

CR 2018/8 - Income tax: deductibility of funds contributed by Australian Taxation Office employees to the Australian Services Union Taxation Officers' Branch Litigation Fund

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Class Ruling

Income tax: deductibility of funds contributed by Australian Taxation Office employees to the Australian Services Union Taxation Officers' Branch Litigation Fund

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📌 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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.

Summary – what this ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

2. The relevant provisions dealt with in this Ruling are:
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)
 - subsection 8-1(1) of the ITAA 1997
 - subsection 8-1(2) of the ITAA 1997.

Class of entities

3. The class of persons to which this Ruling applies is employees of the Australian Taxation Office that contribute to the Australian Services Union Taxation Officers' Branch Litigation Fund.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 17 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

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- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 July 2017. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

8. The following description of the scheme is based on information provided by the applicant.

9. The Australian Services Union Taxation Officers' Branch (ASU Tax) is a registered trade union and is a branch of the national Australian Services Union.

10. ASU Tax only has coverage of all Australian Taxation Office (ATO) employees and does not cover any other employer.

11. ASU Tax established a litigation fund (Litigation Fund) on 30 April 2010 by decision of the ASU Tax Committee of Management following consultation with ASU members in the ATO.

12. The Litigation Fund is to be kept in a separate bank account to other ASU Tax monies.

13. The ASU Tax Branch Secretary must separately account for the income, expenses and assets of the Litigation Fund in the ASU Tax's annual financial statements. The ASU Tax Branch Secretary must also provide an explanation of how the Litigation Fund has been used in the annual financial statements and through ad hoc reports to its members.

14. The Litigation Fund may receive contributions from ASU Tax members, ATO employees or members of the public. It also receives the portion of ASU Tax membership fees, after GST, that are specifically intended for the fund.

15. In the third paragraph of the Litigation Fund Charter it states:

How the Fund may be used

The Fund may only be used to pay for legal advice and representation, court fees, travel or other costs directly associated with litigation being planned or litigated before the Fair Work Commission or an Australian Court for the purpose of improving or safeguarding the salaries, job security and working conditions of employees of the Australian Taxation Office. The Fund may reimburse ASU Tax for any goods and services tax directly associated with any contribution made directly to the Fund by tax officers or the public.

16. In the fourth paragraph of the Litigation Fund Charter it states:

How the Fund may not be used

The Fund may not be used for salaries, workers compensation or other insurance, payroll tax, rent, capitation fees, telecommunication charges, superannuation or for capital equipment. The Fund may not be used to make payments to or assist a political party; provide overseas relief; provide relief to families of ATO employees or make payments into a fund for the election of union officials.

17. As at 1 July 2017 the Litigation Fund has not been called on. This is reflected in the financial statements for financial years ended 30 June 2016 and 30 June 2017.

Ruling

18. The contributions paid to the Litigation Fund by ATO employees are deductible under section 8-1 of the ITAA 1997.

Commissioner of Taxation

7 February 2018

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.*

19. Subsection 8-1(1) of the ITAA 1997 allows a deduction for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income. Subsection 8-1(2) of the ITAA 1997 limits subsection 8-1(1) of the ITAA 1997 by providing that where the outgoings are of a capital, private or domestic nature, or relate to the earning of exempt income, no deduction is allowable.

20. Broadly the test for deductibility under subsection 8-1(1) of the ITAA 1997 is whether the payment to the Litigation Fund by an ASU member is an outgoing which is incidental and relevant to the derivation of the member's assessable income.

21. Taxation Ruling TR 2000/7 *Income tax: subscriptions, joining fees, levies and contributions paid to associations by individuals* states in paragraph 10, that:

The payment of a special levy or contribution by a person to a trade, business or professional association is an allowable deduction under section 8-1 of the Act where the purpose for which it is made is clearly linked to the activities by which the assessable income of the person is derived.

22. TR 2000/7 further states in paragraph 42 that:

Where special levies or contributions are paid by members to a trade, business or professional association, it is essential to consider the purpose for which the payment is made and whether the requirements of section 8-1 of the Act are satisfied. It is not decisive that these payments may be compulsory. What is important is the connection between the purpose for payment of the levy and the activities by which the assessable income of the member is produced.

23. Paragraphs 10 and 42 of TR 2000/7 show that it is essential to consider the purpose for which the contribution to the Litigation Fund is made and that this purpose must be clearly linked to the activities by which the ATO employee's assessable income is derived.

24. When determining the purpose of the members in incurring the expense, it is necessary to have regard to the objects and activities of the Litigation Fund: *Federal Commissioner of Taxation v. Gordon* (1930) 43 CLR 456.

25. The Litigation Fund Charter states how the Litigation Fund may be used, and in doing so, it outlines the objects of the Litigation Fund.

26. Example 9 in TR 2000/7 provides further assistance in determining if the Litigation Fund's purposes are clearly linked to the activities by which an ATO employee's assessable income is derived. Example 9 at paragraphs 51 and 52 of TR 2000/7 states:

51. Jeremy is a university lecturer. At his university the academics are requested to pay their Staff Association a one-off levy equal to one day's pay. This money is paid into the association's 'fighting fund'. The money paid into this fighting fund is then used by the Association to improve the members' salary and working conditions. The levy is not used for political purposes, but is used solely for protecting the interest of members, safeguarding their jobs and for obtaining legal advice or instituting legal proceedings on behalf of their members.
52. Given the purposes of the fund, it is considered that the necessary connection exists between the payment of the levy and the derivation of Jeremy's assessable income. A deduction for this levy is allowable to him under section 8-1 of the Act.

27. The Litigation Fund Charter states that the Litigation Fund was established to pay for legal advice and representation, court fees, travel or other costs directly associated with litigation being planned or litigated before the Fair Work Commission or an Australian Court for the purpose of improving or safeguarding the salaries, job security and working conditions of employees of the ATO.

28. The purposes of the Litigation Fund indicate there is a connection between the contribution and the derivation of the ATO employee's assessable income.

29. Paragraph 12 of TR 2000/7 provides that the following levies and contributions are not allowable deductions under section 8-1 of the ITAA 1997:

- (a) payments to, or to assist, a political party;
- (b) payments to provide overseas relief;
- (c) payments to assist families of employees suffering financial difficulties as a result of employees being on strike or having been laid off by their employers; and
- (d) payments by salaried elected trade union officials into a general fund for the election of union officials.

30. The Litigation Fund Charter does not allow for the Litigation Fund to be used for salaries, workers compensation or other insurance, payroll tax, rent, capitation fees, telecommunication charges, superannuation or for capital equipment. The Litigation Fund may not be used to make payments to or assist a political party, provide overseas relief, provide relief to families of Australian Taxation Office employees or make payments into a fund for the election of union officials.

31. Considering the above restrictions on the Litigation Fund, contributions to the Litigation Fund are not of the type described in paragraph 12 of TR 2000/7 as not being deductible under section 8-1 of the ITAA 1997.

32. The purpose of the expenditure is incidental and relevant to the income producing activities regularly carried on by an ATO employee as prescribed by subsection 8-1(1) of the ITAA 1997.

33. Subsection 8-1(2) of the ITAA 1997 provides that in order for a deduction to be allowable under section 8-1 the expenditure cannot be of a capital, private or domestic nature, or relate to the earning of exempt income.

34. A contribution to the Litigation Fund does not involve the acquisition of any enduring or tangible asset and therefore is not capital in nature and is not precluded from deductibility by subsection 8-1(2) of the ITAA 1997.

35. The Litigation Fund Charter precludes the Litigation Fund from being used for the private or personal affairs of the contributor. The expense is therefore neither private nor domestic in nature for the purposes of subsection 8-1(2) of the ITAA 1997.

36. Contributions to the Litigation Fund by an ATO employee do not relate to the earning of exempt income by an ATO employee.

37. As a contribution to the Litigation Fund by an ATO employee satisfies subsection 8-1(1) of the ITAA 1997 and is not precluded from deductibility by operation of subsection 8-1(2) of the ITAA 1997 the contributions are deductible under section 8-1 of the ITAA 1997.

Appendix 2 – Detailed contents list

38. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

- ITAA 1997 8-1(1)
- ITAA 1997 8-1(2)
- TAA 1953

Related Rulings/Determinations:

TR 2006/10; TR 2000/07

Case references:

Legislative references:

- ITAA 1997
- ITAA 1997 8-1

- *Federal Commissioner of Taxation v. Gordon* (1930) 43 CLR 456; (1930) 4 ALJ 30

ATO references

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section 8-1 ~~ Other

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