid only in relation to a loan interest payment period of 12 months or less, and which ends on or before the last day of the income year following the expenditure year.
- (k) The investors will not draw down on the Principal Loan for any purpose other than to fund the purchase price of Underlying Securities or Interest on the Principal Loan.
- (l) The dominant purpose of an investor in entering into the scheme is to derive assessable income from the Underlying Securities that exceeds the total expenses incurred in connection with the investment.
- (m) The investors have not made an election under subsection 230-455(7) to have Division 230 apply.
- (n) For the purposes of the anti-avoidance rule under section 770-140, the investors or any other entity will not become entitled to either a refund of any foreign income tax paid by the investor (or the Nominee), or any other benefit worked out by reference to the

- amount of the foreign income tax (other than a reduction in the amount of the foreign income tax).
- (o) Principal Loans made to Superannuation Fund investors are covered by the exception in subsection 67A(1) of the SISA.
  - (p) The investors will not be under any legal disability.
  - (q) The scheme will be executed in the manner described in the Scheme section of this Product Ruling and the scheme documentation referred to in paragraph 17 of this Product Ruling.
  - (r) All dealings by the investors, MSIP, MSASL and the Nominee under the scheme will be at arm's length.

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**Commissioner of Taxation**8 September 2021

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## 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 – capital protected borrowings and deductibility of interest**

22. The interest paid on a borrowing used to acquire income-producing assets such as the Underlying Securities is generally treated as deductible under section 8-1 where it is expected that dividends, trust distributions or other assessable income would be derived from the investment (refer to Taxation Ruling TR 95/33 *Income tax: subsection 51(1) – relevance of subjective purpose, motive or intention in determining the deductibility of losses and outgoings*). However, the ability to claim interest deductions may be subject to Division 247.

23. Division 247 limits the allowable deductions for expenditure incurred under a 'capital protected borrowing'. Broadly, a capital protected borrowing arises where an amount is borrowed under an arrangement where the borrower is protected against the fall in value of some specified securities, and where that borrowing is made for the purpose of investing in those securities.

24. Division 247 applies to the Principal Loan where the investor uses the Principal Loan to acquire a beneficial interest in the Underlying Securities and the investor is protected against the fall in the market value of those Underlying Securities.

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

26. Where the investor has a Principal Loan and does not acquire a Related Option:

- (a) The cost of capital protection is the amount worked out under the method statement in subsection 247-20(3), as set out in sub-subparagraph 16(a)(ii) of this Product Ruling.
- (b) Under step 1 of the method statement, the total amount incurred by the investor under or in respect of the Principal Loan for the income year is the Interest incurred on the Principal Loan and any amounts that are in substance for capital protection (such as any Facility Adjustment Fee) for the income year.
- (c) Where the total amount incurred by the investor worked out under step 1 of the method statement is

less than the total interest that would have been incurred by the investor worked out under step 2 of the method statement, there is no amount reasonably attributable to the cost of capital protection. In these circumstances, the Interest on the Principal Loan will be fully deductible under section 8-1.

- (d) Where the total amount incurred by the investor worked out under step 1 of the method statement is greater than the total interest that would have been incurred by the investor worked out under step 2 of the method statement, the balance is reasonably attributable to the cost of capital protection and is treated as if it were incurred for the put option (subsection 247-20(6)).
- (e) The investor's put option is a capital asset. Therefore, the amount reasonably attributable to the cost of capital protection is of a capital nature and not deductible under section 8-1.

27. Where the cost of the Related Option that is a Put Option or Collar is factored into the Interest Rate charged on the Principal Loan; or the investor pays the First Premium Amount as an upfront lump sum:

- (a) The cost of capital protection is the amount worked out under the method statement in subsection 247-20(3), as set out in sub-subparagraphs 16(b)(i) or (c)(i) of this Product Ruling, as applicable.
- (b) Under step 1 of the method statement, the total amount incurred by the investor under or in respect of the Principal Loan for the income year is the Interest incurred on the Principal Loan and any amounts that are in substance for capital protection (such as the First Premium Amount and/or any Facility Adjustment Fee) for the income year.
- (c) Where the total amount incurred by the investor worked out under step 1 of the method statement is less than the total interest that would have been incurred by the investor worked out under step 2 of the method statement, there is no amount reasonably attributable to the cost of capital protection. In these circumstances, the Interest on the Principal Loan will be fully deductible under section 8-1.
- (d) Where the total amount incurred by the investor worked out under step 1 of the method statement is greater than the total interest that would have been incurred by the investor worked out under step 2 of the method statement, the balance is reasonably attributable to the cost of capital protection. In calculating the additional amount (as per

sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling), the amount reasonably attributable to the cost of capital protection will be reduced by the actual payment for a Put Option or Collar (the First Premium Amount and/or any Facility Adjustment Fee) in accordance with subsection 247-20(6). The additional amount, to the extent that it is greater than zero, constitutes a further cost of capital protection in addition to any First Premium Amount and/or any Facility Adjustment Fee paid.

- (e) The investor's Put Option or Collar is a capital asset. Therefore, any First Premium Amount and Facility Adjustment Fee paid and the additional amount (if any) is capital in nature and not deductible under section 8-1.

28. Where an investor has acquired a Portfolio or a Basket and MSIP has applied a single Interest Rate to the Principal Loan, the investment will be treated as one arrangement for the purposes of Division 247.

29. There is no element of capital protection connected with the Supplementary Loan. No part of the Interest incurred by the investor on the Supplementary Loan for the income year will therefore be attributable to the cost of capital protection and the Interest on the Supplementary Loan will be deductible under section 8-1 to the extent the Supplementary Loan is applied to fund Interest on the Principal Loan.

## **Section 51AAA of the ITAA 1936**

30. By acquiring the Underlying Securities, it is contemplated that an investor will derive assessable income by way of the receipt of dividend income and/or trust income and capital gains. As Interest incurred on the Principal Loan and Supplementary Loan would have been deductible under section 8-1 notwithstanding the inclusion of a net capital gain in assessable income, section 51AAA of the ITAA 1936 has no application to an investor that enters into a Transaction under the Loan Facility.

## **Section 82KL of the ITAA 1936**

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

**Subdivision H of Division 3 of Part III of the ITAA 1936**

32. Subdivision H of Division 3 of Part III (Subdivision H) of the ITAA 1936 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 the carrying on of a business, whether the investor is a small or medium 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) of the ITAA 1936 to include amounts of less than \$1,000 or amounts that are of a capital nature.

***Subdivision 328-C – small business entities***

33. 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 the:

- investor carried on a business in the previous income year and the aggregated turnover for that year was less than \$10 million
- aggregated turnover for the current year is likely to be less than \$10 million and, if 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 \$10 million, or
- aggregated turnover for the current year, worked out as at the end of the year, is less than \$10 million.

***The eligible service period for the purposes of Subdivision H of the ITAA 1936***

34. The Interest charged on the Principal Loan and the Supplementary Loan that is deductible under section 8-1 is 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 of the ITAA 1936, 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 and not to the period of the loan.

## ***Sections 82KZME and 82KZMF of the ITAA 1936 – prepaid expenditure and ‘tax shelter’ style arrangements***

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

36. For the purposes of section 82KZME of the ITAA 1936, ‘agreements’ are broadly defined to include an entire scheme of which a contract may form part. Under subsection 82KZME(4) of the ITAA 1936, the relevant agreement is all the contractual arrangements and activities associated with participation in the MSOL Facility, including the financing, Underlying Securities acquisition and Underlying Securities disposal arrangements.

37. Exception 1, as contained in subsection 82KZME(5) of the ITAA 1936, applies to exclude Interest payable under the Principal Loan and Supplementary Loan from the operation of section 82KZMF of the ITAA 1936 where:

- the prepaid Interest expenditure under the Principal Loan and Supplementary Loan is incurred in respect of money borrowed to acquire Underlying Securities that are as described in subparagraphs 82KZME(5)(b)(ii) and (iii) of the ITAA 1936
- the investor can reasonably be expected to obtain dividends or 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 MSOL Facility are conducted at arm’s length.

38. Deductibility of the prepaid Interest must therefore be considered under the prepayment rules contained in paragraphs 39 to 44 of this Product Ruling.

***Section 82KZM of the ITAA 1936 – prepaid expenditure incurred by certain small and medium business entities and individuals incurring non-business expenditure***

39. 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, or an entity covered by subsection 82KZM(1A) of the ITAA 1936<sup>2</sup>, for the year of income that has not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure, or
- an individual and the expenditure is not incurred in carrying on a business.

40. The expenditure must not be excluded expenditure. 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.

41. As the eligible service period in relation to the deductible Interest payment under the Principal Loan and Supplementary Loan is not more 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 referred to in paragraph 39 of this Product Ruling. Such investors will be able to claim an immediate deduction for prepaid Interest incurred under the Principal Loan and Supplementary Loan.

***Sections 82KZMA and 82KZMD of the ITAA 1936 – prepaid non-business expenditure incurred by non-individual and non-small and medium business entities***

42. Sections 82KZMA and 82KZMD of the ITAA 1936 set the amount and timing of deductions for expenditure incurred by an investor (other than a small business entity or an entity covered by subsection 82KZMA(2A) of the ITAA 1936<sup>3</sup>, for the year of income that has not chosen to apply section 82KZMD to the expenditure) that

<sup>2</sup> An entity is covered by subsection 82KZM(1A) of the ITAA 1936 for the expenditure year if the entity is not a small business entity for that year but would be a small business entity for that year if each reference in section 328-110 to \$10 million (as noted in paragraph 33 of this Product Ruling) were instead a reference to \$50 million.

<sup>3</sup> An entity is covered by subsection 82KZMA(2A) of the ITAA 1936 for the expenditure year if the entity is not a small business entity for that year but would be a small business entity for that year if each reference in section 328-110 to \$10 million (as noted in paragraph 33 of this Product Ruling) were instead a reference to \$50 million.

is not an individual and does not incur the expenditure in carrying on a business.

43. 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 to be wholly done within the expenditure year.

44. For these investors, the amount of prepaid Interest incurred under the Principal Loan and Supplementary Loan which is allowable as a deduction under section 8-1 will be apportioned over the relevant interest payment period.

## **Division 235 – look-through treatment for instalment trusts**

45. The object of Division 235 is to ensure that, for most income tax purposes, the consequences of ownership of a certain type of asset (referred to as an 'instalment trust asset') flow to the investor that has a beneficial interest in that asset as the beneficiary of an 'instalment trust', instead of to the trustee of the instalment trust. Essentially, this means treating the investor (and not the trust) as the owner of the asset and treating any act done by the trustee in relation to the asset as if the act had been done by the investor (instead of by the trustee) (subsections 235-820(1) and (2)).

46. Each trust created under the Facility Terms for the purposes of holding Underlying Securities on trust by the Nominee as trustee for an investor (other than a Superannuation Fund investor), as security for the Principal Loan, Supplementary Loan and Related Option (as applicable), will be an instalment trust pursuant to paragraph 235-825(1)(a) on the basis that they will be covered by section 235-830 (about instalment trust arrangements), and satisfy the requirements in section 235-835 (about the type of asset being held on trust).

47. Each Separate Trust created under the Facility Terms, Security Trust Deed and Nominee Deed for the purposes of holding the Underlying Securities of a Superannuation Fund investor on trust by the Nominee as trustee for the Superannuation Fund investor, as security for the Principal Loan, Supplementary Loan and Related Option (as applicable), will be an instalment trust pursuant to paragraph 235-825(1)(b) on the basis that they will be covered by section 235-840 (about limited recourse borrowings by regulated superannuation funds).

## **Parts 3-1 and 3-3 – application of capital gains tax provisions to the Put Option, Collar and Underlying Securities**

48. For the purposes of Parts 3-1 and 3-3 (about capital gains and losses), paragraph 106-60(1)(a) ignores the vesting of a CGT asset in a security holder where the vesting is for the purpose of enforcing, giving effect to or maintaining a security, charge or encumbrance over the asset, and the security, charge or encumbrance remains over the asset just after the vesting.

49. Where the investor has purchased a Collar without a Related Loan (as referred to in subparagraph 20(aa) of this Product Ruling), a transfer of the Underlying Securities by the investor (the security provider) to the Nominee (the security holder) constitutes a vesting of those CGT assets in the Nominee for the purpose of giving effect to a security over the assets and that security will remain over the Underlying Securities 'just after the vesting'. As paragraph 106-60(1)(a) will ignore the vesting of the Underlying Securities in the Nominee upon their transfer by the investor to the Nominee, those assets will, for the purposes of Parts 3-1 and 3-3, be treated as though they continue to be owned by the investor.

50. If an investor procures a Principal Loan without a Related Option and the limited recourse provisions of the Principal Loan are invoked at Maturity, the investor will dispose of the Underlying Securities and CGT event A1 will arise for the investor in respect of the disposal (section 104-10). Under table item 2 of subsection 134-1(1), the investor's cost base and reduced cost base in the Underlying Securities for these purposes will include the amount reasonably attributable to the cost of capital protection (if any) as per sub-subparagraph 16(a)(ii) of this Product Ruling. Any capital gain or capital loss on exercise of the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling will be disregarded (subsection 134-1(4)).

51. If an investor's Put Option or Collar is exercised and physically settled, the investor will dispose of the Underlying Securities and CGT event A1 will arise for the investor in respect of the disposal (section 104-10). Under table item 2 of subsection 134-1(1), the investor's cost base and reduced cost base in the Underlying Securities for these purposes will include the additional amount (if any) as per sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling, plus any Facility Adjustment Fee and First Premium Amount paid. Any capital gain or capital loss on exercise of the Put Option or Collar will be disregarded (subsection 134-1(4)).

52. If an investor's Put Option or Collar is exercised and Cash Settled, CGT event C2 will arise for the investor in respect of the exercise of the Put Option or Collar (section 104-25). The cost base and reduced cost base of the Put Option or Collar will include the additional amount (if any) as per sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling, plus any Facility Adjustment Fee and First Premium Amount paid – sections 110-25 and 110-55. No CGT event will occur in relation to the Underlying Securities.

53. Where an investor procures a Principal Loan without a Related Option and the limited recourse provisions of the Principal Loan are not invoked at Maturity, CGT event C2 will arise for the investor in relation to the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling (section 104-25). As the investor will not receive any capital proceeds in respect of the expiry of this put option, a capital loss will be made by the investor in this regard, equal to the investor's reduced cost base in the put option. Under section 110-55, the reduced cost base of this put option



will include the amount reasonably attributable to the cost of capital protection (if any) as per sub-subparagraph 16(a)(ii) of this Product Ruling.

54. Where the Put Option or Collar expire unexercised, CGT event C2 will arise for the investor in relation to the Put Option or Collar at that time (section 104-25). As the investor will not receive any capital proceeds in respect of the expiry of the Put Option or Collar, a capital loss will be made by the investor in this regard, equal to the investor's reduced cost base in the Put Option or Collar. Under section 110-55, the reduced cost base of the Put Option or Collar will include:

- the additional amount (if any) as per sub-subparagraphs 16(b)(ii) or (c)(ii) of this Product Ruling, plus any Facility Adjustment Fee and First Premium Amount paid, and
- in the case of the Collar only, any Second Premium Amount paid by the investor.

55. Under sections 110-25 and 110-55 respectively, the investor's cost base and reduced cost base in the Underlying Securities acquired by the investor under the MSOL Facility will include the amount of the Principal Loan used to finance the acquisition of the Underlying Securities, their Capital Contribution (if any) and incidental costs incurred by the investor in acquiring and disposing of the Underlying Securities (this includes stamp duty and costs of transfer). As per paragraphs 50 and 51 of this Product Ruling, where the limited recourse provisions of the Principal Loan are invoked or the investor's Put Option or Collar is exercised and physically settled, the investor's cost base and reduced cost base in the Underlying Securities also includes the cost base or reduced cost base of the put option referred to in sub-subparagraph 16(a)(iii) of this Product Ruling, the Put Option or the Collar (as applicable).

56. 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 on the sale of the Underlying Securities or exercise of the Put Option or Collar under a Cash Settlement will be treated as a discount capital gain where the investor is an individual, a complying superannuation entity or a trust and has held the Underlying Securities, Put Option or Collar for more than 12 months (excluding the days of acquisition and disposal).

### **Division 230 – taxation of financial arrangements**

57. Division 230 sets out the tax treatment of gains or losses from a 'financial arrangement'. 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 apply to financial arrangements has not been made, then pursuant to section 230-455,

Division 230 does not apply in relation to gains or losses from a financial arrangement held by:

- an individual
- 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
- an ADI, a securitisation vehicle or other financial sector entity with an aggregated turnover of less than \$20 million, or
- 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.

### **Assessability of dividends applied against Loans**

58. Pursuant to the operation of section 235-820 (as per subparagraph 16(j) and paragraphs 45 to 47 of this Product Ruling), where an investor directs that any dividends or distributions paid in respect of Underlying Securities held on trust by the Nominee be applied toward repayment of principal or payment of Interest on the Principal Loan and/or any Supplementary Loan, the investor will be assessable on those dividends or distributions under sections 44 or 97 of the ITAA 1936, as applicable.

### **Division 770 – foreign income tax offsets**

59. Division 770 allows a non-refundable tax offset for an income year for foreign income tax paid where that amount of foreign income tax is paid in respect of an amount that is included in your assessable income for the year.

60. To the extent that the investor has paid, or is deemed to have paid, foreign income tax (such as withholding tax at source):

- the foreign taxes paid by the investor will be regarded as foreign income tax for the purposes of section 770-15
- where those foreign taxes are paid by the Nominee, the foreign income tax will be deemed, under section 770-130, to have been paid by the investor, and
- subject to the foreign income tax offset limit in section 770-75 the investor will be entitled to a non-refundable foreign income tax offset in an income year for the foreign income tax the investor paid, or is deemed to have paid, on amounts that are included in the investor's assessable income that year.

## **Part IVA of the ITAA 1936 – anti-avoidance**

61. Provided that the scheme ruled on is entered into and carried out as described in this Product 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**

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 95/33

### *Legislative references:*

- ITAA 1997 110-25
- ITAA 1997 110-55
- ITAA 1997 Div 115
- ITAA 1997 115-5
- ITAA 1997 Pt 3-3
- ITAA 1997 134-1(1)
- ITAA 1997 134-1(4)
- ITAA 1997 Div 230
- ITAA 1997 230-455
- ITAA 1997 230-455(7)
- ITAA 1997 Div 235
- ITAA 1997 235-815(2)
- ITAA 1997 235-820
- ITAA 1997 235-820(1)
- ITAA 1997 235-820(2)
- ITAA 1997 235-825(1)(a)
- ITAA 1997 235-825(1)(b)
- ITAA 1997 235-830
- ITAA 1997 235-835
- ITAA 1997 235-835(1)(b)(ii)
- ITAA 1997 235-840
- ITAA 1997 Div 247
- ITAA 1997 247-20
- ITAA 1997 247-20(3)
- ITAA 1997 247-20(4)
- ITAA 1997 247-20(5)
- ITAA 1997 247-20(5A)
- ITAA 1997 247-20(6)
- ITAA 1997 Subdiv 328-C
- ITAA 1997 328-110
- ITAA 1997 Div 770
- ITAA 1997 770-15
- ITAA 1997 770-75
- ITAA 1997 770-130
- ITAA 1997 770-140
- ITAA 1997 Div 775
- SISA 1993 19
- SISA 1993 67A(1)
- TAA 1953
- TAA 1953 Subdiv 14-D Sch 1
- Corporations Act 2001 911A(2)(b)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 51AAA
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZL(2)(a)
- ITAA 1936 82KZM
- ITAA 1936 82KZM(1A)
- ITAA 1936 82KZMA
- ITAA 1936 82KZMA(2A)
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(5)
- ITAA 1936 82KZME(5)(b)(ii)
- ITAA 1936 82KZME(5)(b)(iii)
- ITAA 1936 82KZMF
- ITAA 1936 97
- ITAA 1936 97(1)(a)
- ITAA 1936 Pt III Div 16E
- ITAA 1936 Pt IVA
- ITAA 1997 8-1
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 Pt 3-1
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(c)
- ITAA 1997 104-25(1)(e)
- ITAA 1997 104-25(3)
- ITAA 1997 106-60(1)(a)
- ITAA 1997 109-5

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