



PR 2018/2 - Income tax: taxation consequences of investing in Macquarie Equity Lever Instalment Receipts

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 This document has changed over time. This is a consolidated version of the ruling which was published on *10 July 2019*



Product Ruling

Income tax: taxation consequences of investing in Macquarie Equity Lever Instalment Receipts

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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.

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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 provisions identified in the Ruling section 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* unless otherwise indicated.
2. In this Product Ruling the scheme is referred to as a Macquarie Equity Lever facility (a Facility) offered by Macquarie Bank Limited (the Bank) and issued under the combined Product Disclosure Statement and Financial Services Guide dated 29 September 2017 (the PDS).¹
3. This Product Ruling does not address:
 - (a) a Holder's entitlement to franking credits, except as provided for in paragraphs 15(l) and 45(b) of this Product Ruling
 - (b) the taxation consequences of fees and charges paid to the Bank in respect of the Facility (including Break Costs, Brokerage and particular indirect costs), except any interest or Issuance Fee charged in respect of a Facility
 - (c) the taxation consequences of a transfer of an Instalment Receipt
 - (d) the assessability of any Residual Prepaid Interest Amount received by the Holder
 - (e) the taxation consequences arising from any Stock Loan, and
 - (f) whether this scheme constitutes a financial arrangement for the purposes of Division 230 (Taxation of financial arrangements).

¹ From 1 April 2019 the Macquarie Equity Lever Product Disclosure Statement and the Macquarie Bank Limited Financial Services Guide are no longer combined. From 1 April 2019, all references to the PDS in this Product Ruling should therefore not be read to include the Financial Services Guide.

Class of entities

4. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. Those entities that can rely on the Ruling section are referred to in this Product Ruling as the Holder.

5. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities that:

- enter into the scheme described in paragraphs 16 to 20 of this Product Ruling on or after 29 September 2017 and on or before 30 June 2020, and
- have a genuine intention and realistic expectation of deriving assessable income (other than capital gains) from the investment that exceeds the deductible expenditure incurred in connection with the investment.

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

- are accepted to participate in the scheme described in paragraphs 16 to 20 of this Product Ruling before 29 September 2017 or after 30 June 2020
- do not have a genuine intention and realistic expectation of deriving assessable income (other than capital gains) from the investment that exceeds the deductible expenditure that they incur in order to invest in the scheme
- trade in Instalment Receipts, Underlying Securities and/or other financial investments and are treated for taxation purposes as trading in the Instalment Receipts and/or Underlying Securities, carrying on a business of investing in the Instalment Receipts and/or Underlying Securities, or holding the Instalment Receipts and/or Underlying Securities as trading stock or as revenue assets
- participate in the scheme through offers made other than through the PDS, or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way
- do not satisfy an assumption set out in paragraph 20 of this Product Ruling, 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 16 to 20 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.

Date of effect

10. This Product Ruling applies prospectively from 29 September 2017. It therefore applies only to the specified class of entities that enter into the scheme from 29 September 2017 until 30 June 2020, 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.

11. 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

12. 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.

13. 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

14. 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

15. Subject to paragraph 3 of this Product Ruling and the assumptions in paragraph 20 of this Ruling:

- (a) Interest incurred under a Facility, reduced by an amount reasonably attributable to the cost of capital protection calculated under step 3 of the method statement in subsection 247-20(3), will be deductible under section 8-1.
- (b) Under subsection 247-20(3), the amount reasonably attributable to the cost of capital protection in an income year is the amount by which the interest incurred under a Facility for the income year exceeds:
 - (i) where the interest is charged at a fixed rate for all or part of the term of the Facility and that fixed rate is applicable to the Facility for all or part of the income year, the amount of the credit provided multiplied by the sum of the Reserve Bank of Australia's Indicator Lending Rate for Standard Variable Housing Loans – Investor and 100 basis points (the 'adjusted loan rate') at the time when the interest charge is first incurred during the term of the Facility, or the relevant part of the term (subsections 247-20(4) and (5)), and
 - (ii) where the interest is charged at a variable rate for all or part of the term of the Facility and a variable rate is applicable to the Facility for all or part of the income year, the amount of the credit provided multiplied by the average of the adjusted loan rates applicable during those parts of the income year when the Facility is at a variable rate (subsections 247-20(5) and (5A)).

- (c) The amount reasonably attributable to the cost of capital protection as worked out under paragraph 15(b) of this Product Ruling, is treated as the cost of a put option granted by the Bank to the Holder under subsection 247-20(6). This amount is not deductible under section 8-1.
- (d) Section 51AAA of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to deny deductibility of the interest incurred under a Facility that is allowable as a deduction under section 8-1.
- (e) Section 82KL of the ITAA 1936 will not apply to deny deductibility of the interest incurred under a Facility that is allowable as a deduction under section 8-1.
- (f) Section 82KZMF of the ITAA 1936 will apply to set the amount and timing of deductions for any interest capitalised in advance under a Facility at a fixed rate for a 12 month period and that is allowable as a deduction under section 8-1, unless
 - (i) the Holder's allowable deductions for the expenditure year that are attributable to the Facility are equal to or less than the Holder's assessable income in that year from the Facility, and/or
 - (ii) the interest is less than \$1,000.
- (g) Unless the interest is less than \$1,000, section 82KZMD of the ITAA 1936 will apply to set the amount and timing of deductions for any interest capitalised in advance under a Facility at a fixed rate for a 12 month period and that is allowable as a deduction under section 8-1 to a Holder who is a taxpayer that is not an individual and does not carry on a business (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).
- (h) Where, in respect of any interest capitalised in advance under a Facility at a fixed rate for a 12 month period and that is allowable as a deduction under section 8-1, sections 82KZMD or 82KZMF of the ITAA 1936 do not apply as contemplated in paragraphs 15(f) and (g) of this Product Ruling to set the amount and timing of the deduction as per those provisions, the deduction will be allowable to the extent provided in paragraph 15(a) of this Product Ruling at the time it is capitalised.
- (i) Any interest charged under a Facility at a variable rate will be deductible under section 8-1 to the extent provided in paragraph 15(a) of this Product Ruling as it accrues.

- (j) For the purposes of the ITAA 1936 and the ITAA 1997 (other than the purposes set out in subsection 235-815(2)) and pursuant to the operation of section 235-820, Underlying Securities held on trust for the Holder by the Security Trustee as security for the provision of credit under a Facility will be treated as being the Holder's asset (instead of an asset of the Security Trust), and any act done in relation to the Underlying Securities by the Security Trustee will be treated as if the act has been done by the Holder (instead of the Security Trustee).
- (k) Any dividends or distributions paid on the Underlying Securities while the Underlying Securities are held on trust for the Holder by the Security Trustee, including any dividend or distribution applied to reduce the Holder's Outstanding Instalment Balance, will be included in the assessable income of the Holder (and not the Security Trustee) under subsection 44(1) or paragraph 97(1)(a) of the ITAA 1936 (as applicable), as if the Holder held the Underlying Securities directly.
- (l) The qualified person rules contained in former Division 1A of Part IIIA of the ITAA 1936 will apply to the Holder directly (and not as a beneficiary of a trust) while the Underlying Securities are held on trust for the Holder by the Security Trustee.
- (m) For CGT purposes pursuant to section 109-5, the date of acquisition of an Underlying Security is the date on which the Holder acquires the Instalment Receipt to which the Underlying Security relates.
- (n) The cost base and reduced cost base that a Holder has in the Underlying Securities acquired by the Holder under a Facility will include the amounts of the First Instalment and Final Instalment used to fund the acquisition of the Underlying Securities, the Issuance Fee and any incidental costs of acquisition and disposal of the Underlying Securities: sections 110-25 and 110-55.
- (o) No CGT event happens for the Holder under Division 104 when legal title to an Underlying Security is transferred by the Security Trustee to the Holder.
- (p) If the Holder sells (or arranges for the sale of) the Underlying Securities to fund the Completion Payments owing under a Facility, CGT event A1 under section 104-10 will happen in relation to the Underlying Securities for the Holder.
- (q) If the Bank exercises its Security Interest and the Underlying Securities are disposed of by the Security Trustee:

- (i) CGT event A1 under section 104-10 will happen for the Holder in relation to the Underlying Securities
 - (ii) pursuant to subsection 134-1(1), the cost base and reduced cost base of the Underlying Securities will include the amount reasonably attributable to the cost of capital protection (if any) calculated under paragraph 15(b) of this Product Ruling (but will not include any interest incurred in respect of that amount), and
 - (iii) any capital gain or capital loss made by the Holder on exercise of the put option referred to in paragraph 15(c) of this Product Ruling will be disregarded under subsection 134-1(4).
- (r) Any capital gain made by a Holder on disposal of an Underlying Security will be treated as a discount capital gain pursuant to section 115-5 where the Holder is an individual, a complying superannuation entity, or a trust and the Holder acquired the Instalment Receipt over that Underlying Security at least 12 months before the disposal of the Underlying Security.
- (s) If the Holder pays the Completion Payment:
 - (i) the put option referred to in paragraph 15(c) of this Product Ruling will be taken to have expired pursuant to subsection 247-30(2)
 - (ii) CGT event C2 under paragraph 104-25(1)(c) will happen in relation to the put option for the Holder, resulting in a capital loss equal to the reduced cost base of that put option under subsection 104-25(3), and
 - (iii) pursuant to section 110-55, the reduced cost base of the put option will include the amount reasonably attributable to the cost of capital protection (if any) calculated under paragraph 15(b) of this Product Ruling (but will not include any interest incurred in respect of that amount).
- (t) The commercial debt forgiveness rules in Division 245 will not reduce the tax attributes of a Holder as a result of the debt forgiveness that occurs when the limited recourse provisions of a Facility come into effect if the Bank exercises its Security Interest and the disposal proceeds from the sale of the Underlying Securities will not fully repay the Holder's Outstanding Instalment Balance.

- (u) 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 Holder in respect of the credit provided under a Facility.
- (v) None of the taxation consequences set out in subparagraphs 15(a) to 15(u) of this Product Ruling will change as a consequence of the execution of the terms and conditions of the Portfolio Asset Novation Agreement (the Novation Agreement), nor will the execution of the terms and conditions of the Novation Agreement give rise to any CGT event for the Holder under Division 104.

Scheme

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

- application for a Product Ruling as constituted by documents and information received on 22 November 2017, 20 May 2019, 23 May 2019, 27 May 2019 and 26 June 2019
- combined Macquarie Equity Lever Product Disclosure Statement and Financial Services Guide dated 29 September 2017² and Supplementary Product Disclosure Statements dated 30 October 2018 and 24 May 2019
- Equity Lever Instalment Receipts Deed dated 20 March 2008 between the Bank and the Security Trustee, as amended by the Supplemental Deeds to the Equity Lever Instalment Receipts Deed dated 1 February 2011, 28 October 2015, 21 September 2017 and 24 May 2019 (the Instalment Receipts Deed), and
- Portfolio Asset Novation Agreement dated 23 May 2019 between the Bank and Bell Potter Capital Limited (BPC).

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

17. 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 a

² From 1 April 2019 the Macquarie Bank Limited Financial Services Guide is no longer combined with the Macquarie Equity Lever Product Disclosure Statement dated 29 September 2017.

Holder, or any associate of a Holder, will be a party to, which are a part of the scheme. Capitalised terms in this Product Ruling take their meaning as per the PDS, Instalment Receipts Deed and Novation Agreement referred to in paragraph 16 of this Product Ruling.

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

Overview

19. The details of the Instalment Receipts are summarised as follows:

- (a) A Facility enables leveraged exposure to Securities and any Accretions conferred in respect of those Securities (Underlying Securities) for a term of up to 10 years via an investment, part funded by a provision of credit provided to the Holder by the Bank, in unlisted and limited recourse instalment receipts (Instalment Receipts) issued by the Bank. Each Instalment Receipt is over one Underlying Security.
- (b) The Holder is required to select the Underlying Securities from an approved list or investment menu of Underlying Securities which is available on the Macquarie Equity Lever website. The Underlying Securities obtained under one Facility together form the Underlying Portfolio.
- (c) In respect of each Underlying Security acquired under a Facility
 - (i) the Holder pays an Investment Amount applied to the payment of:
 - the First Instalment which will be generally up to 50% of the Purchase Price of the Underlying Security, and
 - the Issuance Fee, which is a fee to establish the Instalment Receipt
 - (ii) the Bank provides credit to the Holder equal to the Final Instalment, being that part of the Purchase Price of the Underlying Security as remains due by the Holder after payment of the First Instalment
 - (iii) the Bank buys the Underlying Security in the name of the Security Trustee, and
 - (iv) the Instalment Receipt is issued in the name of the Holder.

- (d) Unless the Bank accepts Investment Instructions for lesser amounts at its discretion, the minimum Investment Amount for the Holder's initial Investment Instruction is \$20,000, and \$2,000 for each subsequent Investment Instruction.
- (e) Once the Holder has acquired the Instalment Receipt, interest is calculated daily on the Holder's Outstanding Instalment Balance from the date the Instalment Receipt is issued, and is capitalised (as set out in paragraph 19(f)). The Holder's Outstanding Instalment Balance in respect of an Instalment Receipt is the Final Instalment plus Capitalised Interest owing to the Bank over the term of the Instalment Receipt.
- (f) The Interest Rate payable on the Instalment Receipt can be variable or fixed, as selected by the Holder. Where the Holder selects a variable Interest Rate, a Monthly Interest Amount is capitalised to the Outstanding Instalment Balance on a monthly basis in arrears. Where the Holder selects a fixed Interest Rate, the rate is fixed for 12 months and an Annual Interest Amount is capitalised to the Outstanding Instalment Balance for the entire fixed rate term in advance.
- (g) During the term of the Instalment Receipt, the Underlying Security (plus any Accretion) is held on separate trust (Security Trust) by the Security Trustee for the sole benefit of the Holder, subject to a Security Interest in favour of the Bank to secure its rights to receipt of the Secured Moneys owing under the Instalment Receipt (including the Completion Payment referred to in paragraph 19(j)), in accordance with the Instalment Receipts Deed.
- (h) The Holder is entitled to the benefit of all income from the Underlying Security such as dividends, distributions or other payments (for example, as a result of a corporate action) made in respect of the Underlying Security. Such income from the Underlying Security will generally be used to reduce the Outstanding Instalment Balance owing by the Holder on their corresponding Instalment Receipt.
- (i) The Holder may also elect to provide cash to the Bank as payment (an Early Instalment Payment) of some or all of the Outstanding Instalment Balance in respect of an Instalment Receipt.

- (j) The Holder is entitled to be transferred legal title to the Underlying Security on payment of the Completion Payment provided their Current Facility Leverage to Valuation Ratio (LVR) will not exceed their Facility LVR. The Completion Payment for an Instalment Receipt is payable by the Completion Date (generally 10 years from the date of acquisition of the Instalment Receipt); may be paid at any time during the term of the Instalment Receipt; and is comprised of
 - (i) the Holder's Outstanding Instalment Balance
 - (ii) any Accrued Interest (being interest that has accrued since the last Interest Payment Date, and not capitalised)
 - (iii) Brokerage
 - (iv) any Fixed Interest Adjustment Amount, and
 - (v) any other amount due to be paid by the Holder but which remains unpaid.
- (k) If an Instalment Acceleration Event occurs in respect of a Holder's Facility (because their Current Facility LVR increases to a level above their Maximum Facility LVR), the Holder will be required to reduce their Current Facility LVR by the Instalment Acceleration Event Amount by paying a portion of the Total Completion Payments owing by the Holder prior to the Completion Date. This can be done either by requesting the Early Closure of a sufficient number of Instalment Receipts and applying the proceeds from the sale of the Underlying Securities relevant to those Instalment Receipts (as undertaken by the Security Trustee pursuant to the exercise by the Bank of its Security Interest) against the Completion Payments, or by direct payment to the Bank.
- (l) An Early Closure of the Holder's Instalment Receipts, as contemplated in paragraph 19(k) above, may also be requested by the Holder at any time by submitting an instruction to that effect. The sale proceeds of an Underlying Security in these circumstances will, in the first instance, be applied to cover the Completion Payment of the corresponding Instalment Receipt.
- (m) The Holder may, as an alternative to paying the Completion Payment by the Completion Date, or not paying the Completion Payment by the Completion Date and having the Underlying Security over which the Instalment Receipt has been issued sold by the Security Trustee, apply to the Bank to extend the Completion Date. An extension of the Completion Date for the Instalment Receipt in these circumstances is subject to the Bank's discretion.

- (n) The Holder's liability to the Bank under a Facility is limited to the proceeds which the Bank receives from exercising its rights under the Security Interests to dispose of part or all of the Holder's Underlying Portfolio.
- (o) On, and subject to, the terms and conditions of the Novation Agreement:
 - (i) the Bank has agreed to novate to BPC (or a Related Body Corporate of BPC) all of the right, title, interest and benefit of a Macquarie Group Member under or in connection with each Facility entered into with a Holder, as at the date on which the completion of the novation occurs (the Equity Lever Completion Date, being 1 July 2019), and
 - (ii) BPC has agreed, as at the Equity Lever Completion Date, to assume all liabilities of each Macquarie Group Member related to each Facility entered into with a Holder, and discharge them as and when they fall due.
- (p) As a consequence of the execution of the Novation Agreement, as and from the Equity Lever Completion Date:
 - (iii) BPC shall be substituted for the Bank under each Facility as if BPC had originally been a party to each Facility instead of the Bank on the terms of the PDS, and
 - (iv) BPC Custody Pty Ltd shall be appointed as the new Security Trustee and assume all the rights, powers and obligations of the retiring Security Trustee under the terms of the Instalment Receipts Deed.

Assumptions

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

- (a) the Holder is an Australian resident for taxation purposes
- (b) the Holder will enter into the Instalment Receipt through the purchase of an Underlying Security via a Facility and not under a secondary market transfer
- (c) the Holder will hold their interests in the Underlying Securities on capital account, is not a trader in investments and is not treated for taxation purposes as trading in the Instalment Receipts and/or Underlying Securities, carrying on a business of investing in the

Instalment Receipts and/or Underlying Securities, or holding the Instalment Receipts and/or Underlying Securities as trading stock or as a revenue asset

- (d) the dominant purpose of a Holder in entering into the scheme is to derive an amount of receipts (income, gains and distributions) from their Underlying Securities acquired under the scheme that exceeds the total expenses incurred in respect of a Facility
- (e) at all times the Security Trustee will be an Australian resident and management and control of the Security Trust will be in Australia
- (f) the Underlying Security will be a share, unit in a unit trust or stapled security either listed for quotation in the official list of an approved stock exchange, or that meets the widely held requirements set out in the table contained in subsection 235-835(1)(b) and paragraph 247-15(5)(b)
- (g) at all times while the Security Trustee holds the Underlying Security, the Underlying Security will not be subject to any charge, security or other encumbrance (apart from any charge securing obligations relating to the provision of credit under a Facility)
- (h) a Stock Loan pursuant to the terms of the Instalment Receipts Deed will not be entered into involving any Underlying Security held under a Security Trust by the Security Trustee for the Holder
- (i) the Holder will not be under any legal disability
- (j) a Holder that is a superannuation fund is not prevented from investing in the scheme by any terms of its trust deed, and is not in breach of any of its stated investment guidelines and strategies
- (k) the scheme will be executed in the manner described in the Scheme section of this Ruling and the scheme documentation referred to in paragraph 16 of this Product Ruling, and
- (l) all transactions between the Holder, the Security Trustee, the Bank and BPC in relation to the Instalment Receipts will be at prevailing market prices and otherwise on arm's length terms.

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Section 8-1 and Division 247 – capital protected borrowings and deductibility of interest

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

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

23. Division 247 applies to a Facility where the Holder uses the credit provided to acquire a beneficial interest in the Underlying Securities and the Holder is protected against the fall in the market value of those Underlying Securities.

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

25. The amount reasonably attributable to the cost of capital protection under a Facility is worked out according to the method statement in subsection 247-20(3), as set out in paragraph 15(b) of this Product Ruling. Under step 1 of the method statement, the total amount of interest incurred by the Holder under or in respect of a Facility for the income year is the interest incurred on the Facility for the income year.

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

27. Where the total amount incurred by the Holder worked out under step 1 of the method statement is greater than the total interest

that would have been incurred by the Holder worked out under step 2 of the method statement, the balance is reasonably attributable to the cost of capital protection and is treated as if it were incurred for a notional put option granted to the Holder (subsection 247-20(6)).

28. The Holder's put option is a capital asset. Therefore, the amount reasonably attributable to the cost of capital protection is of a capital nature and not deductible under section 8-1.

Section 51AAA

29. By acquiring the Instalment Receipts, it is contemplated that a Holder will derive assessable income by way of the receipt of dividends and/or trust distributions and capital gains from the Underlying Securities. As interest incurred under a Facility would have been deductible under section 8-1 notwithstanding the inclusion of a net capital gain in assessable income, section 51AAA of the ITAA 1936 has no application to a Holder who enters into a Facility.

Section 82KL

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

Subdivision H of Division 3 of Part III

31. 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 arrangement 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 Holder is a small business entity, whether the Holder is an individual and whether the Holder is not an individual and incurs the expenditure otherwise than in carrying on a business. This Subdivision does not apply to 'excluded expenditure' which is defined in subsection 82KZL(1) of the ITAA 1936 to include amounts of less than \$1,000 or amounts that are of a capital nature.

Subdivision 328-C – small business entities for the purposes of Subdivision H

32. Under section 328-110, a Holder carrying on a business in an income year will be a small business entity for that year (the current year) if:

- (a) the Holder carried on a business in the previous income year and the aggregated turnover for that year was less than \$10 million

- (b) the aggregated turnover for the current year is likely to be less than \$10 million and, where the Holder carried on a business in each of the two previous income years, the aggregated turnover for each of those income years was less than \$10 million, or
- (c) the aggregated turnover for the current year, worked out as at the end of the year is less than \$10 million.

The eligible service period for the purposes of Subdivision H

33. The interest charged under a Facility that is deductible under section 8-1 may be in relation to a prepayment of 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 an amount similar to a loan principal (such as a provision of credit) is to be taken, for the purposes of Subdivision H of the ITAA 1936, to be expenditure incurred under an agreement in return for the doing of a thing under the agreement for the period to which the interest payment relates. The eligible service period in relation to a payment of interest is determined by reference to the period to which the interest relates and not to the period of the provision of credit.

Sections 82KZME and 82KZMF – prepaid expenditure and ‘tax shelter’ style arrangements

34. 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’ style arrangement for the doing of a thing that is not to be wholly done within the expenditure year.

35. 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 Facility, including the financing, share and/or unit purchase, share and/or unit holding and disposal arrangements.

36. Section 82KZMF of the ITAA 1936 will have application and apportion over the relevant period any prepaid capitalised interest incurred by the Holder at a fixed rate and which is allowable as a deduction under section 8-1 where the interest for the expenditure year is not excluded expenditure; and (for the purposes of paragraph 82KZME(3)(a) of the ITAA 1936) the Holder’s allowable deduction in respect of that interest for the expenditure year exceeds their assessable income in connection with their Facility in that same year. Each of the other requirements for the agreement under subsection 82KZME(3) of the ITAA 1936 are met and none of the other exceptions contained in subsections 82KZME(5), (6), (8) or (9) of the ITAA 1936 apply to exclude prepaid capitalised interest

incurred under a Facility at a fixed rate from the operation of section 82KZMF of the ITAA 1936.

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

37. 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) 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
- (b) an individual and the expenditure is not incurred in carrying on a business.

38. The expenditure must not be excluded expenditure. Section 82KZM of the ITAA 1936 applies if the eligible service period for the expenditure is longer than 12 months, or the eligible service period for the expenditure is 12 months or shorter but ends after the last day of the year of income after the one in which the expenditure was incurred and the expenditure would otherwise be immediately deductible under section 8-1.

39. As the eligible service period in relation to the interest capitalised in advance under a Facility is not more than 12 months and does not end after the last day of the year of income after the one in which the expenditure was incurred, section 82KZM of the ITAA 1936 will have no application to Holders that are a small business entity for the year of income that have not chosen to apply section 82KZMD of the ITAA 1936 to the expenditure, or to Holders who are individuals and the expenditure is not incurred in carrying on a business. Those Holders will be able to claim a deduction allowable under section 8-1 in respect of the interest when it is capitalised.

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

40. Sections 82KZMA and 82KZMD of the ITAA 1936 set the amount and timing of deductions for expenditure for a Holder (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.

41. 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.

42. For these Holders, the amount of interest capitalised in advance and allowable as a deduction under section 8-1 in respect of

a Facility will be apportioned over the relevant interest payment period.

Division 235 – look-through treatment for instalment trusts

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

44. Each Security Trust created under the terms of the Instalment Receipts Deed for the purposes of holding the Underlying Securities of a Holder on trust by the Security Trustee as trustee for the Holder will be an instalment trust pursuant to paragraph 235-825(1)(a) on the basis that they will be covered by section 235-830 (about instalment trust arrangements), and satisfy the requirements in section 235-835 (about the type of asset being held on trust).

Dividends and distributions

45. Pursuant to the operation of section 235-820 (as per paragraphs 15(j), 43 and 44 of this Product Ruling):

- (a) all dividends and distributions paid in respect of Underlying Securities held on trust for the Holder by the Security Trustee, including any dividends or distributions applied toward repayment of the Holder’s Outstanding Instalment Balance, will be included in the assessable income of the Holder (and not the Security Trustee) under subsection 44(1) or paragraph 97(1)(a) of the ITAA 1936, as applicable, and
- (b) all franking credits attached to franked distributions made in respect of Underlying Securities held on trust for the Holder by the Security Trustee will be taken to have flowed directly to the Holder (instead of indirectly through the Security Trust). In determining whether the Holder is entitled to an offset under Division 207 in respect of franking credits received, the qualified person rules in former Division 1A of Part IIIAA of the ITAA 1936 are applied to the Holder directly rather than as a beneficiary of a trust.

Parts 3-1 and 3-3 – application of CGT provisions to the put option and Underlying Securities

46. If the Security Trustee disposes of the Underlying Securities to pay the Completion Payments, the Holder will be treated as having

disposed of the Underlying Securities and CGT event A1 under section 104-10 will arise for the Holder in respect of that disposal.

47. If the Holder does not pay the Completion Payments and, in exercising its Security Interest, the Security Trustee disposes of the Underlying Securities, CGT event A1 under section 104-10 will arise for the Holder in respect of the disposal. Where:

- (a) a notional put option (as referred to in paragraph 15(c) of this Product Ruling) has arisen, it will be treated as having been exercised by the Holder. The Holder will include the payment they are deemed to have made to acquire the put option (that is, the amount reasonably attributable to the cost of capital protection as per paragraph 15(b) of this Product Ruling, but excluding any interest incurred in respect of that amount)) in the second element of the Holder's cost base and reduced cost base of the Underlying Securities, pursuant to item 2 of the table in subsection 134-1(1). Any capital gain or capital loss the Holder makes from exercising the put option will be disregarded under subsection 134-1(4), and
- (b) no notional put option has arisen under Division 247 such that there is a shortfall in repayment of the Completion Payment, the Holder's cost base and reduced cost base in the Underlying Securities will be reduced by the amount of the shortfall under subsections 110-45(3) and 110-55(6) respectively.

48. If the notional put option referred to in paragraph 15(c) of this Product Ruling expires unexercised (including where the sale proceeds obtained by the Bank on exercise of its Security Interest exceed the Completion Payment), CGT event C2 will arise for the Holder in relation to the put option at that time (section 104-25). As the Holder will not receive any capital proceeds in respect of the expiry of the put option, a capital loss will be made by the Holder in this regard, equal to the Holder's reduced cost base in the put option. Under section 110-55, the reduced cost base of this put option will include the amount reasonably attributable to the cost of capital protection (if any) as per paragraph 15(b) of this Product Ruling (but will not include any interest incurred in respect of that amount).

49. Under section 110-25 and 110-55 respectively, the Holder's cost base and reduced cost base in the Underlying Securities will include the amounts of the First Instalment and Final Instalment used to fund the acquisition of the Underlying Securities plus the Issuance Fee and any incidental costs incurred by the Holder in acquiring and disposing of the Underlying Securities. As per paragraph 47(a) of this Product Ruling, where the limited recourse provisions of the Facility are invoked, the Holder's cost base and reduced cost base in the Underlying Securities also includes the cost base or reduced cost base of the put option referred to in paragraph 15(c) of this Product Ruling.

50. Division 115 allows a taxpayer a discount on capital gains in certain circumstances. In accordance with section 115-5, any capital gain realised by the Holder on the sale of the Underlying Securities will be treated as a discount capital gain where the Holder is an individual, a complying superannuation entity or a trust and acquired the Instalment Receipts at least 12 months before the disposal of the Underlying Securities (excluding the days of acquisition and disposal).

Division 245 – commercial debt forgiveness

51. The Outstanding Instalment Balance will be treated as a 'commercial debt' under section 245-10.

52. Where the limited recourse provisions of a Facility come into effect, a Holder is not required to repay the shortfall between the Outstanding Instalment Balance and the sale proceeds of the Underlying Security. This will result in the forgiveness of a commercial debt at that time, under paragraph 245-35(a).

53. Under Division 245, where the forgiveness of a commercial debt results in the Holder having a positive 'net forgiven amount', the Holder will be required to reduce certain tax attributes that could otherwise reduce their taxable income (in the same or a later income year), to the extent of the net forgiven amount.

54. To calculate the net forgiven amount of a debt, it is first necessary to calculate the 'gross forgiven amount' of a debt. In the Holder's circumstances, Division 245 will have no practical effect as there will be no gross forgiven amount in respect of the Outstanding Instalment Balance. The gross forgiven amount is equal to the value of the debt when it is forgiven (worked out under section 245-60) less the amount (if any) that is offset against the value of the debt when it is forgiven (worked out under section 245-65).

55. As the value of the Outstanding Instalment Balance when it is forgiven will be equal to the amount that is offset against the value of that debt when it is forgiven, there will be no gross forgiven amount in respect of the Outstanding Instalment Balance (subsection 245-75(2)).

56. Accordingly, the commercial debt forgiveness rules in Division 245 will not reduce the tax attributes of a Holder as a result of the debt forgiveness that occurs when the limited recourse provisions of a Facility come into effect.

Part IVA – anti-avoidance

57. Provided that the scheme ruled on is entered into and carried out in the manner described in this Product Ruling, it is accepted that the scheme is an ordinary commercial transaction and that Part IVA of the ITAA 1936 will not apply.

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