



Public advice and guidance compendium – TD 2023/6

❗ Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Taxation Determination TD 2019/D5 *Income tax: tax incentives for early stage investors: what is an 'expense' that is 'incurred' for the early stage test?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	The final Determination should clarify that the meaning of 'year' and of 'current year' in the law refers to a financial year and confirm that it is not a reference to calendar year. The target audience (start-up entrepreneurs) may not appreciate that years doesn't mean a calendar year as it conventionally does. Commenters acknowledged that such a view is clearly in error.	No change was made in the final Determination. We think it is well understood in the community that tax ordinarily operates on a financial year basis and that the Determination, as worded, does not introduce any ambiguity or confusion on this point.
2	The final Determination should provide additional confirmatory wording to highlight that the investor must reference expenses in the prior income (tax) year and the prior 3 income (tax) years as the case may be.	This is a separate interpretative issue outside the scope of the final Determination which deals only with the meaning and scope of the kind of expenses taken into account for these tests. However, we note that amendments made by <i>Treasury Laws Amendment (2018 Measures No. 2) Act 2020</i> seek to address this issue.

Issue number	Issue raised	ATO response
3	Using the 'total expenses' label in the company tax return as a de facto measure of total expenses 'incurred' can be misleading and can be significantly higher than accounting expenses. For example, the 'total expenses' label includes total depreciation deductions claimed by small businesses under simplified depreciation rules and uniform capital allowances rules, including instant asset write-offs.	We agree. In many cases, a company will still satisfy the expense tests relying on the tax return label and its investors will still be able to rely on the easier compliance approach provided in the Determination. The use of the label is an option the ATO makes available as an administrative approach for practical compliance. The compliance approach does not prevent a company and its investors from using an amount worked out to be the correct amount of incurred expenses in determining if the relevant expense tests are met. We have provided additional clarification at paragraphs 16 and 18 of the final Determination.

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