CR 2004/4 - Income tax: AXA SA 2002 Leveraged Plan Share Offer for Australian employees

Class Ruling

Income tax: AXA SA 2002 Leveraged Plan Share Offer for Australian employees

Contents Para

Preamble

The number, subject heading, and the ***What this Class Ruling is about*** *(including* ***Tax laws****,* ***Class of persons*** *and* ***Qualifications*** *sections),* ***Date of effect****,* ***Arrangement*** *and* ***Ruling*** *parts of this document are a 'public ruling' in terms of Part IVAAA of the* ***Taxation Administration Act 1953****. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax laws

2. The tax laws dealt with in this Ruling are:

- section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 13A of Part III of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act* 1997 (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- subsection 112-20 (1) of the ITAA 1997;
- subsection 116-20(1) of the ITAA 1997;
- Division 110 of the ITAA 1997;

- Division 115 of the ITAA 1997;
- section 43 of the *Fringe Benefit Tax Assessment Act 1986* (FBTAA 1986); and
- subsection 136(1) of the FBTAA 1986.

Class of persons

3. The class of persons to which this Ruling applies consists of the Australian residents employed by AXA Asia Pacific Holdings Limited and its Australian subsidiaries, AXA Assistance Australia Pty Ltd and AXA Corporate Solutions Asia Pacific Pty Ltd, who participate in the offer under the arrangement described below in paragraphs 9 to 27.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangements identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 9 to 27 in this Ruling.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:

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

Date of effect

8. This Ruling applies to arrangements entered into during the income year ending 30 June 2003. This Ruling continues to apply, in respect of the tax laws ruled upon, even following 30 June 2003, for arrangements entered into during the income year ended 30 June 2003. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Arrangement

9. The arrangement that is the subject of the Ruling is described below. It was entered into when the subscriptions referred to paragraph 11 were made by the employees. This description is based on the copies of documents listed below. These documents, or the relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of arrangement are:

- AXA Shareplan of October 2002;
- AXA Shareplan 2002 Australian Employee Supplement;
- translation dated 24 July 2002 of International Group Savings Plan and Addendum No. 1. The Plan was established on 19 October 2001 and subsequently modified on 27 May 2002; translation of draft Regulations dated 18 July 2002 of a **Fonds Commun de Placement d'Enterprise** (**'FCPE'**). (a FCPE is a collective investment vehicle without legal personality commonly used in France to facilitate employee share offers.);
- translation of Draft Information Notice of 18 July 2002;
- translation of draft 'Swap Transaction Agreement' dated 13 June 2002 between FCPE and Deutsche Bank AG (the 'Bank'); and
- translation of draft 'Guarantee Agreement' of 1 July 2002 between FCPE and the Bank.

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

Description of the arrangement

10. AXA Shareplan 2002 is an arrangement under which Australian resident employees, together with other employees of the AXA group, could invest in securities concerning a portfolio of AXA SA shares. It is referred to as the '**Investment Leverage Plan'** to distinguish it from the AXA Shareplan 2002 offer, known as the '**Traditional Plan'**.

11. Employees who subscribed to the Investment Leverage Plan received units in the AXA Plan 2002 Global FCPE, hereafter referred to as **the Fund**. The FCPE Manager then subscribed for AXA shares on the employee's behalf.

12. The **Subscription Price** of Euros 9.04 paid for each unit was at a discount of 20% to the **Reference Price** of Euros11.29. The Reference Price was the average trading price of AXA SA shares on the Paris Stock Exchange over the 20 trading days from 25 September 2002 to 22 October 2002.

13. Employees could subscribe for units in the Fund during the period extending from 28 October until 12 November 2002. There was no minimum subscription and they could personally invest in the Plan up to 2.5% of their 2002 estimated gross annual compensation. The amount invested was effectively multiplied by 10 under a Swap Transaction Agreement between the Fund and the Bank. Therefore, the employee's actual contribution comprised 10% of the amount used by the Fund to subscribe for AXA shares on 20 December 2002. The remaining 90% was provided by the Bank. However, the maximum amount of the employee's total investment under the Investment Leverage Plan and the Traditional Plan, including contributions made on their behalf by the Bank, could not exceed 25% of their salary, for example:

Reference Price	E$11.29
Discount allowed by AXA SA	E$(2.25)
Subscription Price payable by FCPE manager to AXA SA	E$ 9.04
Employee contribution (10% of E$9.04)	= E$ 0.90
The Bank payment (90% of E$9.04)	= E$ 8.14

14. Accordingly, if based on those facts, an employee contributed an amount of E$9.00, the FCPE manager would have subscribed for and been allotted 10 AXA SA shares. The balance of the Subscription Price of E$81.40 would have been met by the Bank under the Swap Transaction Agreement. The employee would then have been allocated 10 units in the FCPE and the Fund would have 10 AXA SA shares.

15. The FCPE manager subscribed for ordinary shares in the capital of AXA SA pursuant to a capital increase in the company made on 20 December 2002. In accordance with French practice, the increase was reserved to company employees of AXA SA on a worldwide basis. The shares are held by the FCPE custodian in the name of the Fund.

16. In consideration for their investment employees were allotted units in the Fund. When a unit is issued, one unit is equivalent to the value of one AXA SA share. However, from that time the value of a unit is the **Net Asset Value** (**NAV**) as defined under the FCPE Regulations. It is calculated by dividing the net assets in the Fund by the number of units issued. The calculation is usually made on the 15th day and last trading day of each month.

17. Employees do not get access to AXA SA shares during a **Lock up Period** of approximately five years ending on 1 July 2007. Australian member employees may only choose to redeem the investment before that time in the event of death, disability or cessation of employment with the AXA SA Australian companies.

18. Article 11 bis of the Fund Regulations provides the employee with a **Guaranteed Net Asset Value** for each unit subscribed for in the Fund. The guarantee ensures that upon redemption of units, either before the Fund's maturity or at the **Expiration Date**, the employee has the right to participate in a (62.5%) portion of the increase in market value above the Reference Price of the 10 AXA SA shares. In addition, the employee benefits from a guarantee in Euros of his or her personal contribution to the Subscription Price.

19. Under the Guarantee Agreement, the Bank guarantees to the Fund that where units are presented for redemption, either before or after the Expiration Date, the NAV shall be equal to the defined Guaranteed Net Asset Value. If the NAV happens to be less, then the Bank will pay to the Fund a sum representing an amount equal to the difference.

20. If the investment is redeemed prematurely, the unit holders will be paid by delivery of the number of AXA SA shares (X) from the Fund's portfolio that the units represent in accordance with the following calculation:

$$X = \frac{A \times B}{C}$$

Where:

A = number of units tendered for redemption

B = NAV upon redemption

C = share price used to value the portfolio on the date of the NAV calculation.

If X is not a whole number of shares, the number is rounded down and the difference paid by a cash payment.

The unit holder or their legal beneficiary may arrange to retain the shares and to be able to trade them on the Paris Stock Exchange. Alternatively, if it is desired to sell the shares at the time, the FCPE manager may elect to do so and transfer the sale proceeds to a nominated bank account.

21. At the expiration of the Lock up Period, the unit holder has two options:

(a) The unit holder may opt to redeem his or her units in exchange for AXA SA shares. Upon redemption, the units will be paid by delivery of the number of AXA SA shares from the Fund's portfolio that the units represent using the same calculation method as that used in paragraph 20. The investment will then fluctuate in line with AXA SA share price performance and is no longer guaranteed; or

(b) The unit holder may opt to redeem his or her units for cash. In that event, cash is withdrawn from the Fund's assets and the FCPE manager sends the amount equivalent to the units redeemed directly to the unit holder's nominated bank account.

22. If the units are not redeemed by the Expiration Date, the FCPE's assets will automatically be transferred to the Traditional Plan FCPE. This transfer is made on the basis of the NAV of the two Funds on the maturity date of 1 July 2007. The unit holder is then allocated units in the Traditional Plan FCPE of the equivalent value.

23. Under the Leverage Plan, unit holders renounce their right to receive any sums equivalent to dividends paid on the AXA SA shares held by the FCPE custodian on behalf of the Fund. As dividends are received, the FCPE manager is required to pay the Bank the equivalent amount of the dividends less any Fund expenses in AXA SA shares under the terms of the Swap Transaction Agreement.

24. In addition, upon the Expiration Date, the Bank is entitled to receive the difference (where such difference is positive) between the total value of the Funds assets and the aggregate Guaranteed Net Asset Value to which unit holders are entitled at that date. In effect, the payment to the Bank would include the following:

a) The amount initially provided by the Bank, that is, 90% of the Subscription Price (E$81.40 based on the example at paragraph 14 above);

b) The difference between the Subscription Price and the Reference Price (E$22.50, based on the example above being E$2.25 discount on each of the 10 shares that the FCPE manager subscribes for); and

c) The specified proportion of 37.5% of any excess of the value of the Investment Leveraged Plan shares over the Reference Price. (Assuming that the market value of the 10 shares at redemption time has risen by 33.3% to E$150.50, the amount would be E$14.10, being the $37.60 increase in value by 37.5%.

25. The Bank is entitled to the above payments in return for its contribution to the subscription payable by the FCPE manager and for guaranteeing the unit holder's entitlements.

26. If the market value of AXA SA shares rises above the Reference Price, it may be expected that the value of the obligations under the Swap Transaction Agreement will also increase. However, the Net Asset Value should also increase and unit holders are entitled to a specified percentage (62.5%) of the increase in value of all shares subscribed for by the Fund on their behalf (e.g. The 10 AXA shares according to the example in paragraph 14). Continuing with the paragraph 13 example, assuming a 33.3% increase in the value of AXA SA shares at withdrawal time, the position simplified would be:

<u>Value of Fund Assets on Redemption</u>

10 AXA SA shares @ E$15.05		E$150.50
Redemption amounts payable to employees in AXA SA shares or cash:		
Guaranteed Net Asset Value of Subscription Price	E$ 9.00	
62.5% Share of increase in Market Value of Portfolio	E$23.50	<u>E$ 32.50</u>
Balance payable to the Bank		E$118.00
In effect this amount comprises:		
Bank's Contribution	E$81.40	
Discount on Shares	E$22.50	
37.5% Share of increase in Value	E$14.10	<u>E$118.00</u>

27. If the AXA SA share price remains unchanged or falls, the employee's investment is worth E$9.00, being the value of the guaranteed initial investment in the Fund.

Ruling

28. When units in the Fund are issued to an Australian resident employee, the units constitute a fringe benefit as defined in subsection 136(1) of the FBTAA 1986. Fringe Benefits are exempt from income tax in the hands of the employee under section 23L of the ITAA 1936.

29. Dividends received by the FCPE manager in relation to AXA SA shares held in the name of the Fund are not assessable to the Australian resident unit holders.

30. If an Australian resident unit holder redeems his or her units or the unit holder's entitlements are transferred to the Traditional Plan, a CGT event C2 occurs pursuant to section 104-25 of the ITAA 1997. A capital gain results if the capital proceeds exceed the cost base of the units. A capital loss occurs if the capital proceeds are less than the reduced cost base.

31. The capital proceeds of a redemption (CGT event C2) consist of any cash received and the market value of any shares acquired in consideration for the redemption (subsection 116-20(1) of the ITAA 1997 applies).

32. In the case of an Australian resident unit holder's entitlements being transferred to the Traditional Plan, the capital proceeds consist of the market value of the units issued in the Traditional Plan at the date of the transfer (subsection 116-20(1) of the ITAA 1997 applies).

33. The cost base or reduced cost base of the units redeemed or cancelled on transfer of entitlements to the Traditional Plan consists of the amount invested by the unit holder i.e. his or her contribution to the Subscription Price. (section 110-25 of the ITAA 1997 applies).

34. If an Australian resident unit holder makes a capital gain on redemption of his or her units or the transfer of his or her entitlements to the Traditional Plan and units were acquired 12 months or more prior to the CGT event C2 happening, the gain is a discount capital gain pursuant to Division 115 of the ITAA 1997.

35. If an Australian resident unit holder, having redeemed his or her units in consideration for AXA SA shares, disposes of the shares, a CGT event A1 happens (refer section 104-10 of the ITAA 1997). The capital gain or capital loss with respect to the disposal is calculated on the basis of the first element of cost base or reduced cost base of the shares being their market value at the date of acquisition. If a capital gain is made, it will be a discount capital gain pursuant to Division 115 if the acquisition of the shares occurred 12 months or more prior to the disposal.

Explanation

Exemption of the benefit from acquisition of units at a discount

36. The provision of units in the Fund to Australian resident employees is a fringe benefit for the purposes of the FBTAA 1986. The provision of the units is a 'benefit' as defined in relation to the employee's employment by the AXA SA employer or its associate.

37. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) of the definition of 'fringe benefit' in section 136; it is not 'a benefit constituted by the acquisition by a person of a share or right under an employee share scheme (within the meaning of Division 13A of Part III of the ITAA 1936)'. In this regard, the unit holder's interest under the Fund regulations (*a chose in action*) is not identical with the inherent or underlying interest that the unit holder may have in shares that are part of the net assets. This

issue is discussed in greater depth in CR 2003/53 at paragraphs 47 to 56 inclusive.

38. The fringe benefit is classified as an external property fringe benefit, the taxable value of which falls for determination under section 43 of the FBTAA 1986.

39. In accordance with section 23L of the ITAA 1936 Australian resident employees acquiring units in the Fund are exempt from tax on the benefit obtained.

Taxation of dividends

40. Dividend income received with respect to AXA SA shares held in the name of the Fund will not be assessable income of Australian resident unit holders as they are not entitled to that income. Under the terms of the offer and in accordance with the Swap Transaction Agreement, Deutsche Bank AG is entitled to the dividends.

Capital Gains Tax

41. The general capital gains tax rules under Parts 3-1 to 3-3 of the ITAA 1997 apply to CGT events in relation to the interests in net assets of the Fund represented by units and shares acquired via redemption of units. The units are not units in a unit trust and Taxation Determination 2000/32 does not apply.

42. Section 104-25 provides that CGT event C2 happens if your ownership of an intangible CGT asset ends by it being redeemed or cancelled. Accordingly, when an Australian resident unit holder redeems his or her units there will be a CGT event.

43. If the redemption is satisfied fully or partly by the transfer of AXA SA shares, the capital proceeds with respect to CGT event C2 will include the market value of the shares at the date of the redemption in addition to any money received (refer subsection 116-20(1)).

44. Under Division 110 the cost base or reduced cost base of the units includes the subscription price paid by the unit holder.

45. If a unit holder redeems his or her units for AXA SA shares and subsequently sells the shares, a CGT event A1 occurs pursuant to section 104-10 with respect to the shares. The first element of the cost base or reduced cost base of the shares will be the market value of the shares at the date they were acquired (subsection 112-20(1) applies).

46. For the purposes of Division 115 (discount capital gains) the time of acquisition of units will be the date on which the units were subscribed for by the unit holder.

47. AXA SA shares obtained by redeeming units in the Fund are acquired when they are transferred to the unit holder on or immediately after the redemption time.

48. If an Australian resident unit holder does not redeem his or her units on the maturity date of 1 July 2007, the unit holder's entitlements are transferred from the Investment Leverage Plan to the Traditional Plan. This involves a transfer made on the basis of the Net Asset Value for units under the two Funds at that time. The unit holder will then receive an allocation of units in the Traditional Plan in satisfaction of rights under the Investment Leverage Plan. This is a CGT event C2 under section 104-25.

49. The capital proceeds will include the market value of the units received in the Traditional Plan at the date of the transfer of the Australian resident unit holder's entitlements (refer subsection 116-20(1)). The cost base or reduced cost base in relation to this CGT event will be as indicated in paragraph 47.

Detailed contents list

50. Below is a detailed contents list for this Class Ruling:

Commissioner of Taxation
14 January 2004

Previous draft:
Not previously released in draft form

Related Rulings/Determinations:
CR 2001/1; CR 2003/53; TR 92/1; TR 97/16; TR 92/20; TD 2000/23

Subject references:
- acquisition of share or right
- capital gains tax
- CGT event A1
- CGT event C2
- cost base
- chose-in-action
- derivation of income
- discount capital gains
- dividends
- employee savings plan
- employee share schemes
- external property fringe benefit
- Fonds Commun de Placement d'Enterprise
- fringe benefit
- fringe benefits tax
- reduced cost base
- reinvested income

Legislative references:
- ITAA 1936 23L
- ITAA 1936 Div 13A Pt III
- ITAA 1997 Parts 3-1
- ITAA 1997 Parts 3-2
- ITAA 1997 Parts 3-3
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 110-25
- ITAA 1997 112-20(1)
- ITAA 1997 116-20 (1)
- ITAA 1997 Div 110
- ITAA 1997 Div 115
- FBTAA 1986 43
- FBTAA 1986 136
- FBTAA 1986 136(1)
- TAA 1953 Pt IVAAA
- Copyright Act 1968

ATO References
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