

# ***PR 2003/49 - Income tax: deductibility of interest incurred on borrowings under the Leveraged Equities Share Protection Plan***



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This document has changed over time. This is a consolidated version of the ruling which was published on *17 December 2003*



## Product Ruling

### Income tax: deductibility of interest incurred on borrowings under the Leveraged Equities Share Protection Plan

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Participants may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

#### *Preamble*

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product 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.*

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

## No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product. Further, we give 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.

Participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

## Terms of use of this Product Ruling

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This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

## What this Product Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates. In this Ruling the arrangement is the borrowing of moneys from Leveraged Equities Limited ('LEL') to fund the acquisition of shares and/or stapled securities listed on the Australian Stock Exchange and the acquisition of a put option on the terms of a lending and investment facility named the Leveraged Equities Share Protection Plan, which is referred to in this Ruling as the 'SPP'.

2. This Ruling does not address the tax consequences of:

- undertaking limited trades of the acquired shares under the terms of the SPP;
- interest (or other costs) incurred on a loan advanced against an existing portfolio of shares;
- rollover of the protected shares into a new SPP at maturity;
- conversion of all or part of a protected loan to LEL's standard margin loan; and
- investing in any other products promoted by LEL.

### Tax law(s)

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

- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- subsection 110-25(2) (ITAA 1997);
- section 51AAA of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KL (ITAA 1936);
- section 82KZM (ITAA 1936);
- section 82KZMA (ITAA 1936);
- section 82KZMD (ITAA 1936);

- section 82KZME (ITAA 1936);
- section 82KZMF (ITAA 1936); and
- Part IVA (ITAA 1936).

**Class of persons**

4. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed and of deriving assessable income from their involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Investors'.

**Qualifications**

5. The Commissioner rules on the precise arrangement identified in the Ruling.

6. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner and it will be withdrawn or modified.

7. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, the Product Ruling cannot be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the:

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**Date of effect**

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8. This Ruling applies prospectively from 9 July 2003, the date this Ruling is made. However, the 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).

9. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, this Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Note: The Addendum to this Ruling that issued on 17 December 2003 applies on and from 17 December 2003.

## Previous Ruling

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10. This Ruling replaces Product Ruling PR 2002/89, which is withdrawn on and from the date of effect of this Ruling. Product Ruling PR 2002/89 will continue to apply to Investors who entered into the arrangement on or before 8 July 2003.

## Withdrawal

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11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2007. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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12. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- a) application for a Product Ruling dated 16 December 2002 and amended application for a Product Ruling dated 18 February 2003 received from Deloitte Touche Tohmatsu;

- b) documents relating to the SPP terms and conditions consisting of:
  - (i) Marketing brochure (received 1 April 2003);
  - (ii) Application form (including Power of Attorney) (received 18 March 2003);
  - (iii) SPP Agreement (draft received 18 June 2003);
  - (iv) SPP Notice (also referred to as SPP Confirmation), (received 8 April 2003);
  - (v) Notes to the Legal Documentation (received 18 December 2002);
  - (vi) Nominee and Sponsorship Agreement (received 18 December 2002); and
  - (vii) Equitable Mortgage Agreement (received 8 April 2003);;); and
- c) additional information received from Deloitte Touche Tohmatsu on 14 February 2003, 18 March 2003, 17 April 2003, 5 June 2003 and 18 June 2003.

13. The details and aspects of the arrangement subject to this Ruling are summarised as follows:

- a) the SPP is a combined loan and Put Option product for which Investors pay an annual Interest Rate. The Interest Rate comprises the cost of borrowing and the Put Option Premium (see paragraph 13(1)). The total funding cost is the amount calculated by applying the Interest Rate to the amount of the relevant loan;
- b) under the SPP, Investors borrow funds from LEL to finance the purchase of a portfolio of securities in the Investors' own names ('SPP Securities'). Each Investor's portfolio of SPP Securities will consist of shares in a company selected by the Investor from a list of at least 50 Australian publicly listed companies specified by LEL and/or stapled securities. Where the SPP Securities include a stapled security, the stapled security is comprised of share/s and unit/s that are jointly listed for quotation on the Australian Stock Exchange. The purchase price of each security becomes the 'Protected Price', that is, the price to be received on exercise of the Put Option;
- c) the SPP Securities and the Protected Price are set out in the SPP Notice;
- d) the minimum loan amount is \$50,000 for a single stock and \$100,000 for a multiple share portfolio;

- e) the Interest Rate on the funds borrowed is a fixed interest rate, with the interest amount indicated on the SPP Notice. The interest rate is based on a number of factors and varies from stock to stock. Generally, the longer the term the cheaper the overall interest rate;
- f) interest accrues daily, based on a 365 day year. Interest is payable annually in advance;
- g) the term of the loan is either one, two, three, four or five years;
- h) the Investor grants a mortgage to LEL over the SPP Securities. The SPP Agreement provides that in the event of default by the Investor or guarantor, LEL's entitlement to exercise its rights as mortgagee is limited to the proceeds on the sale of the SPP Security;
- i) under the SPP, Investors are protected from a fall in the market value of the SPP Securities by an LEL entity, Leveraged Equities Nominees Limited ('Nominees'), acquiring a Put Option(s) on behalf of the Investor. The Put Option is purchased from an unrelated third party under a Power of Attorney granted to Nominees by the Investor. The rights under the Put Option are not transferable and not assignable without the written consent of LEL;
- j) the purchase of the Put Option(s) is confirmed in the SPP Notice;
- k) if, at expiry of the loan, the market value of a particular tranche of SPP Securities is less than the Protected Price, the Investor can instruct Nominees to exercise the Put Option and sell the SPP Securities under the Power of Attorney. The exercise of the Put Option will result in the SPP Securities realising a net sale price equal to the Protected Price;
- l) in determining the Interest Rate, the cost of acquiring the Put Option ('Put Option Premium') on behalf of the Investor is added. The Put Option Premium varies depending on the SPP Securities selected, the market at the time and the term of the loan. The amount of the Put Option Premium is specified in paragraph 16(b);
- m) expenses in relation to the preparation, execution, amendment, enforcement and preservation of rights may be borne by the Investor. These may include, but are not limited to, share brokerage fees, stamp duty and Financial Institutions Duty on the purchase and sale of the SPP Securities;

- n) the Investor may trade the Investor's shares during the course of the loan. This is limited to two trades per annum. There is a \$30,000 minimum trade in each stock for a \$100,000 portfolio, and a \$40,000 minimum trade in each stock for a portfolio greater than \$100,000. Any proceeds from the sale of shares will be applied on the Investor's behalf to acquire units in a widely held unit trust of the type described in subsection 82KZME(5)(b)(iii) of the ITAA 1936 until the termination of the SPP or used to repurchase an identical number and type of shares;
- o) seven working days before expiry of the SPP, Investors must notify LEL which of the following options they elect for the SPP Securities:
  - (i) repay the entire loan using their own funds and retain title to the SPP Securities;
  - (ii) sell the Protected Security via their usual broker prior to close of business on the third working day before the expiry date, as long as the net sales price realised is more than the Protected Price and the contract note is received by LEL prior to the expiry date;
  - (iii) request LEL to enter into a new SPP with respect to that protected security;
  - (iv) convert that part of the loan outstanding under the SPP to a standard Leveraged Equities Margin Lending Facility, or
  - (v) where the market value of a particular tranche of SPP Securities is less than the Protected Price relating to that tranche at the expiry date, instruct Nominees to exercise the Put Option and sell the SPP Securities under the Power of Attorney. The exercise of the Put Option will result in the SPP Securities realising a net sale price equal to the Protected Price; and
- p) any dividends paid in respect of the SPP Securities are paid to the Investor.

### **The Participants**

14. LEL is the provider of the loans to Investors under the SPP to fund the acquisition of the SPP Securities.



15. Investors in the SPP may include individuals, companies and trusts.

## Ruling

16. Subject to paragraphs 2 and 17 of this Ruling:
- a) the SPP interest charge allowable under section 8-1 of the ITAA 1997 is the amount that does not exceed the lower of the Reserve Bank Bulletin Indicator Lending Rates for Personal Unsecured Loans – fixed or the relevant percentage of the Interest Rate charged by LEL under the SPP Agreement as follows:
    - (i) 60% (for loans with a term of one year);
    - (ii) 72.5% (for loans with a term of two years);
    - (iii) 80% (for loans with a term of three years);
    - (iv) 82.5% (for loans with a term of four years); or
    - (v) 85% (for loans with a term of five years);
  - b) the difference between the total SPP interest charge and the deductible amount as calculated under paragraph 16(a) is an instalment of the Put Option Premium payable. This instalment payment is not deductible and becomes part of the cost base of the Put Option under subsection 110-25(2) of the ITAA 1997;
  - c) section 51AAA of the ITAA 1936 will not apply to deny an Investor a deduction for the SPP interest charge allowable under section 8-1 of the ITAA 1997;
  - d) section 82KL of the ITAA 1936 will not apply to deny deductibility of the SPP interest charge allowable under section 8-1 of the ITAA 1997;
  - e) section 82KZMF of the ITAA 1936 will not apply to set the amount and timing of deductions for the SPP interest charge allowable under section 8-1 of the ITAA 1997;
  - f) section 82KZM of the ITAA 1936 will not apply to deny the Investor immediate deductibility of any part of the SPP interest charge allowable under section 8-1 of the ITAA 1997 where at least one of the following applies for the year of income:
    - (i) the Investor is an STS taxpayer; or

- (ii) the Investor is an individual who does not incur the interest charge in carrying on a business;
- g) sections 82KZMA and 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for the SPP interest charge that is deductible to an Investor (other than an STS taxpayer for the year of income) who is a taxpayer that is not an individual and does not carry on a business; and
- h) the anti-avoidance provisions contained in Part IVA of the ITAA 1936 will not be applied to deny deductibility of the SPP interest incurred by the Investor in respect of borrowings used to fund the purchase of SPP Securities.

## **Assumptions**

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

- a) the Investors are Australian residents;
- ba) at all times during the arrangement, where the stapled security includes a unit in a trust, the trust satisfies the requirements of subparagraph 82KZME(5)(b)(iii) of the ITAA 1936;
- b) the Investors are not traders in investments and would not be treated for taxation purposes as either trading in SPP Securities or carrying on a business of investing in SPP Securities. Further, the Investors do not otherwise hold the SPP Securities as revenue assets;
- c) the interest that is prepaid by Investors is paid for a maximum period of 12 months or less that ends on or before the last day of the income year following the expenditure year;
- d) the dominant purpose of an Investor in entering the arrangement is to derive assessable income comprising dividends and capital gains from their investment in the SPP Securities;
- e) the Investors will not prepay the Loan prior to maturity or terminate the arrangement early;
- f) all dealings by the Investors and LEL will be at arm's length; and

- g) the arrangement ruled on will be executed in the manner described in the 'Arrangement' section of this Ruling .

## Explanation

### Section 8-1 of the ITAA 1997

18. The interest paid on a borrowing used to acquire income producing assets such as shares is generally treated as deductible under section 8-1 where it is expected that dividends or other assessable income would be derived from the investment (see Taxation Ruling TR 95/33).

19. In the arrangement under this Product, part of the interest payments under the loan is allocated to the consideration for the Put Option (being the 'Put Option Premium'). The Put Option Premium ensures that the borrower is protected from liability to repay the principal if the market value of the SPP Securities falls below their original purchase price. The Put Option Premium is not deductible under section 8-1.

20. Investors should only claim deductions equal to the amount of interest on the loan determined in paragraph 16(a).

### Cost base of Put Option – subsection 110-25(2) of the ITAA 1997

21. That amount which is not deductible to the Investor under section 8-1 of the ITAA 1997 forms the cost base of a Put Option under subsection 110-25(2) and constitutes an asset for capital gains tax purposes which is separate and in addition to the other rights created under the SPP as described in this Ruling.

### Section 51AAA of the ITAA 1936

22. By entering into the SPP it is contemplated that an Investor will derive assessable income by the receipt of dividends and capital gains. Accordingly, the interest would have been deductible under section 8-1 of the ITAA 1997 notwithstanding the inclusion of a net capital gain in assessable income. Accordingly, section 51AAA has no application to an Investor in the SPP.

### Section 82KL of the ITAA 1936

23. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Insufficient additional benefits will be provided to trigger the

application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

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

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

### ***Subdivisions 328-F and 328-G of the ITAA 1997 – STS taxpayer***

25. An Investor will be an STS taxpayer for an income year if the Investor is eligible to be an STS taxpayer for that year and the Investor notifies the Commissioner of the choice to become such a taxpayer for that year.

26. An Investor will be eligible to be an STS taxpayer for an income year if the Investor carries on a business and the STS average turnover of the business and related business for that year is less than \$1 million and the business and related businesses have depreciating assets with a total adjustable value below \$3 million at the end of that year.

### ***The eligible service period for the purposes of Subdivision H of Division 3 of Part III of the ITAA 1936***

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

***Sections 82KZME and 82KZMF of the ITAA 1936: prepaid expenditure and 'tax shelter' arrangements***

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

29. For the purposes of section 82KZME, 'agreements' are broadly defined to include an entire arrangement of which a contract may form part. Under subsection 82KZME(4), the relevant 'agreement' is all the contractual arrangements and activities associated with the participation in the SPP, including the financing, share purchase, shareholding and disposal arrangements.

30. Exception 1, as contained in subsection 82KZME(5), applies to exclude the interest incurred on borrowings under the SPP from the operation of section 82KZMF, as:

- a) the prepaid interest expenditure under the SPP is incurred in respect of money borrowed to acquire shares that are listed for quotation on the Australian Stock Exchange;
- b) the Investor can reasonably be expected to obtain dividends from the investment;
- c) the Investor will not obtain any other kind of assessable income from the investment, except for capital gains; and
- d) all aspects of the SPP are at arm's length.

31. Deductibility of the expenditure must therefore be considered under the prepayment rules outlined in paragraphs 32 to 37.

***Section 82KZM of the ITAA 1936: prepaid expenditure incurred by STS taxpayers and individuals incurring non-business expenditure***

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

- a) an STS taxpayer for the year of income; or
- b) an individual and the expenditure is not incurred in carrying on a business.

33. The expenditure must not be excluded expenditure and must be incurred otherwise than in carrying on a business. Section 82KZM applies if the eligible service period for the expenditure is longer than 12 months, or the eligible service period for the expenditure is 12 months or shorter but ends after the last day of the year of income

after the one in which the expenditure was incurred and the expenditure would otherwise be immediately deductible under section 8-1 of the ITAA 1997.

34. As the eligible service period in relation to the deductible interest payment under the SPP 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 will have no application to Investors who are STS taxpayers for the year of income, or to Investors who are individuals and the expenditure is not incurred in carrying on a business. Investors who satisfy these tests will be able to claim an immediate deduction for the allowable interest incurred.

***Sections 82KZMA and 82KZMD of the ITAA 1936: prepaid non-business expenditure incurred by non-individual and non-STs taxpayers***

35. Sections 82KZMA and 82KZMD set the amount and timing of deductions for expenditure for an Investor (other than an STS taxpayer for the year of income) who is a taxpayer that is not an individual and does not carry on a business.

36. 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.

37. For these Investors, the deduction for prepaid interest on the loan will be apportioned over the relevant interest payment period.

**Part IVA**

38. Provided that the SPP arrangement ruled on is entered into and carried out as disclosed in this Ruling, it is accepted that the arrangement is a normal commercial transaction and Part IVA will not apply.

## **Detailed contents list**

39. Below is a detailed contents list for this Product Ruling:

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**Commissioner of Taxation**

9 July 2003

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Not previously issued in draft form.	- prepaid expenses
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<i>Related Rulings/Determinations:</i>	- public rulings
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TR 92/20; TR 97/16; TD 93/34;	- taxation administration
TR 95/33.	- tax avoidance
<i>Subject references:</i>	<i>Legislative references:</i>
- financial products	- ITAA 1936 51AAA

- |                                       |                          |
|---------------------------------------|--------------------------|
| - ITAA 1936 Part III, Div 3, Subdiv H | - ITAA 1936 82KZMF       |
| - ITAA 1936 82KL                      | - ITAA 1936 Part IVA     |
| - ITAA 1936 82KZL(1)                  | - ITAA 1997 8-1          |
| - ITAA 1936 82KZL(2)(a)               | - ITAA 1997 110-25       |
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| - ITAA 1936 82KZME(5)(b)(iii)         |                          |
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## ATO references

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