


PR 2010/16 - Income tax: deductibility of interest in relation to investment in Macquarie Flexi 100 Trust June 2010 Offer (Class H to P Units) - full recourse borrowings

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Product Ruling

Income tax: deductibility of interest in relation to investment in Macquarie Flexi 100 Trust June 2010 Offer (Class H to P Units) – full recourse borrowings

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

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

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

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

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

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

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

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling the scheme is the investment in a Macquarie Flexi 100 Trust (the Fund) using a full recourse loan (Full Recourse Investment Loan) made by Macquarie Specialist Investments Lending Limited (the Loan Provider) and a further borrowing from the Loan Provider, if it occurs, used to fund the payment of interest on the Full Recourse Investment Loan (Interest Loan). The Full Recourse Investment Loan and Interest Loan are in the form of the Loan and Security Agreement contained in section 5.2 of Part II of the Product Disclosure Statement (PDS) that forms part of the scheme.
3. This Ruling does not deal with the taxation consequences of:
 - the 'Walk-Away' feature (see subparagraph 20(n) of this Ruling);
 - the termination of the scheme as described in subparagraph 20(k) of this Ruling;
 - fees paid by the Fund;
 - fees paid to the Responsible Entity; or
 - any upfront and trailing commissions, including any arrangement whereby commissions are rebated by a financial adviser to an Investor (see subparagraphs 20(o) and 20(p) of this Ruling).

Class of entities

4. This part of the Product Ruling specifies which entities:
 - are subject to the taxation obligations; and
 - can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

5. 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 17 of this Ruling on or before 30 June 2010. 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 have a realistic expectation of deriving assessable income from the investment that exceeds the expenditure incurred from this involvement. These entities are referred to as Investor/s.

6. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- do not hold their units for the full term, or who do not intend to derive assessable income from their units;
- are accepted to participate in the scheme specified below and which execute relevant Agreements mentioned in paragraph 17 of this Ruling before this Ruling is published or after 30 June 2010;
- exercise the 'Walk-Away' feature (see subparagraph 20(n) of this Ruling);
- choose a Limited Recourse Investment Loan to fund their investment in the Fund;
- are superannuation fund trustees; or
- are subject to Division 230 in respect of this scheme. Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.

Superannuation Industry (Supervision) Act 1993

7. 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 SISA.

Qualifications

8. 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 28 of this Ruling.

9. 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.

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Date of effect

11. This Product Ruling applies prospectively from 23 June 2010, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 23 June 2010 until 30 June 2010 being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

12. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

13. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

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

Note to promoters and advisers

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Ruling

Application of this Ruling

16. Subject to paragraph 3 of this Ruling and the assumptions in paragraph 28 of this Ruling:

- (a) income distributions by the Fund are included in the assessable income of an Investor, in accordance with Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (b) an amount equal to the expense incurred for interest on the Full Recourse Investment Loan and interest on full recourse Interest Loan (if applicable) will be deductible under section 8-1;
- (c) Division 247 does not apply to an arrangement where an Investor enters into a Full Recourse Investment Loan to fund an investment in the Fund;
- (d) Division 247 does not apply to an arrangement where an Investor enters into a Full Recourse Investment Loan and a full recourse Interest Loan to fund an investment in the Fund;
- (e) section 51AAA of the ITAA 1936 will not apply to deny an Investor a deduction for the interest expense allowable under section 8-1 of the ITAA 1997;
- (f) section 82KL of the ITAA 1936 will not apply to deny deductibility of the interest expense allowable under section 8-1 of the ITAA 1997;
- (g) 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 a Full Recourse Investment Loan;
- (h) section 82KZM of the ITAA 1936 will not apply to deny an Investor immediate deductibility of the prepaid interest on a Full Recourse 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) that has not chosen to apply section 82KZMD of the ITAA 1936; or
 - the Investor is an individual who does not incur that expenditure in carrying on a business;

- (i) sections 82KZMA and 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for prepaid interest on borrowings under a Full Recourse 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 that has not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure) who is a taxpayer that is not an individual and does not carry on a business;
- (j) the Loan Establishment Fee paid, if applicable, is deductible under section 25-25; and
- (k) 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 a Full Recourse Investment Loan or an Interest Loan.

Scheme

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

- Application for a Product Ruling as constituted by documents and correspondence received on 3 February 2010, 24 February 2010, 9 March 2010, 17 March 2010, 19 March 2010, 29 March 2010, 1 April 2010, 18 May 2010 and 9 June 2010;
- **Product Disclosure Statement (PDS)** for the Macquarie Flexi 100 Trust prepared by Macquarie Financial Products Management Limited as responsible entity (Responsible Entity or RE), dated 18 March 2010;
- **Draft Loan and Security Agreement**, received on 18 May 2010; and
- **Constitution for the Macquarie Flexi 100 Trust (the Constitution), dated 21 February 2008 and Amending Deeds dated 21 April 2009 and 6 May 2009.**

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. The documents highlighted in paragraph 17 of this Ruling are those that will govern the scheme that an Investor will 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.

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

Overview

20. Following is a summary of the scheme:

The Macquarie Flexi 100 Trust

- (a) an investment in the Macquarie Flexi 100 Trust (the Fund) involves the subscription for ordinary fully paid units in the Fund, an Australian unit trust registered as a managed investment scheme;
- (b) the Fund will be an open ended trust with a termination date no later than 80 years from its commencement;
- (c) the units will be issued on 30 June 2010 (Unit Issue Date) and the issue price is \$1 per unit. There are different classes of units issued with each unit having a fixed term as follows.

Unit class	Unit class type	Maturity Date	Term (in years)
H, I, J & K	Fixed Distribution Classes	18 December 2015	5.5
L	Fixed Distribution Class	20 December 2013	3.5
M, N, O & P	Variable Distribution Classes	30 June 2013	3

- (d) each Class Portfolio will provide exposure to a Reference Asset through a Swap Agreement and Collateral Agreement to be entered by the Fund and the Swap Counterparty and Collateral Counterparty, respectively. The Swap Counterparty and Collateral Counterparty will be a Macquarie Group Company;
- (e) the Cash Collateral is equal to the subscription amount for units issued and is deposited with the Collateral Counterparty as collateral for the Fund's obligations under the Swap Agreement;
- (f) the Reference Assets will be:
 - for the Class H and M units – the S&P/ASX200,
 - for the Class I, L and N units – the MQ Asia Long Short Fund,

- for the Class J and O units – weighted exposure to Asian shares through the Tracker Fund of Hong Kong (20%), Hang Seng H-Share Index ETF (20%), MSCI Taiwan Index (20%), Kospi 200 Index (20%) and the MSCI Singapore Cash Index (20%), and
 - for the Class K and P units – the Macquarie Global Infrastructure 100 Index;
- (g) each Swap Agreement and Collateral Agreement will set out the amount payable by each Class Portfolio to the Swap Counterparty during the period from the Unit Issue Date to Maturity. In return, the Swap Counterparty will pay coupons to the Fund as follows:
- for the Class H, I, J and K units – fixed annual amount, payable at the end of each year throughout the Term, and a fixed half year amount payable at Maturity. An additional variable amount may be paid at Maturity depending on the performance of the Reference Asset over the Term,
 - for the Class L units – fixed annual amount, payable at the end of each year throughout the Term. An additional variable amount may be paid at Maturity depending on the performance of the Reference Asset over the Term,
 - for the Class M, N, O and P units – variable amount may be paid annually during the Term based on the positive performance of the Reference Asset during the year;
- (h) the Constitution sets out the provisions relating to the calculation of the net income of the Fund and the distribution of distributable income from the Fund. **This Product Ruling only applies where an Investor is entitled to benefit from distributions as set out in the Constitution;**
- (i) the nature of distributions that will be paid to Investors in respect of their units are specified in subparagraph 20(g) of this Ruling. Certain units will have caps placed on the amount that will be paid to Investors. For Fixed Distribution Classes, the cap will limit the amount that could be paid to an Investor at Maturity (Term Performance Cap) and for Variable Distribution Classes, the cap will limit the amount of annual distribution that could be paid to an Investor (Annual Performance Cap). These caps are expressed as a percentage of the Investment Amount;

- (j) For investments in any of the Fixed Distribution Classes, Hurdles will be used to determine whether a Reference Asset Gain will be paid at Maturity. If the closing level of a Reference Asset is greater than or equal to the Hurdle, then the Reference Asset Gain will be paid. However, the actual amount that will be paid to an Investor will be subject to the Term Performance Cap;
- (k) Table 1 of the PDS specifies the rate of the indicative performance caps for certain units and the minimum performance caps for all units. The dates as to when the actual performance caps will be set are also specified in the PDS. If the actual performance cap of a unit is less than its minimum performance cap, then an Investor's participation into the scheme in respect of that unit will be terminated. The consequences of this termination include the termination of the Loan and Security Agreement and the refund of the prepaid interest and, for Distribution Period 1, the refund of the Loan Establishment Fee;

Credit facilities

- (l) there are two credit facilities available to finance an investment in the Fund. One is an Investment Loan that Investors must enter into to finance the initial subscription for their units in the Fund. This compulsory Investment Loan can be taken as Limited Recourse Investment Loan or Full Recourse Investment Loan. **This Product Ruling applies to Full Recourse Investment Loan;**
- (m) the second credit facility available is an optional full recourse Interest Loan which allows the Investor to fund the interest payment on the Investment Loan;

'Walk-Away' feature

- (n) Investors can exercise the 'Walk-Away' feature described in the PDS and the Loan and Security Agreement. This feature involves the ability of Investors to redeem their units before the Maturity Date. **This Product Ruling does not apply to Investors who exercise the 'Walk-Away' feature;**

Commissions to financial advisers

- (o) Information regarding the payment of upfront and trailing commissions by the Responsible Entity to financial advisers is set out in the PDS. If an Investor indicates in their Application Form that an upfront commission rebate arrangement exists, then the Loan Establishment Fee payable will be reduced by the rebated amount;
- (p) If an Investor indicates in their Application Form that a trailing commission rebate arrangement exists, then the interest payable on the Full Recourse Investment Loan in the second and subsequent years will be reduced by the rebated amount. **This Product Ruling does not rule on the tax consequences of any trailing commission rebate arrangement.**

Loan and Security Agreement

21. The Loan and Security Agreement will be between the Loan Provider and an Investor who chooses a Full Recourse Investment Loan to finance their investment in the Fund. This agreement also sets out the terms of the optional full recourse Interest Loan.

22. The terms of the agreement in respect of the Full Recourse Investment Loan include as follows:

- interest is payable annually in advance on or around each 30 June for the term of the loan. The first interest payment date will be on 30 June 2010;
- the interest rate is fixed for the prepaid interest period (which will be twelve months or less). The indicative interest rate for 30 June 2010 is 8.85%;
- as security for the Investor's obligations, a Mortgage will be granted over the Mortgaged Property which includes the units that Investor holds and their proceeds; and
- the agreement will end at the Maturity Date for each class of units (as specified in subparagraph 20(c) of this Ruling.

23. The agreement also sets out the terms of the Interest Loan that is available to an Investor to fund the interest payment on the Full Recourse Investment Loan for 30 June 2010 and subsequent Investment Loan Interest Payment Date. The Interest Loan is repayable by monthly in arrears principal and interest repayments over the prepaid interest period on the Full Recourse Investment Loan and is limited to twelve months and the interest is fixed for one year. The term of the Interest Loan can not be extended and the indicative interest rate for an Interest Loan that will commence on 30 June 2010 is 10.95%.

24. Both the Full Recourse Investment Loan and the Interest Loan will be full recourse for the Loan Provider in respect of the principal owing on the Full Recourse Investment Loan. Accordingly, Investors must pay the Loan provider any shortfall between the value of their investment and their Loan balance.

25. A Loan Establishment Fee of 2% of the Full Recourse Investment Loan may be charged by the Loan Provider. This fee is payable in full on 30 June 2010 if Interest Loan is not utilised.

26. However, for Investors who take out an Interest Loan, the Loan Establishment Fee (if applicable) is payable in 12 monthly repayments over the first year of the investment. These additional payments will be direct debited from an Investor's nominated bank account at the same time as the Interest Loan repayments.

27. The Loan and Security Agreement provides that Investors may redeem their units in the Fund on the Maturity Date and they may also be given the opportunity to retain their units. If Investors are given the option to retain their units in the Fund, they will still be required to repay their Full Recourse Investment Loan and any Interest Loan at Maturity. **This Product Ruling does not apply to schemes entered into after the Maturity Date including the retention of units by Investors.**

Assumptions

28. 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 and carrying out the scheme is to derive an amount of assessable trust income from the investment that exceeds the total expenses incurred;
- (c) the Investor is absolutely entitled to and has a vested and indefeasible interest in the income of the Fund;
- (d) the Investor is not a trader in investments and is not treated for taxation purposes as trading in interests in the Fund, carrying on a business of investing in the Fund, or holding their interests in the Fund as trading stock or as a revenue asset;
- (e) in respect of any interest amounts paid in advance under the Full Recourse 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;
- (f) the scheme will be executed in the manner described in the scheme documentation and in the Scheme section of this Ruling;

- (g) all dealings between the Investor and the Macquarie group of companies including the Responsible Entity and the Loan Provider will be at arm's length;
- (h) at the time of the prepayment the Fund will have at least 300 unit holders;
- (i) the Investor will not repay or partially repay the Full Recourse Investment Loan prior to its relevant term or terminate the scheme prior to the Maturity Date; and
- (j) the Investors will not enter into the scheme with the intention to terminate their participation in the scheme early.

Commissioner of Taxation

23 June 2010

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

29. 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 subsection 51(1) of the ITAA 1936 which was the predecessor of section 8-1 of the ITAA 1997).

Division 247

30. Section 247-10 describes when a borrowing under an arrangement satisfies the requirements as a capital protected borrowing. Subsection 247-10(1) states:

An arrangement under which a borrowing is made, or credit is provided, is a **capital protected borrowing** if the borrower is wholly or partly protected against a fall in the market value of a thing (the **protected thing**) to the extent that:

- (a) the borrower uses the amount borrowed or credit provided to acquire the protected thing; or
- (b) the borrower uses the protected thing as security for the borrowing or provision of credit.

31. Subsection 247-10(2) states:

That protection is called **capital protection**.

32. Under either of the arrangements that cover an Investor entering into a Full Recourse Investment Loan or a Full Recourse Investment Loan with a full recourse Interest Loan, the Investor is not wholly or partly protected against the fall in the market value of the acquired units. The only items that could be protected things are the units that an investor holds in the Fund. However, the two types of arrangements mentioned above do not offer protection against a fall in the market value of the units or the underlying Reference Assets of the various Distribution Classes. Therefore, an Investor in either of these arrangements does not have a capital protected borrowing.

33. Clause 6.1 of the Loan and Security Agreement confirms that there is no protection provided to an Investor against a possible fall in the market value of their units. This clause indicates that if an Investor redeems any of their units, the Loan Provider is entitled to apply the proceeds from the redemption to effectively meet all outstanding loan amounts and if the proceeds are insufficient to meet these debt/indemnity obligations, the Investor will need to use their own funds to cover the shortfall.

Section 51AAA

34. 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 the Fund. As interest will be deductible under section 8-1 of the ITAA 1997, section 51AAA of the ITAA 1936 has no application to an Investor.

Section 82KL

35. 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

36. Subdivision H of Division 3 of Part III of the ITAA 1936 (Subdivision H) 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 for the purposes of Subdivision H

37. 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:

- (a) the Investor carried on a business in the previous income year and the aggregated turnover for that year was less than \$2 million;
- (b) the aggregated turnover for the current year is likely to be less than \$2 million and, where 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 \$2 million; or
- (c) the aggregated turnover for the current year, worked out as at the end of the year, is less than \$2 million.

The eligible service period for the purposes of Subdivision H

38. The prepaid interest charges on the Full Recourse 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, 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

39. The rules in sections 82KZME and 82KZMF of the ITAA 1936 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.

40. 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), the relevant 'agreement' is all the contractual arrangements and activities associated with the participation in a Fund, including the financing and management arrangements.

41. Exception 1, as contained in subsection 82KZME(5) of the ITAA 1936, applies to exclude the interest deductible under section 8-1 of the ITAA 1997 incurred on borrowings under the Full Recourse Investment Loan, from the operation of section 82KZMF of the ITAA 1936 as:

- the documents and facts described in the scheme at paragraphs 17 to 28 of this Ruling establish that Investors have fixed entitlements to all of the income and capital of the Fund. Therefore, the prepaid interest deductible under section 8-1 is incurred in respect of money borrowed to acquire units in a widely held unit 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.

42. Deductibility of expenditure must therefore be considered under the prepayment rules outlined in paragraphs 43 to 48 of this Ruling.

Section 82KZM – prepaid expenditure incurred by small business entities and individuals incurring non-business expenditure

43. 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 that has not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure; or
- a taxpayer that is an individual and the expenditure is not incurred in carrying on a business.

44. 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.

45. As the eligible service period in relation to a deductible interest payment under a Full Recourse 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 that is incurred under a Full Recourse Investment Loan.

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

46. 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 has not chosen to apply section 82KZMD to the expenditure) that is not an individual and does not incur the expenditure in carrying on a business.

47. 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.

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

Section 25-25 – Loan Establishment Fee

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

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

Part IVA

50. Provided that the scheme ruled on is entered into and carried out in the manner described in the scheme documentation and in the Scheme section of this Ruling including the Assumptions (see paragraphs 17 to 28 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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 95/33

Subject references:

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

Legislative references:

- ITAA 1936
- ITAA 1936 51(1)
- 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 III Div 6
 - ITAA 1936 Pt IVA
 - ITAA 1997
 - ITAA 1997 8-1
 - ITAA 1997 25-25
 - ITAA 1997 Div 230
 - ITAA 1997 Subdiv 328-C
 - ITAA 1997 328-110
 - ITAA 1997 328-110(1)
 - ITAA 1997 Div 247
 - ITAA 1997 247-10
 - ITAA 1997 247-10(1)
 - ITAA 1997 247-10(2)
 - TAA 1953
 - Copyright Act 1968
 - SISA 1993
-

ATO references

NO: 1-1VEQ2T2

ISSN: 1441-1172

ATOLaw topic: Income Tax ~~ Product ~~ finance