



Taxation Determination

Income tax: is any part of an amount, which is otherwise deductible as a transport expense for travel between workplaces (one of which is a business), attributable to the relevant business activity under subsection 35-10(2) of the *Income Tax Assessment Act 1997*?

❶ 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.

Ruling

1. Yes. Where a *business is carried on at one of the workplaces, the amount of a *transport expense otherwise deductible for *travel between workplaces under section 25-100 of the *Income Tax Assessment Act 1997* (ITAA 1997) is attributable to both the relevant business activity and the activity at the other workplace.¹
2. The extent to which such an amount is attributable to the business activity for the purposes of subsection 35-10(2) of the ITAA 1997 is a question of fact and degree and where apportionment is called for, this needs to be on a 'fair and reasonable' basis. In most situations a fair and reasonable basis will be to apportion the amount 50 per cent to the business activity and 50 per cent to the other workplace activity as the travel arises because of the income producing activities being carried out at both.
3. However, there may be cases where the circumstances strongly suggest a different basis of apportionment is appropriate. Taxpayers should self assess on a fair and reasonable basis or seek the Commissioner's opinion on what portion of the otherwise deductible amount is attributable to the business activity.

¹ The terms marked with * are defined in section 995-1 of the ITAA 1997. Any subsequent use of an asterisked term carries with it the same definition as the ITAA 1997.

Example 1

4. *Tony works as a public servant in a government department during the day. He also carries on a business as a kung fu teacher at a studio he rents for this purpose. On three days a week he travels either from his employment work location to the studio or from the studio to the employment work location. Tony has incurred \$2,000 transport expenses which are deductible under section 25-100 of the ITAA 1997.*

5. *Tony has only been teaching kung fu for a part of the year and, while he has derived income of \$16,000 he has not been able to satisfy any of the four tests² set out in the non-commercial loss provisions of Division 35 of the ITAA 1997. Tony's business activity also does not satisfy either of the exceptions to the loss deferral rule.³ If Tony's expenses attributable to his kung fu teaching business activity exceed the assessable income he derives from it then any loss he makes must be deferred. Tony has incurred \$14,000 of otherwise deductible expenses, excluding the \$2,000 transport expenses.*

6. *Tony's circumstances are indicative of those situations where a 50:50 split is the fair and reasonable basis of determining that part of the deductible amount to be attributed to the business activity.*

7. *Therefore, \$1,000 of the \$2,000 that Tony can deduct under section 25-100 of the ITAA 1997 is attributable to his business activity, and is added to the \$14,000 of otherwise deductible expenses to determine whether the loss deferral rule applies. Tony now has a total of \$15,000 of otherwise deductible expenses attributable to his business activity. As this does not exceed the \$16,000 of assessable income that he derived from his business activity the loss deferral rule will not apply.*

Date of effect

8. This Determination applies both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination.

Commissioner of Taxation27 September 2006

² The four tests are: the Assessable income test (section 35-30); the Profits test (section 35-35); the Real property test (section 35-40), and the Other assets test (section 35-45).

³ The exceptions are contained in subsection 35-10(4) and apply where the business activity is a *primary production business or a *professional arts business and income from other unrelated sources is less than \$40,000.

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.***

Explanation

9. Under Division 35 of the ITAA 1997 unless a business activity, carried on by an individual (whether alone or in partnership), can pass one of the four tests,⁴ one of the exceptions applies, or the Commissioner exercises his discretion to allow the losses, any loss made must be deferred.

10. The loss deferral rule is contained in subsection 35-10(2) of the ITAA 1997. It provides that where the total of otherwise deductible amounts that are **attributable to a business activity** exceed the assessable income from that business activity then the loss must be deferred until a later year in which the business activity is carried on.

11. Section 25-100 of the ITAA 1997 applies to assessments for the 2002 and later income years and specifically allows, subject to certain exclusions, a deduction for transport expenses incurred in travelling between two workplaces. It was enacted after the High Court decision in *Federal Commissioner of Taxation v. Payne* (2001) 202 CLR 93; [2001] HCA 3 (*Payne's Case*).

12. While a majority of the High Court in *Payne's Case* did not consider that the connection between the travel expenditure and gaining or producing assessable income was sufficient for the purposes of subsection 51(1)⁵ of the *Income Tax Assessment Act 1936* (ITAA 1936), they did acknowledge that there was a causal connection between the two. This was by virtue of the fact that the travel allowed the taxpayer to be in the position of producing assessable income at each of the workplaces the taxpayer travelled to.

13. In *Federal Commissioner of Taxation v. Sun Alliance Investments Pty Ltd (in liq)* [2005] HCA 70; 2005 ATC 4955; (2005) 60 ATR 560, the High Court considered the meaning of the expression, 'could reasonably be taken to be attributable to', as it appeared in paragraph 160ZK(5)(b) of the ITAA 1936. In relation to the link that this provision was concerned with between a distribution by a company and profits derived by that company, the Court said at paragraph 77:

Thirdly, that link may be described in terms of necessary causation but, as with all questions of causality, the starting point is the identification of the purpose (here the legislative purpose) to which the question is directed.

14. The High Court held (at paragraph 80), that given the text of subsection 160ZK(5) of the ITAA 1936 and its objects as expressed in the relevant Explanatory Memorandum,⁶ the meaning of 'attributable to' as requiring only a 'contributory causal connection' applied, rather than any narrower meaning. At paragraph 82 they referred to the 'breadth of nexus' contemplated by the words 'attributable to'.

15. The purpose of subsection 35-10(2) of the ITAA 1997 is to quantify for a particular income year the overall amount of the 'loss' generated by the relevant business activity that is not taken into account in the calculation of taxable income for that year.

⁴ See footnote 3 of this Determination.

⁵ Section 8-1 of the ITAA 1997 has replaced subsection 51(1) and is in similar terms.

⁶ See the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 1994.

16. Where, as in the case in question, this includes an otherwise deductible amount for which one contributory cause is the business activity, but there is another contributory cause, being another income producing activity, it is not considered that subsection 35-10(2) of the ITAA 1997 attributes all of this amount in the calculation of the loss to be deferred. Rather, as is stated in paragraph 57 of Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses:

The 'amounts attributable to the *business activity' that an individual taxpayer can otherwise deduct are, for the purposes of applying the loss deferral rule in subsection 35-10(2), all those amounts otherwise deductible under any provision...to the extent that they relate to the carrying on of the particular *business activity in the income year in question.

17. Carrying on the business activity is a contributory cause of the amount otherwise deductible under section 25-100 of the ITAA 1997, whether the travel is to the place where that activity is carried on, or from that place.

18. In applying paragraph 57 of TR 2001/14, in determining how much of the amount deductible under section 25-100 of the ITAA 1997 is attributable to the business activity for the purposes of subsection 35-10(2) of the ITAA 1997, a 'fair and reasonable basis' of apportionment is called for. In most cases apportionment equally to each activity will be accepted as fair and reasonable.

References

Previous draft:

TD 2006/D21

- ITAA 1997 35-10(2)

- ITAA 1997 35-10(4)

- ITAA 1997 35-30

- ITAA 1997 35-35

- ITAA 1997 35-40

- ITAA 1997 35-45

- ITAA 1997 995-1

Related Rulings/Determinations:

TR 2001/14

Subject references:

- allowable deductions

- business activity

- deferred non commercial loss

- employment related expenses

- travel

Case references:

- Federal Commissioner of Taxation v. Payne (2001) 202 CLR 93; [2001] HCA 3

- Federal Commissioner of Taxation v. Sun Alliance Investments Pty Ltd (in liq) [2005] HCA 70; 2005 ATC 4955; (2005) 60 ATR 560

Legislative references:

- ITAA 1936 51(1)

- ITAA 1936 160ZK(5)

- ITAA 1936 160ZK(5)(b)

- ITAA 1997 8-1

- ITAA 1997 25-100

- ITAA 1997 Div 35

Other references:

- Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 1994

ATO references

NO: 2006/4890

ISSN: 1038-8982

ATOlaw topic: Income Tax ~~ Losses ~~ non commercial
Income Tax ~~ Deductions ~~ travel expenses