Australian Government
Australian Taxation Office

Public advice and guidance compendium – TD 2024/7

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2023/D4 *Income tax: deductions for financial advice fees paid by individuals who are not carrying on a business*. 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

All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Issue number	Issue raised	ATO response
1	**Scope of the Determination** Several comments were received on the scope of the draft Determination: • The Determination should fully contemplate the experience of different advice models within the market providing different forms of financial advice to consumers. • The scope of the Determination is restricted to when an individual may be entitled to a deduction under section 8-1 or section 25-5, however it should be noted for completeness it is anticipated that both tax agents preparing returns for individuals and financial advisers issuing itemised invoices will rely on the Determination for their purposes.	Noted, however no changes have been made to the final Determination to specifically address these points. The examples in the final Determination are for illustrative purposes only and were sourced in consultation with the industry. The application of the principles requires consideration of the specific facts and circumstances of each case and it is not possible to address every potential scenario in the final Determination. We understand that there is a broad audience for the final Determination, however it only applies to individuals who are not carrying on an investment business.

Issue number	Issue raised	ATO response
2	**Apportionment** Several comments were received requesting we provide more guidance on the apportionment methodology for advice fees. • The final Determination should expand further on what the adviser needs to document in the invoice and how the cost of advice can be apportioned (for example, time-based apportionment) to make it clearer for the client and their tax agent in claiming the deduction. • A financial adviser may decide to charge a fixed fee for advice, based on the complexity of a case and the number of strategies to be considered. It follows that it should be possible for a financial adviser to itemise an invoice in one of several ways to support appropriate apportionment − to specify hours spent on individual tasks, including which of those may be deductible − to specify strategies implemented in the advice, including which of those strategies relate to tax and therefore may be deductible, and − to specify the assets involved in the advice, including where the fees are deductible. • The ATO should consider updating at least one example to provide specific guidance on how a fee can be apportioned in preparing and delivering each specific component of the advice. • Financial advice is charged for as advice as a whole and is often fairly standard, being priced in line with market conditions. In the case of Example 4 of the draft Determination, if Juanita agreed to the advice, it is likely Nate would direct the implementation to the appropriate areas. The self-managed superannuation fund (SMSF) would be established by a SMSF Administration firm or an Accountant. So Nate's part in the process is limited to recommending a structure as	The appropriate apportionment methodology will depend on the facts and circumstances of the case. The law requires apportionment to be on a fair and reasonable basis (see paragraph 47 of the final Determination). It does not prescribe one method over another.

Issue number	Issue raised	ATO response
	a part of the overall advice. It would be difficult for Juanita to dissect the invoice for deductibility of the component parts as it is likely, if the advice included everything except the establishment of a SMSF, the fee would be the same.	
3	**Initial advice arrangements** The draft Determination does not reflect the case for tax deductibility of financial advice as part of initial advice arrangements. There is a shift from an example in Taxation Determination TD 95/60 *Income tax: are fees paid for obtaining investment advice an allowable deduction under section 8-1 of the Income Tax Assessment Act 1997 (ITAA 1997) for taxpayers who are not carrying on an investment business?* (now withdrawn) where a fee is paid to draw up an investment plan to Example 1 in the draft Determination where a fee is paid for personal advice. Prior to recent regulatory reform an investment plan in 1995 did not necessarily require consideration of an individual's objectives, financial situation or needs. This meant that it was less likely that an adviser was required to consider an individual's pre-existing income-producing assets and there could be little nexus between that person's existing income, liabilities, financial assets and the new investments acquired in accordance with the plan. This made the essential character of that investment plan 'structural' in nature. In 2024 all financial advice requires consideration of an individual's financial situation and needs, with relevant strategies delivered to meet their goals and objectives. This requires consideration or advice regarding an individual's pre-existing income producing assets. In this instance there is a clear nexus between that person's existing income, liabilities, financial assets and the new investments acquired in accordance with the advice. This makes the advice 'incremental' in nature.	As a result of regulatory reforms to the financial services industry TD 95/60 (now withdrawn) has been modernised. *Pre-existing investments* We have amended the final Determination and Example 1 so that it addresses new investments and pre-existing investments (see paragraphs 28, 29, 52 and 55 of the final Determination). We consider that fees for financial advice on a proposed investment prior to the acquisition of the asset will not be deductible under section 8-1 as it is an expense that is associated with putting the income-earning investment in place. It is not incurred in gaining or producing the taxpayer's assessable income and is capital in nature. Fees for financial advice on pre-existing investments are not deductible under section 8-1 when: • an individual seeks advice from a new financial adviser at the commencement of an advisory engagement, and • that advice involves consideration of the individual's circumstances by that financial adviser for the first time and making recommendations and advising on the income-earning structure. In these circumstances, the fees for that advice are capital or of a capital nature.

Issue number	Issue raised	ATO response
	We should consider specific examples where advice requires either consideration about pre-existing income-producing assets or specific advice on such assets. The draft Determination should reflect the case for tax deductibility of financial advice fees as part of an initial advice arrangement.	
4	**Initial advice – sufficient connection in time** For both TD 95/60 (now withdrawn) and the draft Determination, the ATO supports the view that the fee is not incurred in gaining or producing assessable income by citing the decision of the Full High Court in *Commissioner of Taxation (Cth) v Maddalena* 71 ATC 4161 *(Maddalena)*, and the discussion of that case by Hill J in *Commissioner of Taxation v Cooper, RJ* [1991] FCA 177. For the purposes of the draft Determination, it is submitted that *Maddalena* should be contrasted with the more contemporaneous decision in *Spriggs v Commissioner of Taxation* [2009] HCA 22 (*Spriggs*) which could not have been considered when we initially came to the position in TD 95/60 (now withdrawn) but can be considered now. In *Spriggs*, the taxpayers were also professional footballers, who incurred expenses for the services of a sports management company that negotiated both employment contracts with professional football clubs and related business contracts. This time the Full High Court held that management company expenses incurred in negotiating employment contracts were deductible. In distinguishing *Maddelena* the court relied on the fact that the employment contracts specifically anticipated other income from the related business contracts. It is considered that a similar connection in time exists where an individual incurs expenses for the services of a financial adviser with regards to pre-existing financial assets as well as the specific anticipation of investment income. It is accepted that expenditure can satisfy the positive limbs of section 8-1 even though it is incurred in a period prior to	We have amended the final Determination and Example 1 so that it addresses new investments and pre-existing investments (see paragraphs 28, 29, 52 and 55 of the final Determination). We acknowledge that *Spriggs* was decided after TD 95/60 (now withdrawn) was issued. However, *Spriggs* involved considering the deductibility of expenses incurred by 2 individuals who were carrying on businesses. That was a different arrangement to the scenario being considered in the final Determination being an individual who incurs fees for financial advice where the individual does not carry on an investment business (see paragraph 5 of the final Determination). We do not consider that the principles relevant to deciding that case impact the analysis outlined in the final Determination. The final Determination explains that where there is a significant delay between incurring the loss or outgoing and the commencement of the income-producing activity then this may suggest that the expenses may have been incurred for some purpose other than gaining or producing assessable income. It may also demonstrate that the outgoing was entirely preliminary to the gaining or producing of assessable income. Whether there is a sufficient connection between the loss or outgoing and the activities which directly gain or produce the assessable income will depend on the facts and circumstances of each case. However, to be deductible under section 8-1, the expense must not be capital or of a capital nature, or private or domestic expenditure. Fees for financial advice on a new investment are not deductible because the expenditure is incidental to the cost of acquiring the income-producing investment (and may be included in the cost base of the asset). Where a new adviser considers pre-existing investments, we consider that financial advice fees will not be deductible under section 8-1 where that advice involves the consideration of the individual's circumstances by that

Issue number	Issue raised	ATO response
	any expected resultant income. See Taxation Ruling TR 2004/4 *Income tax: deductions for interest incurred prior to the commencement of, or following the cessation of, relevant income earning activities*.	financial adviser for the first time and making recommendations and advising on the income-earning structure. In these circumstances, the fees for that advice are capital or of a capital nature.
5	**Initial advice – capital or capital in nature** In many cases initial advice is not in fact a one-off, but rather the commencement of an ongoing advice arrangement or the commencement of a new ongoing arrangement with a different adviser. In this regard, it would not be the initial advice which gives rise to an enduring benefit but the start of a continuing relationship between an individual and their adviser. The principle is reflected in Example 2 of the draft Determination where continued advice on the suitability and performance of investments is provided. In this context, the initial advice is no longer enduring, but subject to the continued relationship between the individual and their financial adviser.	We have updated the final Determination and Example 1 to refer to both new and pre-existing investments (see paragraphs 28, 29, 52 and 55 of the final Determination).
6	**Ongoing investment advice arrangements should be deductible** An ongoing arrangement to provide advice on suitability and performance of investments should be deductible regardless of whether investments are purchased or disposed when the portfolio is rebalanced. Further, the investments are not just for capital gains but for assessable dividends and distribution income. The practical application of paragraph 22 of the draft Determination in the context of ongoing advice is queried. Where the adviser provides ongoing advice on the suitability and performance of investments and the taxpayer also makes regular contributions/investments to earn assessable income as well as capital growth, it is considered that there is sufficient connection with producing assessable income rather than capital in nature. It is unfair and unreasonable to require deductibility apportionment of the ongoing advice on suitability and performance where the taxpayer also happens	We have modified the final Determination and Example 1 to refer to both new and pre-existing investments (see paragraphs 28, 29, 52 and 55 of the final Determination). We have added a new paragraph 30 in the final Determination to confirm our view that the advice fees on an individual's contribution of additional funds is not deductible under section 8-1 as it is ordinarily capital or of a capital nature. Further, apportionment is not based on whether the taxpayer makes regular contributions. Apportionment is dealt with at paragraphs 44 to 48 of the final Determination.

Issue number	Issue raised	ATO response
	to make regular contributions versus a taxpayer who doesn't make regular contributions.	
7	**Date of application** As the focus of the draft Determination is on deductions for fees paid for financial advice by individuals, the position in draft TD 2023/D4 should apply for income years beginning on or after 1 July 2023 rather than from the date of withdrawal of TD 95/60 (now withdrawn). This will ensure that individuals preparing their tax returns who have received financial advice during the income year will only be required to apply the updated view in TD 2023/D4 without considering the superseded view in TD 95/60 (now withdrawn). In a financial advice context, splitting and apportioning fees during a year between what was pre 13 December 2023 and what was post would be extremely complicated for both clients and financial advisers. It is argued that the extent to which a fee was deductible under section 25-5 was a right that existed prior to the release of the draft Determination.	The positions taken in the final Determination concerning the application of section 8-1 are consistent with the technical views set out in TD 95/60 (now withdrawn). Accordingly, the final Determination applies to arrangements both before and after its date of application.
8	**Further explanation of 'Tax (financial) advice service' and 'qualified tax relevant provider'** The concepts of 'tax (financial) advice service' and 'qualified tax relevant provider' should be further explained. It would also be helpful to explain where an individual could go to confirm that their financial adviser is in fact a qualified tax relevant provider. Paragraphs 43, 53 and 60 of the draft Determination should include the following at the end of the paragraph 'as he is registered with ASIC as a qualified tax relevant provider.	These are terms used in Acts which we do not administer. Therefore, providing further explanation of these concepts is outside the scope of this final Determination. 'Tax (financial) advice service' is referred to in paragraph 8 of the final Determination.
9	**Cost base for the asset in relation to non-deductible fees** It would be useful to have more discussion around the treatment of non-deductible fees in the cost base of the asset being acquired. Currently, there is only a small reference in an example, with no section reference provided.	An additional sentence has been included at paragraph 28 of the final Determination explaining that the expenditure may be included as an incidental cost of the acquisition of the asset and may be included in the cost base of the asset under subsection 110-25(3) and section 110-35.

Issue number	Issue raised	ATO response
10	**Upfront fees** There is an argument that upfront fees should be deductible under section 8-1 as per the existing law on the basis the ATO has used the previous rationale from TD 95/60 (now withdrawn) that an upfront fee is a capital event which is too distant from a client drawing income to say that an upfront fee is not deductible under section 8-1. An upfront deduction for section 25-5 is already provided for and the draft Determination can be relied on so advisers will be able to claim a deduction on upfront fees proportional to the amount of that advice which is tax related now. This is likely to be a high proportion, especially for holistic and investment advice when considering the number of strategies consumer might have with nexus to taxation (less so for insurance advice).	Noted, however no change has been made to the final Determination to specifically address this comment. Both provisions have different requirements for a deduction to be available. For the purposes of the final Determination, where financial advice fees are deductible under both sections 8-1 and 25-5, the most appropriate provision will be the specific deduction in section 25-5. We note that financial advice fees need to be apportioned on a fair and reasonable basis to the extent that they are not deductible under either section 8-1 or section 25-5.
11	**Examples generally** Delete last sentence of paragraph 48 of the draft Determination and add a new paragraph after paragraph 48 which states: *48A. As the advice is provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis. Claudio issues Min-Ji an itemised invoice. In doing so, he proportions the fixed fee into components such as personal advice regarding both existing and new investments and time spent preparing his tax (financial) advice.* The same suggestion is made in relation to paragraphs 52, 59 and 67 of the draft Determination.	Noted, however paragraphs 44 to 48 of the final Determination address apportionment. The examples in the final Determination are for illustrative purposes only and were drafted in consultation with the industry. Apportionment needs to occur on a fair and reasonable basis. What is fair and reasonable will depend on the facts and circumstances of each case. The final Determination does not intend to prescribe to financial advisers how they should invoice a client.
12	**Pre-existing investments** In Examples 1 and 2 there is currently no mention of any pre-existing investments held by Min-Ji. The status of pre-existing investments was addressed in paragraph 7 of TD 95/60 (now withdrawn).	We have updated the final Determination and Example 1 to refer to pre-existing investments (see paragraphs 29, 52 and 55 of the final Determination).

Issue number	Issue raised	ATO response
	It would be helpful if Examples 1 and 2 were slightly expanded such that Claudio also reviews Min-Ji's existing investments in the context of her financial objectives, situation and needs and retains investments appropriate to such objectives, et cetera. Our understanding of the ATO's view is the continuing fee for that which relates to ongoing advice on the suitability and performance of investments is deductible under section 8-1 remains deductible under section 8-1.	
13	**Example 1 of the draft Determination** The following changes should be made to Example 1: • paragraph 44 – add the following to the end of the paragraph: 'The advice provided by Claudio is expected to be relevant to this objective.' • paragraph 45 – specify the basis for the fee. • paragraph 46 – make it clear that Claudio has both considered and provided advice in relation to pre-existing income producing assets.	We do not consider that the suggested changes were required to be made to paragraphs 44 and 45 of the draft Determination for the purposes of Example 1. The final Determination and Example 1 have been updated to refer to pre-existing investments (see paragraphs 29, 52 and 55 of the final Determination).
14	**Example 2 of the draft Determination** Several comments were received in relation to Example 2: For the continuing arrangement, where the component of the fee that relates to ongoing advice on the suitability and performance of investments is deductible under section 8-1, it would be helpful to confirm this is the case where the fee is simply: • deducted directly from the financial product (noting the example does not relate to a fee deducted from a superannuation fund which is specifically excluded from the scope of the Determination), and • calculated as a percentage of the value of the investments.	In relation to the comments on Example 2, except for the comments on paragraph 50, the final Determination has not been updated in this regard. The way in which the fee is paid does not result in a different technical outcome being reached in relation to the Example. In relation to the comments about paragraph 50, we have updated the final Determination to include our view on the deductibility of fees for financial advice when changes are made to the mix of investments held by an individual where assets are acquired and disposed of (see paragraphs 20 and 58 of the final Determination).

Issue number	Issue raised	ATO response
	In both these cases, the essential character of the advice remains the same, it is just the payment method or calculation of the fee that may be different. • Paragraph 49 – should be amended to specify the basis for the fee. • Paragraph 50 – should be reworded to reflect that where Min-Ji's risk profile has changed, the investment allocations within the managed fund would also need to change. • Paragraph 50 – This example is not realistic because for investment in unitised funds changing the mix of investments or modifying the risk profile requires acquiring/disposing of units in managed funds to rebalance a portfolio. Clarity over whether ongoing financial advice on suitability and performance of an investment is deductible where it requires acquisition or disposal of units to change the mix of investment would also be appreciated.	
15	**Example 3 of the draft Determination** The following changes should be made to Example 3: • Paragraph 54 – should be amended to reflect a more realistic scenario. • Paragraph 55 – should be amended to clarify that the term 'life insurance' is the more general term encompassing death, total and permanent disability, trauma and income protection insurance. • Paragraph 56 – should be amended to make it clear that Lara has considered and provided advice in relation to the pre-existing income protection insurance policy. • Paragraph 57 – should be reworded to clarify that a financial adviser recommending risk products may charge a fee for their work in determining relevant cover, identifying policies and advising on the tax	The final Determination has been updated to include our view on the deductibility of advice on income protection insurance. Example 3 of the final Determination also considers advice in relation to income protection insurance policies. We do not consider further changes were required to the Example.

Issue number	Issue raised	ATO response
	implications. In addition, that adviser may also be paid a commission by the insurance company as a percentage of the premium paid by the individuals. In the case of income protection insurance, the premium remains deductible to the individual, notwithstanding some of that premium may be indirectly paid to the adviser by way of commission. • Paragraph 58 – should be amended to clarify which component of the fee is deductible.	
16	**Example 4 of the draft Determination** Suggest changes be made to Example 4: • Paragraph 61 – should be amended to include stronger justification for the recommendation of an SMSF. • Paragraph 62 – should be amended to specify the basis for the fee. • Paragraph 63 – should be amended to clarify that the financial adviser would recommend establishing a superannuation fund but would not typically do this themselves. This would be completed by the individual, their lawyer or accountant. • Paragraph 65 – should be amended to clarify that the financial adviser would not undertake work on the establishment of the SMSF. This work would typically be completed by the individual, their lawyer or an accountant.	No changes have been made to the final Determination in relation to the comments on paragraphs 61 and 62. In relation to the changes suggested to paragraphs 63 and 65 of the draft Determination, we have made minor revisions to Example 4 of the final Determination to clarify that the advice would be to recommend establishing a SMSF.

Issue number	Issue raised	ATO response
17	**Salary sacrifice - Example 4 paragraph 66 of the draft Determination** Section 8-1 allows a general deduction if the expense is incurred in gaining or producing assessable income. How should that be applied to the (non-tax related part of) salary sacrifice?	The final Determination has been updated to include our view on the deductibility of advice on salary sacrifice arrangements (refer to paragraph 37 of the final Determination). This view is also reflected in Example 4 of the final Determination. Example 4 of the draft Determination indicated that the fee was deductible under section 8-1 to the extent that it was not deductible under section 25-5. However, we consider this could be misleading and so we have adjusted the example in the final Determination to clarify that the fee is deductible under section 25-5.

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).