


CR 2001/78 - Income tax: suitability notice for contractors employed by the Department of Education, Training and Youth Affairs under the Aboriginal Tutorial Assistance Scheme

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Class Ruling

Income tax: suitability notice for contractors employed by the Department of Education, Training and Youth Affairs under the Aboriginal Tutorial Assistance Scheme

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Arrangement	9
Ruling	16
Explanations	19
Examples	27
Detailed contents list	34

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 is persons providing services under the Aboriginal Tutorial Assistance Scheme (ATAS) to the Department of Education, Training and Youth Affairs (DETYA) where the services are provided in connection with child-related employment.

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs

9 to 15 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. 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- (b) this Ruling may be withdrawn or modified.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

8. This Ruling applies from 1 May 2001.

Arrangement

9. DETYA administers the ATAS. Under the ATAS, supplementary tutorial assistance is made available to Indigenous students who are assessed as requiring assistance with their studies. Assistance is also available through Homework Centres.

10. DETYA contracts tutors and Homework Centre staff to provide these services. Potential contractors must first complete a Retainer Agreement which is the method by which the person provides DETYA with their personal and professional details. The completion, and acceptance by DETYA, of the Retainer Agreement is not a guarantee of work but places people on a register of people available to provide services if required.

11. When a tutor or Homework Centre contractor is identified they are sent a Letter of Approval to Provide Services. This Letter provides details of the contract arrangements.

12. The maximum period for any contract arrangement is 26 weeks.

13. The *Commission for Children and Young People Act 2000* (Qld) (the CCYP Act) came into effect on 1 May 2001. Under the CCYP Act a self-employed person carrying on a regulated business must apply to the Commission for a suitability notice stating whether they are a suitable person for child-related employment. For the purposes of this Act the Commission regards both ATAS tutors and Homework Centre staff as 'self employed' rather than employees.

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

15. 'Regulated business' is defined in Schedule 1 of the CCYP Act and includes a business where the usual activities of the business include, or are likely to include, teaching, coaching or tutoring a child, individually or on a commercial basis.

Ruling

16. Where ATAS tutors or Homework Centre staff (referred to hereafter as 'tutors') incur the cost of obtaining the suitability notice this cost is deductible in the following situations:

- where there is an existing contract in place with DETYA and the tutor is required to obtain a suitability notice in order to continue to derive assessable income under that contract; or
- where the tutor has a Retainer Agreement in place and has recently been employed by DETYA under a previous ATAS contract or has recently derived assessable income from child-related employment or business contract with another party.

17. Should a suitability notice need to be renewed, the cost of renewal is deductible to the tutor in the following situations:

- where an ATAS contract is in place that generates assessable income and a suitability notice must be renewed if the contract is to remain in force; or
- where a Retainer Agreement is in place and the tutor has recently held a previous ATAS contract or has recently derived assessable income from child-related employment or business contract with another party.

18. The cost of obtaining an initial suitability notice for a new tutor who has not recently been employed under an ATAS contract or, has not previously held child-related employment or business contract

with another party that generated assessable income is not deductible to the tutor.

Explanations

19. The basic tests for deductibility of work-related expenses are in section 8-1 of the ITAA 97. 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.

20. 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).

21. Obtaining a suitability notice under the CCYP Act is a requirement for a person to commence child-related employment or, in some cases, to continue such employment in Queensland. For tutors who are required to obtain the notice and who already have a contract in existence at the time of obtaining the notice, 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.

22. For tutors who are offered a new ATAS contract who have held previous positions in the field of child-related employment (either with DETYA or with another employer), 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 tutor. The existence of a previous ATAS contract or 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.

23. New tutors who need to obtain the notice as a prerequisite to starting child-related employment (either at the time of signing the Retainer Agreement or the Letter of Approval to Provide Services) 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 is an outgoing that precedes the earnings of assessable income’.

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

25. 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 tutor continues to derive assessable income from child-related employment as it is necessary to maintain the continuity of the income stream. This applies both to tutors who have a contract in place at the time of the renewal and to tutors who have previously been employed under an ATAS contract and who still have a Retainer Agreement in place but do not have a contract in existence at the time of renewal.

26. It is a question of fact whether a tutor who does not have a current contract with DETYA at the time of renewing the suitability notice is still engaged in child related employment. The existence of a contract of child-related employment with another employer and the period of time since the last contract with DETYA will be taken into account to determine whether the break between DETYA contracts is enough to sever the nexus between the outgoing and assessable income.

Examples

Example 1: Existing tutor

27. Amy has a contract in place with DETYA from 3 January 2002 to 3 June 2002. She applies to the Commission for a suitability notice.

28. Amy is entitled to a deduction as the expense was incurred in order to preserve the continuity of an existing income stream.

Example 2: New tutor

29. Tessa signs a Retainer Agreement which puts her on a register of employment. Tessa has not previously held a position involving

child-related employment. At the same time she applies for a suitability notice and pays the required fee.

30. Tessa is not entitled to a deduction. The expense precedes the earning of assessable income in the field of child-related employment.

Example 3: New tutor previously employed in child-related employment field

31. Nadia derives most of her income from the child-related employment field, both from ATAS contracts and before that private tutoring. Her previous ATAS contract expired in April 2001 and she is offered a new contract beginning in February 2002. Before she can commence work under the new contract she is required to obtain a suitability notice and she lodges the application and required fee with the Commission. Nadia is entitled to a deduction. Although she is commencing a new contract, the existence of her recent previous ATAS contracts and her private tutoring means that she can be considered to be continuously employed in the child-related employment field and the expense is necessary to secure the continuity of this income stream.

Example 4: Renewal of notice

32. Neil has had several previous ATAS contracts with DETYA. His suitability notice has expired and at the time he does not have a contract although he still has a Retainer Agreement in place. He applies to the Commission for renewal of his suitability notice.

33. Neil is entitled to a deduction. The renewal of the notice allows him to continue working in an industry in which he has been continuously employed.

Detailed contents list

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

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Withdrawal	9

Arrangement	10
Ruling	18
Explanations	19
Class of Assets	19
Meaning of Personal-Use	21
CGT Exemption	24
Detailed contents list	26

Commissioner of Taxation

 5 December 2001

Previous draft:

Not previously issued in draft form

- Commission for Children and Young People Act 2000

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16; TR 98/6

Case references:
 - FC of T v. Maddalena 71 ATC 4161; (1971) 2 ATR 541
 - 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
Subject references:

- work related expense

Legislative references:

- ITAA 1997 8-1

ATO References

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