

# ***CR 2001/38 - Income tax: The deductibility for Queensland school employees of the cost of obtaining a suitability notice for working with children***

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## Class Ruling

Income tax: The deductibility for Queensland school employees of the cost of obtaining a suitability notice for working with children

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### *Preamble*

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

## What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

### **Tax law(s)**

2. The tax law dealt with in this Ruling is section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

### **Class of persons**

3. The class of persons to whom this Ruling applies are paid employees (other than registered teachers) of a Queensland school who are newly appointed to a permanent, temporary or casual position on or after 1 May 2001 and who are in 'regulated employment' and required to undergo a suitability check under the *Commission for Children and Young People Act 2000* (the CCYP Act). It also applies to existing employees of a Queensland school who undergo the suitability check (also known as the 'working with children' check).

4. 'Regulated employment' is defined in Schedule 1 of the CCYP Act. It includes:

- work carried out inside a boarding facility at a school (but not work carried out by a registered teacher),

- work at a school if the usual functions of the employment include, or are likely to include, providing services that are directed mainly towards children, or conducting activities that mainly involve children, but does not include work carried out by a registered teacher;
- work which involves counselling or support services where the usual functions of the employment include providing counselling or support where the employee is physically present with the child while no-one else is present or the employee is not physically present with the child (e.g., providing advice over the telephone).

5. Examples of this class of school employees include people engaged as administrative officers, registrars, janitors, community education counsellors, teacher aides, scientific assistants, cleaners and school-employed trainees.

## Qualifications

6. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

7. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 11 to 14 is carried out in accordance with the details of the arrangement provided in this Ruling.

8. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
- (b) this Ruling may be withdrawn or modified.

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## **Date of effect**

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10. This Ruling applies from 1 May 2001.

## **Arrangement**

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11. The CCYP Act came into effect on 1 May 2001. Under the Act an employer who proposes to start employing, or continue employing, another person in regulated employment may apply for a suitability notice for the employee stating whether the employee is a suitable person for child-related employment.

12. A suitability notice generally requires renewal after 2 years.

13. Once the principal of a school in Queensland has selected the 'preferred applicant' for an advertised vacancy, the principal (as employer) and the 'preferred applicant' (as prospective employee) complete the appropriate sections of the *Application by employer for suitability notice of a prospective paid employee* form. The principal lodges the form with the Commission for Children and Young People with the required fee. The fee is to be paid by the preferred applicant.

14. The Act provides a discretion for employers to apply for a suitability notice for existing employees where the employer knows or reasonably suspects that a current employee has a criminal history that may make them unsuitable for child-related employment. This application is also accompanied by an application fee, the cost borne by the employee.

## **Ruling**

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15. Where the cost of the application is borne by the employee the expense is deductible in the following situations:

- where the employee is an existing employee of a school and is required to obtain a suitability notice in order to continue to derive assessable income in that position
- where a new employee of a school has recently derived assessable income from being continuously employed within the field of child-related employment.

16. Where a suitability notice is required to be renewed the cost of the renewal is deductible to the employee where the employee is currently employed in a permanent, temporary or casual position at a school and requires a suitability notice to be renewed to continue in that employment.

17. The cost of obtaining the initial suitability notice for a new employee who has not recently been continuously employed in the field of child-related employment is NOT deductible.

## **Explanations**

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18. The basic tests for deductibility of work-related expenses are in section 8-1 of the ITAA 1997. This states that you can deduct any loss or outgoing to the extent that is incurred in gaining or producing your assessable income. However, you cannot deduct a loss or outgoing if it is of a capital or private or domestic nature.

19. A number of significant court decisions have determined that, for an expense to satisfy the tests in section 8-1, it must have the essential character of an outgoing incurred in gaining assessable income (*Lunney v FC of T*; *Hayley v FC of T* (1958) 100 CLR 478; [1958] ALR 225; 11 ATD 404) and there must be a nexus between the outgoing and the assessable income so that the outgoing is incidental and relevant to the gaining of assessable income (*Ronpibon Tin NL v FC of T* (1949) 78 CLR 47; 8 ATD 431).

20. Obtaining a suitability notice under the Act is a requirement for a person to commence child-related employment or, in some cases, to continue such employment in Queensland. For existing employees who are required to obtain the notice and who already have paid employment at a school, either in a temporary, casual or permanent position, the expense is necessary to secure the continuity of the existing income stream. The necessary nexus between the outgoing and the income is therefore established and the cost of obtaining the notice is deductible.

21. For new employees of a particular school who have held previous positions in the field of child-related employment with other employers, the necessary nexus is established if it can be considered that they have been continuously employed in the field of child-related employment and it is necessary for them to obtain the suitability notice to secure the continuity of this income stream. This is a question of fact to be determined for each employee. The existence of a position involving child-related employment with another employer and the period of time since assessable income was last derived from such a position will be taken into account to determine whether any breaks in employment sever the nexus between the outgoing and assessable income.

22. New employees who need to obtain the notice as a prerequisite to starting work in the field of child-related employment incur the expense at a point too soon to be regarded as obtaining assessable income (*FC of T v Maddalena* 71 ATC 4161; (1971) 2 ATR 541). In

these cases, the expense is not deductible. This view is supported by *Taxation Ruling* TR 98/6 which, in relation to a similar issue, states:

‘In nearly all States and Territories, employers require real estate employees to obtain a police clearance certificate when entering the industry. A deduction is not allowable for the cost of obtaining the police clearance certificates. Although the police clearance certificate may be necessary for employment into the industry, the expense if an outgoing that precedes the earnings of assessable income’.

23. It is considered that the suitability notice for child-related employment performs a similar role to the police clearance certificate.

24. A suitability notice is required to be renewed at least every 2 years. The cost of obtaining the renewal of the notice is deductible provided the employee can be said to be continuously employed in the child-related employment industry at the time of renewal. The expense is necessary to preserve the existing income stream.

## **Examples**

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### **Example 1: new employee previously employed in child-related employment field**

25. Fred derives most of his income in the child-related employment field. For a number of years he has worked at a number of schools as a groundsperson, employed under a series of temporary contracts. His last contract ended in March 2001 and he is offered another contract at a different school in May 2001. In order for Fred to start this new contract the principal of the school is now required to apply for a suitability notice for Fred. Fred pays the application fee.

26. The cost of the notice is deductible to Fred. Although he is a ‘new’ employee at this particular school it is considered that he is continuously employed in the child-related employment field and the expense is necessary to secure the continuity of this income stream.

### **Example 2: new employee previously employed in child-related employment**

27. Dominique was once employed as a cleaner in a school. However, for some time she has worked in a variety of jobs, none of which involved child-related employment. In June 2001 she is offered another position as a cleaner with a new school and the principal of the school applies for a suitability notice for her. Dominique pays the application fee.

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28. Dominique is not entitled to a deduction. Although she has previously been employed in the field of child-related employment the time elapsed since her last position and the fact that she has since had several jobs in other fields of employment severs the nexus between the outgoing and assessable income. The notice is required to allow her to re-enter the field of child-related employment as a new employee, rather than to preserve the continuity of an existing income stream. The expense precedes the earning of assessable income from that field.

**Example 3: renewal of notice**

29. Steve is working as a janitor at a school when his suitability notice expires. The principal applies for a renewal of the notice and Steve pays the application fee.

30. Steve is entitled to a deduction. The expense is necessary to preserve his existing income stream.

**Detailed contents list**

31. Below is a detailed contents list for this Class Ruling:

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**Commissioner of Taxation**29 August 2001

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*CR 2001/1; TR 92/1; TR 97/16;  
TR 98/6*Subject references:*

- work related expense

*Legislative references:*

- ITAA 1997 8-1
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- CCYP Act Schedule 1

*Case references:*

- *Lunney v FC of T; Hayley v FC of T* (1958) 100 CLR 478; [1958] ALR 225; 11 ATD 404
- *Ronpibon Tin NL v FC of T* (1949) 78 CLR 47; 8 ATD 431
- *FC of T v Maddalena* 71 ATC 4161; (1971) 2 ATR 541

ATO References

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