



PR 2008/26 - Income tax: deductibility of interest incurred on borrowings in relation to the Macquarie Fusion Funds - June 2008 Offer

 This cover sheet is provided for information only. It does not form part of *PR 2008/26 - Income tax: deductibility of interest incurred on borrowings in relation to the Macquarie Fusion Funds - June 2008 Offer*

 This document has changed over time. This is a consolidated version of the ruling which was published on *20 March 2013*



Product Ruling

Income tax: deductibility of interest incurred on borrowings in relation to the Macquarie Fusion Funds – June 2008 Offer

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Ruling	17
Scheme	18
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	23
Appendix 2:	
Detailed contents list	49

ⓘ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

[Note: *This is a consolidated version of this document. Refer to the ATO 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 Tax Office **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.

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling part apply to the defined class of entities, who participate in the scheme to which this Ruling relates.
2. In this Ruling the scheme is the investment in a Macquarie Fusion Fund using a limited recourse loan (Investment Loan) made by Macquarie Bank Ltd (the Bank); and a further borrowing from the Bank, if it occurs, used to fund the payment of interest (Interest Loan).
3. This Ruling does not deal with the tax consequences of:
 - using a Profit Loan;
 - fees paid by a Fusion Fund – Equity Trust or the Fusion Fund – Cash Trust; and
 - acquiring a put option without also drawing down an Investment Loan.

Class of entities

4. The class of entities who can rely on this Product Ruling consists of those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is published and which execute relevant Agreements mentioned in paragraph 18 of this Ruling on or before 30 June 2008. They must have a purpose of staying in the scheme until it is completed (that is being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement. These entities are referred to as Investor/s.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product 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 product may contravene the provisions of SISA 1993.

Qualifications

6. The class of entities defined in this Product Ruling may rely on it provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 18 to 21 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

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

8. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Attorney General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

9. This Product Ruling applies prospectively from 19 March 2008, the date this Ruling is published. It therefore applies to the specified class of entities that enter into the scheme from 1 May 2008 until 30 June 2008, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application for schemes entered into during the period of application.

10. 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;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

12. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

13. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Changes in the law

14. Although this Product Ruling deals with the 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 the Ruling and, to that extent; this Product Ruling will have no effect.

15. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

16. 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 Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

Ruling

17. Subject to the assumptions in paragraph 22 of this Ruling:
- (a) an amount equal to the interest incurred on the Investment Loan, in an income year, 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) of the *Income Tax Assessment Act 1997* (ITAA 1997) or subsection 247-75(1) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), as applicable, will be deductible under section 8-1 of the ITAA 1997;
 - (b) where the Investor enters into the Investment Loan on or after 1 May 2008 but at or before 7.30 pm by legal time in the Australian Capital Territory on 13 May 2008, under subsection 247-75(1) of the IT(TP)A 1997, the

amount reasonably attributable to the cost of capital protection under Division 247 of the IT(TP)A 1997, in an income year, is the amount by which the interest incurred on the Investment Loan exceeds an amount representing the interest that would have been incurred for the income year on the Investment Loan if the following interest rates applied:

- where the interest rate incurred on the Investment Loan is at a fixed rate for all or part of the term of the loan and that fixed rate is applicable to the loan for all or part of the income year – the relevant rate is the Reserve Bank of Australia’s Indicator Lending Rate for Personal Unsecured Loans – Variable Rate (the ‘personal unsecured loan rate’) at the first time an interest amount is incurred during the term of the loan, or the relevant part of the term of the loan (subsection 247-75(2) of the IT(TP)A 1997); and
 - where the interest rate incurred on the Investment Loan is at a variable rate for all or part of the term of the loan and a variable rate is applicable to the loan for all or part of the income year – the relevant rate is the average of the personal unsecured loan rates published by the Reserve Bank of Australia during the relevant part of the income year (subsection 247-75(3) of the IT(TP)A 1997);
- (ba) where the Investor enters into the Investment Loan after 7.30 pm by legal time in the Australian Capital Territory on 13 May 2008 and on or before 30 June 2008, under subsection 247-20(3) of the ITAA 1997, the amount reasonably attributable to the cost of capital protection under Division 247 of the ITAA 1997, in an income year, is the amount by which the interest incurred on the Investment Loan exceeds an amount representing the interest that would have been incurred for the income year on the Investment Loan if the following interest rates applied:
- where the interest rate incurred on the Investment Loan is at a fixed rate for all or part of the term of the loan and that fixed rate is applicable to the loan for all or part of the income year – the relevant rate is the sum of the Reserve Bank of Australia’s Indicator Lending Rate for Standard Variable Housing Loans and 100 basis points (the ‘adjusted loan rate’) at the first time an interest amount is incurred during the term of the loan, or the

- relevant part of the term of the loan (subsections 247-20(4) and (5) of the ITAA 1997); and
- where the interest rate incurred on the Investment Loan is at a variable rate for all or part of the term of the loan and a variable rate is applicable to the loan for all or part of the income year – the relevant rate is the average of the adjusted loan rates during the relevant part of the income year (subsections 247-20(5) and (5A) of the ITAA 1997);
- (c) the amount reasonably attributable to the cost of capital protection under Division 247 of the ITAA 1997 or Division 247 of the IT(TP)A 1997 (the Excess Amount), as applicable and as worked out under paragraph 17(b) or 17(ba) of this Ruling, is treated as if it were incurred only for a notional put option under subsection 247-20(6) of the ITAA 1997 (Division 247 Put Option). The Excess Amount (if any) is not deductible under section 8-1 of the ITAA 1997;
- (ca) Division 247 of the ITAA 1997 and IT(TP)A 1997 will not apply to the Interest Loan. An amount equal to the interest incurred on the Interest Loan will be deductible under section 8-1 of the ITAA 1997;
- (d) section 51AAA of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to deny an Investor a deduction for the interest allowable under section 8-1 of the ITAA 1997;
- (e) section 82KL of the ITAA 1936 will not apply to deny deductibility of the interest allowable under section 8-1 of the ITAA 1997;
- (f) section 82KZMF of the ITAA 1936 will not apply to set the amount and timing of deductions for the prepaid interest allowable under section 8-1 of the ITAA 1997 in respect of borrowings under an Investment Loan;
- (g) section 82KZM of the ITAA 1936 will not apply to deny an Investor immediate deductibility of the prepaid interest on an Investment Loan allowable under section 8-1 of the ITAA 1997 where at least one of the following applies for the year of income:
- the Investor is a small business entity as defined in subsection 328-110(1) of the ITAA 1997; or
 - the Investor is an individual who does not incur that expenditure in carrying on a business;

- (h) sections 82KZMA and 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for prepaid interest on borrowings under an Investment Loan that is allowable under section 8-1 of the ITAA 1997 to an Investor (other than a small business entity for the year of income) who is a taxpayer that is not an individual and does not carry on a business;
- (i) if there is an Excess Amount as described in paragraph 17(c) of this Ruling, and the Investor invokes the capital protection under the limited recourse Investment Loan, the Investor is taken to have exercised the Division 247 Put Option, pursuant to subsection 247-30(1) of the ITAA 1997. The Excess Amount will form part of the cost base and the reduced cost base of the Investor's units in the Fund under section 134-1 of the ITAA 1997. Any capital gain or capital loss upon the exercise of the Division 247 Put Option will be disregarded by virtue of section 134-1(4);
- (j) if there is an Excess Amount as described in paragraph 17(c) of this Ruling, and the Investor does not invoke the capital protection under the limited recourse Investment Loan, the Division 247 Put Option is taken to have expired under subsection 247-30(2). The Excess Amount will form part of the cost base (under subsection 110-25(2) of the ITAA 1997) and the reduced cost base (under section 110-55 of the ITAA 1997) of the Division 247 Put Option;
- (k) a CGT event will occur under section 104-25 of the ITAA 1997 if the Division 247 Put Option is taken to have expired. The Investor will make a capital loss equal to the reduced cost base of the Division 247 Put Option;
- (l) the Loan Establishment Fee paid, if applicable, is deductible under section 25-25 of the ITAA 1997; and
- (m) the anti-avoidance provisions in Part IVA of the ITAA 1936 will not be applied to deny the deductibility of the interest incurred by the Investor in respect of borrowings under an Investment Loan or an Interest Loan.

Scheme

18. The scheme that is the subject of this Ruling is described below. The scheme is incorporated within the following documents:

- Application for a Product Ruling received on 4 February 2008 from Macquarie Financial Products Management Limited as responsible entity (Responsible Entity or RE) for each Fusion Fund – Equity Trust (Equity Trust) and the Fusion Fund – Cash Trust (Cash Trust);

- Draft Product Disclosure Statement for the Macquarie Fusion Funds received on 4 February 2008 and dated 12 March 2008 (the PDS);
- Loan and Security Agreement (included in the PDS at Appendix C);
- Constitution for an Equity Trust. The constitution for each Equity Trust is the same in all material respects other than in the description of the public unit trust or portfolio of Australian public unit trusts (Underlying Managed Fund) into which the Equity Trust will invest; and
- Constitution for the Cash Trust.

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

19. The documents listed in paragraph 18 of this Ruling are those that an Investor may enter into. 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. The effect of these agreements is summarised as follows.

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

Overview

21. Following is a summary of the scheme.

- (a) an investment in a Macquarie Fusion Fund involves the subscription for units in one of a number of Equity Trusts together with the subscription for corresponding units in the Cash Trust. The combined investment in an Equity Trust and the Cash Trust is referred to as units in a 'Fund';
- (b) investors subscribe for units in a Fund pursuant to the PDS. Investors will initially be required to invest 99.99% of their investment amount in one or more Equity Trusts and 0.01% of their investment in the Cash Trust;
- (c) all units in an Equity Trust will be issued at a price based on the prevailing net asset value of that Equity Trust and will be issued as fully paid units;

- (d) each Equity Trust will invest all application monies in an existing Underlying Managed Fund. Each Equity Trust will invest in a different Underlying Managed Fund. The Underlying Managed Funds are not listed on any stock exchange;
- (e) all units in the Cash Trust will be issued as partly paid units with a paid up amount of \$0.0001 and an effective unpaid amount of \$1.4999;
- (f) the Cash Trust will be divided into pools of assets (Property Pools), each consisting of fixed term deposits or similar investments. There will be a different Property Pool for each class of units in the Cash Trust. Each class of unit will correspond to units in an Equity Trust issued on particular dates. All units in a particular class will have identical rights to the income and capital of the Property Pool to which the class relates;
- (g) the RE will manage an Investor's investment in the Equity Trust and the Cash Trust according to a technique known as 'Threshold Management'. This technique attempts to achieve the result that the value of an Investor's combined investment in the Equity Trust and the Cash Trust, including units acquired by the reinvestment of income, at the conclusion of the period ending 28 June 2013 (the 'Threshold Management Period') will be at least equal to the amount of their combined initial investment. The achievement of that result is, however, not guaranteed;
- (h) under Threshold Management, if the value of an Investor's units in a Fusion Fund falls below a sell trigger the Investor is deemed to have given a redemption request in respect of some of the Investor's units in the Equity Trust. The RE will redeem some of the Investor's units in that Equity Trust and apply the proceeds of that redemption to further pay up an amount on that Investor's corresponding units in the Cash Trust;
- (i) alternatively, if the value of an Investor's units in a Fusion Fund rises above a buy trigger, the RE may make a return of capital on the Investor's units in the Cash Trust and apply the proceeds to subscribe for further units in the corresponding Equity Trust on behalf of the Investor. This return of capital increases the amount which the RE, in accordance with Threshold Management, can call up on those units at a later time, hence fixing the effective maximum net paid up amount on the Cash Units at \$1.50 per unit;
- (j) the Equity Trust will invest all monies received pursuant to Threshold Management in the relevant Underlying Managed Fund;

- (k) the Cash Trust will invest all further amounts paid up in respect of its units pursuant to Threshold Management in fixed term deposits or similar investments;
- (l) the RE will be entitled to a fee for acting as responsible entity of each Equity Trust equal to a certain percentage per annum of the value of the assets of that Equity Trust. The RE will not be entitled to a fee for acting as responsible entity of the Cash Trust;
- (m) in the exercise of Threshold Management, the RE may require an Investor to reinvest some or all of their distribution or redemption payments into new units in the Equity Trust or into capital subscriptions to further pay up units in the Cash Trust;
- (n) each Equity Trust and the Cash Trust will be an open ended trust with a termination date no later than 80 years from its commencement;
- (o) none of the Equity Trusts nor the Cash Trust will be listed;
- (p) there are three credit facilities available to finance an investment in a Fund. One is a limited recourse Investment Loan to enable Investors to fund the initial subscription for their units in a Fund. The second is a full recourse Interest Loan which allows the Investor to fund the interest payment on the Investment Loan for the first full financial year (if the Investor prepays that interest and wishes to take out an Interest Loan to fund that prepayment). Approved borrowers may be invited to apply for further Interest Loans to fund prepaid interest obligations on Investment Loans in subsequent periods;
- (q) clause 20 of the Loan and Security Agreement provides for limited recourse for the Bank in respect of the principal owing on an Investment Loan, but only if the Investment Loan stays on foot until the Maturity Date and is repaid from the proceeds of redemption of an Investor's units in a Fusion Fund on that date. If the redemption of an Investor's units in a Fusion Fund occurs at (and not before) the Maturity Date, the Bank will be unable to take any action to seek to recover any Investment Loan principal over and above the redemption proceeds;

- (r) an investor will not be obliged to redeem units in a Fusion Fund on the Maturity Date to repay an Investment Loan. It will be open to an Investor to repay that Investment Loan from their own sources and continue to hold its units in a Fusion Fund;
- (s) the Investment Loan will end on 28 June 2013 (the 'Maturity Date'). The interest rate will be determined by the Bank prior to the drawdown of the Investment Loan and in some cases may be varied during the term of the Investment Loan;
- (t) an investor has 3 interest rate and payment options:
 - (i) variable interest is paid monthly in arrears for the term of the Investment Loan at an interest rate that may be varied each month. Investors in this option may be given the choice to pay their interest annually in advance from 30 June 2009;
 - (ii) fixed to 29 June 2009. Interest is paid annually in advance on each 30 June for the term of the Investment Loan at an interest rate which is fixed until 29 June 2009 and which may be varied each 30 June thereafter. Investors who use this option may be given the choice to pay their interest monthly in arrears from 30 June 2009; and
 - (iii) fixed for the term. Interest is paid annually in advance on each 30 June for the term of the Investment Loan at an interest rate which is fixed for the term;
- (u) the interest rate on an Interest Loan will be determined by the Bank prior to drawdown of that loan. The term of an Interest Loan equals the term of the prepaid interest period on the Investment Loan and is limited to twelve months. An Interest Loan is repayable by way of twelve monthly in arrears principal and interest repayments over the prepaid interest period on the Investment Loan immediately following the date the Interest Loan is borrowed. Under the Interest Loan there is no limitation on the recourse of the Bank. Repayment of the Interest Loan prior to its maturity may incur break costs; and
- (v) investors may also be required to pay a Loan Establishment Fee to the Bank upon successful application for an Investment Loan.

Assumptions

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

- (a) the Investor is an Australian resident for taxation purposes;
- (b) the dominant purpose of the Investor in entering into the scheme is to derive assessable trust income or both assessable trust income and a capital gain from their investment in a Fund;
- (c) the Investors are not traders in investments and are not treated for taxation purposes as trading in interests in a Fund, carrying on a business of investing in a Fund, or holding their interests in a Fund as trading stock or as a revenue asset;
- (d) in respect of any interest amounts paid in advance under the Investment Loan, these may be prepaid, but only in relation to a payment period of 12 months or less that ends on or before the last day of the income year following the expenditure year;
- (e) the scheme will be executed in the manner described in the 'Scheme' section of this Ruling;
- (f) all dealings between the Investors and the Bank will be at arm's length;
- (g) at the time of the prepayment each of the two unit trusts comprising a Fund will have at least 300 unit holders;
- (h) neither the Investment Loan nor the Interest Loan will extend beyond their original maturity dates; and
- (i) the Investors will not choose to repay the Investment Loan or the Interest Loan prior to their maturity or terminate the scheme early.

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

23. Interest paid on a borrowing used to acquire income producing assets, such as units in a unit trust, is generally treated as deductible under section 8-1 of the ITAA 1997 where it is expected that assessable income would be derived from the investment (see Taxation Ruling TR 95/33 which relates to section 51(1) of the ITAA 1936 which was the predecessor of section 8-1 of the ITAA 1997).

24. Division 247 of the ITAA 1997 applies to the scheme as it is a capital protected borrowing (CPB). The Investor uses the borrowing to acquire an investment in the Fusion Fund and the Investor is wholly or partly protected against a fall in the market value of the investment. The investment in the Fusion Fund represents beneficial interests in unit trusts.

25. Division 247 of the IT(TP)A 1997 sets out a methodology for reasonably attributing the cost of capital protection incurred by a borrower under a CPB entered into on or after 1 May 2008 but on or before 7.30 pm by legal time in the Australian Capital Territory on 13 May 2008 (section 247-75 of the IT(TP)A 1997). Division 247 of the IT(TP)A 1997 ignores any amount which is not in substance for capital protection or interest, in calculating the cost of capital protection (subsection 247-75(1) of the IT(TP)A 1997).

25A. Division 247 of the ITAA 1997 sets out a methodology for reasonably attributing the cost of capital protection incurred by a borrower under a CPB entered into after 7.30 pm by legal time in the Australian Capital Territory on 13 May 2008 (section 247-20 of the ITAA 1997). Division 247 of the ITAA 1997 ignores any amount which is not in substance for capital protection or interest, in calculating the cost of capital protection (subsection 247-20(3) of the ITAA 1997).

26. Where a borrower enters into an Investment Loan, the amount reasonably attributable to capital protection, is worked out under the method statement in subsection 247-75(1) of the IT(TP)A 1997 or subsection 247-20(3) of the ITAA 1997, as applicable and as set out in paragraph 17(b) or 17(ba) of this Ruling.

27. Under step 1 of the method statement, the total amount incurred by the Investor under or in respect of the CPB for the income year is the interest incurred on the Investment Loan for the income year.

28. 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 total amount of interest incurred on the Investment Loan will be deductible.

29. 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 Excess Amount is reasonably attributable to the cost of capital protection and is treated as if it were incurred only for a Division 247 Put Option. The Division 247 Put Option is a capital asset for an investor in the Fusion Fund. Therefore, the amount reasonably attributable to the cost of capital protection is capital in nature and not deductible under section 8-1 of the ITAA 1997.

29A. There is no element of capital protection connected with the Interest Loan. No part of the interest incurred by the Investor on the Interest Loan for the income year will therefore be attributable to the cost of capital protection.

Section 51AAA

30. Under the scheme, it is contemplated that over the period of an Investor's involvement there will be assessable income derived by way of distributions of the net income of a Fund and net capital gains. As the interest incurred on the Investment Loan, to the extent that it is not reasonably attributable to the cost of capital protection, and the interest incurred on the Interest Loan will be deductible under section 8-1 of the ITAA 1997, notwithstanding the inclusion of a net capital gain in assessable income, section 51AAA of the ITAA 1936 has no application to an Investor.

Section 82KL

31. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1936. 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

32. Subdivision H of Division 3 of Part III 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 carrying on a business, whether the Investor is a 'small 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 of expenditure that are of a capital nature.

Subdivision 328-C – small business entities

33. Under Subdivision 328-C of the ITAA 1997, an Investor will be a small business entity for an income year if the Investor carries on a business and either:

- the Investor carried on a business in the previous income year and the Investor's aggregated turnover for the previous year was less than \$2 million; or
- the Investor's aggregated turnover in the current income year is likely to be less than \$2 million.

The eligible service period for the purposes of Subdivision H of Division 3 of Part III

34. The prepaid interest charges on the Investment Loan allowable under section 8-1 of the ITAA 1997 are 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 Division 3 of Part III 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, which is 12 months, and not to the period of the loan.

Sections 82KZME and 82KZMF – prepaid expenditure and tax shelter 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' 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 arrangement 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 the participation in a Fund, including the financing and management arrangements.

37. Exception 1, as contained in subsection 82KZME(5) of the ITAA 1936, applies to exclude the interest allowable under section 8-1 of the ITAA 1997 incurred on borrowings under the

Investment Loan, from the operation of section 82KZMF of the ITAA 1936 as:

- the documents and facts described in the scheme at paragraphs 18 to 21 of this Ruling establish that Investors have fixed entitlements to all of the income and capital of an Equity Trust and the Cash Trust. Therefore, the prepaid interest allowable under section 8-1 of the ITAA 1997 is incurred in respect of money borrowed to acquire units in a widely held trust as described in subparagraph 82KZME(5)(b)(iii) of the ITAA 1936;
- the Investor can reasonably expect to obtain 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 scheme are at arm's length.

38. Deductibility of expenditure must therefore be considered under the prepayment rules outlined in paragraphs 39 to 44 of this Ruling.

Section 82KZM – prepaid expenditure incurred by small 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 for the year of income; or
- a taxpayer that is an individual and the expenditure is not incurred in carrying on a business.

40. The expenditure must not be excluded expenditure and must be incurred otherwise than in carrying on a business. 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 of the ITAA 1997.

41. As the eligible service period in relation to a deductible interest payment under an Investment Loan is not longer 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 who are small business entities 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 interest allowable under section 8-1 of the ITAA 1997 incurred under an Investment Loan.

Sections 82KZMA and 82KZMD – prepaid non-business expenditure incurred by non-individuals and non-small business entities

42. Sections 82KZMA and 82KZMD of the ITAA 1936 set the amount and timing of deductions for expenditure for a taxpayer (other than a small business entity for the year of income) that 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 wholly done within the expenditure year.

44. For these Investors, the deduction for prepaid interest on the Investment Loan will be apportioned over the relevant interest payment period.

Section 110-25 and Division 134 – cost base of the Division 247 Put Option

45. If there is an Excess Amount under the method statement in subsection 247-75(1) of the IT(TP)A 1997 or subsection 247-20(3) of the ITAA 1997, as applicable, and at the Maturity Date the Investor invokes capital protection, the Investor is taken to have exercised the Division 247 Put Option pursuant to subsection 247-30(1) of the ITAA 1997. Any capital gain or capital loss on exercise of the Division 247 Put Option is disregarded (section 134-1(4) of the ITAA 1997). The second element of the Investor's cost base and the reduced cost base for the units in the Fund will include the Excess Amount which is taken to have been incurred by the Investor to acquire the Division 247 Put Option (subsection 134-1(1) of the ITAA 1997, item 2).

46. If there is an Excess Amount under the method statement in subsection 247-75(1) of the IT(TP)A 1997 or subsection 247-20(3) of the ITAA 1997, as applicable, and the Investor repays the Investment Loan from their own funds, the Investor will not have invoked the capital protection of the Investment Loan. Where the capital protection is not invoked, the Division 247 Put Option is taken to have expired (subsection 247-30(2) of the ITAA 1997). The Excess Amount will form part of the cost base (under subsection 110-25(2) of the ITAA 1997) and the reduced cost base (under section 110-55 of the ITAA 1997) of the Division 247 Put Option. Where the Division 247 Put Option expires (because it is not invoked), CGT Event C2 will arise (paragraph 104-25(1)(c) of the ITAA 1997). The capital proceeds on the lapsing Put Option will be nil, therefore the capital loss will be equal to the reduced cost base of the Division 247 Put Option.

Section 25-25 – Loan Establishment Fee

47. The Loan Establishment Fee, if applicable, incurred by an Investor upon successful application for an Investment Loan will be an allowable deduction pursuant to section 25-25 of the ITAA 1997. The Loan Establishment Fee will be deductible on a straight line basis over the period of the shorter of:

- the term of the Investment Loan; or
- five years.

Part IVA

48. Provided that the scheme ruled on is entered into and carried out as described (see the Scheme section of this Ruling), it is accepted that the scheme is an ordinary commercial transaction and that Part IVA of the ITAA 1936 will not apply.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Class of entities	4
Superannuation Industry (Supervision) Act 1993	5
Qualifications	6
Date of effect	9
Changes in the law	14
Note to promoters and advisers	16
Ruling	17
Scheme	18
Overview	21
Assumptions	22
Appendix 1 – Explanation	23
Section 8-1 and Division 247	23
Section 51AAA	30
Section 82KL	31
Subdivision H of Division 3 of Part III	32
Subdivision 328-C – small business entities	33
The eligible service period for the purposes of Subdivision H of Division 3 of Part III	34
Sections 82KZME and 82KZMF – prepaid expenditure and tax shelter arrangements	35
Section 82KZM – prepaid expenditure incurred by small business entities and individuals incurring non-business expenditure	39
Sections 82KZMA and 82KZMD – prepaid non-business expenditure incurred by non-individuals and non-small business entities	42
Section 110-25 and Division 134 – cost base of the Division 247 Put Option	45
Section 25-25 – Loan Establishment Fee	47
Part IVA	48
Appendix 2 – Detailed contents list	49

References

Previous draft:

Not previously issued as a draft

- ITAA 1997 8-1
- ITAA 1997 25-25
- ITAA 1997 104-25

Related Rulings/Determinations:

TR 95/33

- ITAA 1997 104-25(1)(c)
- ITAA 1997 110-25
- ITAA 1997 110-25(2)

Subject References:

- financial products
- interest expense
- interest income
- prepaid expenses
- product rulings
- public rulings
- taxation administration

- ITAA 1997 110-55
- ITAA 1997 Div 134
- ITAA 1997 134-1
- ITAA 1997 134-1(1)
- ITAA 1997 134-1(4)
- ITAA 1997 Div 247
- ITAA 1997 247-20
- ITAA 1997 247-20(3)
- ITAA 1997 247-20(4)
- ITAA 1997 247-20(5)

Legislative References:

- ITAA 1936 51AAA
- ITAA 1936 82KL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZL(2)(a)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(5)
- ITAA 1936 82KZME(5)(b)(iii)
- ITAA 1936 82KZMF
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 Pt IVA

- ITAA 1997 247-20(5A)
 - ITAA 1997 247-20(6)
 - ITAA 1997 247-30(1)
 - ITAA 1997 247-30(2)
 - IT(TP)A 1997 Div 247
 - IT(TP)A 1997 247-75
 - IT(TP)A 1997 247-75(1)
 - IT(TP)A 1997 247-75(2)
 - IT(TP)A 1997 247-75(3)
 - ITAA 1997 Subdiv 328-C
 - ITAA 1997 328-110(1)
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - Copyright Act 1968
 - SISA 1993
-

ATO references

NO: 2007/18247

ISSN: 1441-1172

ATOlaw topic: Income Tax ~~ Product ~~ finance