TR 93/D38 - Income tax: interest deductions under subsection 51(1) - application of the use test following FC of T v. Roberts and Smith

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Draft Taxation Ruling

Income tax: interest deductions under subsection 51(1) - application of the use test following *FC of T v. Roberts and Smith*.

other Rulings on this topic

IT 2582

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What this Ruling is about

1. This ruling -

   (a) sets out the general principles governing deductibility of interest under section 51(1) of the *Income Tax Assessment Act 1936* and the Australian Taxation Office's understanding of how those principles apply in particular circumstances following the decision of the Full Federal Court in *FC of T v. Roberts & Smith* 92 ATC 4380; 23 ATR 494, dealing separately with the position of partnerships, companies, trusts and individuals; and

   (b) in so doing, states the revised ATO view on the matters dealt with in Exposure Draft Ruling 73 (deductibility of interest on borrowings by companies to pay dividends, buy back the company's shares or pay for losses transferred under section 80G).

Ruling

General principles governing deductibility of interest

2. The general principles governing deductibility of interest under section 51(1) are:

(a) a taxpayer's expenditure is deductible if its essential character is that of expenditure that has the necessary connection with the operations or activities which more directly gain or produce the taxpayer's assessable income (see paragraph 13);

(b) characterisation of interest on money borrowed is generally ascertained by reference to the objective circumstances of the use to which the borrowed funds are put by the borrower, although the taxpayer's objective and subjective purpose or motive may sometimes be relevant (see paragraphs 15-18 and 20);

(c) a tracing of the borrowed money which establishes that it has been applied to an income producing use will generally demonstrate the relevant connection between the interest and the income producing activity (see paragraphs 16 and 18); and

(d) the fact that a rigid tracing of the borrowed money does not demonstrate the relevant connection does not necessarily mean that the interest expense is not deductible (see paragraphs 3 and 21).

3. In his judgment in *Roberts & Smith*, Hill J gives examples, in the partnership context, of circumstances in which a rigid tracing of the borrowed money is not necessary or appropriate in order to characterise the interest. Those examples serve to identify a further, or subsidiary, principle: interest is deductible to an entity if the borrowing replaces funds employed in the entity's business by financing a payment by the entity in discharge or reduction of an obligation to a person who is entitled to be paid those funds (paragraphs 22-27). 'Business' is used in this Ruling to mean the assessable income producing activities of the entity, whether or not those activities are carried on as a business. The extent, if any, to which funds are employed in the entity's business is a question of fact (see the examples at the end of this Ruling).

4. Interest on the borrowing continues to be deductible, of course, only to the extent that the new funds continue to be employed in the borrower's business (see paragraph 30).

Application of the principles

Partnerships

5. Subject to paragraph 6, interest is deductible in accordance with the principle in paragraph 3 where a partnership borrows to finance any of the following payments:

(a) a payment in reduction of partnership capital which the partnership is obliged to reduce either under the partnership agreement or by agreement of the partners. Funds representing partnership capital are, by definition, employed in the partnership business because they are contributed by partners for the purpose of commencing or carrying on the partnership business and intended to be risked by the partners in the business. If the partnership business is carried on for the purpose of producing both assessable and exempt income then the interest on borrowed funds used to replace capital must be apportioned;

(b) paying partners their share of profit distributions. Funds representing the obligation to partners are employed in the partnership business because immediately prior to the profits being released they are represented by the increase in net assets of the partnership from the beginning of the accounting period to the end. If the partners make drawings against anticipated profits, the drawings are an interest-free loan and interest on borrowings by the partnership to finance those drawings is not deductible until the drawings are set off against profit distributions;

(c) repaying a loan (from, for example, a financial institution or a partner) which is, at the time of the replacement borrowing, being applied to the income producing purposes of the partnership;

(d) discharging a liability to a supplier of goods or services who extends trade credit to the partnership. The liability is in respect of funds employed in the business because it arises in the course of carrying on the business.

6. However, a 'capital' or 'equity' account of a partnership, to the extent it represents the value of internally generated goodwill or an unrealised revaluation of assets (which are simply book entries), does not constitute partnership capital or

loans from partners (including undrawn profit distributions). Accordingly, interest on money borrowed to make a payment to partners purportedly to diminish or extinguish that part of such an account is not deductible.

Companies

7. Subject to the restriction mentioned in paragraph 8, interest on borrowings by a company is deductible if the borrowings finance the discharge or reduction of any of the following obligations:

(a) a liability to a lender of money which, at the time of the replacement loan, is being applied to the assessable income producing purposes of the company;

(b) a liability to a trade creditor;

(c) an obligation to pay shareholders under an agreement to buy back shares or otherwise reduce paid up capital. This is equivalent to an obligation to reduce partnership capital;

(d) a liability to pay a declared dividend, whether final or interim, if the dividend is paid from profits arising from the company's assessable income producing activities. Although, strictly speaking, declaration of an interim dividend does not create a liability, we do not consider it is the intention of the law that borrowings to pay interim and final dividends should attract different tax treatment. Being paid a dividend is being paid funds employed in the company's business because the unappropriated profits account that is diminished by the creation of the liability to pay the dividend is, like partnership profits, a product of the carrying on of the business of the company;

(e) a liability to another company in a wholly owned group under an agreement to transfer losses for the purposes of section 80G. The transfer of a loss under such an agreement reduces the transferee's liability to pay income tax. Discharging the liability to the other company is therefore effectively the same as discharging the liability to income tax, which, in turn, constitutes the withdrawal of funds employed in the company's business.

8. As with partnerships, interest is not deductible if the borrowings finance payments to shareholders in purported reduction or extinguishment of capital or equity accounts representing internally generated goodwill or unrealised revaluations of assets. To the extent a revaluation reserve represents realised gains, however, it is accepted that the reserve is equivalent to retained earnings and is capable of supporting a dividend and, thereby, of attracting a deduction for interest on borrowings to finance the relevant dividend (see paragraph 29).

Trust estates

9. Interest on borrowings by a trustee is deductible if the borrowings finance the discharge or reduction of any of the following obligations, again subject to the restriction mentioned in paragraph 6:

(a) a liability to a lender of money which, at the time of the replacement borrowings, is being applied to the assessable income producing purposes of the trust estate;

(b) a liability to a trade creditor;

(c) an obligation to make a payment to a beneficiary of the trust estate, under the terms of the trust or by agreement between the beneficiaries, in reduction or extinguishment of the beneficiary's interest in the corpus of the trust estate; and

(d) a liability to pay a beneficiary a share of the net income of the trust estate.

Individuals

10. The principle set out in paragraph 3 above has a limited operation in relation to borrowings by individuals. It would apply where the borrowings replace other borrowings which, at the time of the new borrowing, are being applied to an income producing purpose of the individual. It would also apply where the borrowings finance the discharge of a liability (e.g., to a trade creditor) created in the course of the income producing activities of the individual.

11. An individual cannot have a liability to himself or herself. It follows that an individual cannot withdraw equity or profits from an income producing business or property

owned by the individual. Accordingly, interest on borrowings purportedly used to finance such a withdrawal is not deductible.

Date of effect

12. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

General principles

13. In order to obtain a deduction for interest, a taxpayer must show that the expense was incurred for the purpose of furthering the taxpayer's present or future assessable income producing activities, whether or not those activities constitute the carrying on of a business (*FC of T v. Total Holdings (Aust.) Pty Ltd* 79 ATC 4279; 9 ATR 885). In deciding whether the interest was incurred for this purpose, it is necessary to determine the essential character of the interest expense (*FC of T v. Riverside Road Pty Ltd (in liq.)* 90 ATC 4567 at 4574; 21 ATR 499 at 506). Interest expenditure will have the character of an income producing expense if it is incidental and relevant to the end of gaining or producing assessable income. In determining this, regard must be had to its connection (if any) with the income producing activities of the taxpayer (*FC of T v. D. P. Smith* (1981) 147 CLR 578; 81 ATC 4114; 11 ATR 538).

14. The reference in subsection 51(1) to "*the* assessable income" is not to be read as confined to assessable income actually derived by a taxpayer in the particular income year in which an interest outgoing is incurred. It refers not only to assessable income derived in that or some other income year but also to assessable income of the taxpayer which the outgoing would reasonably be expected to produce (*Fletcher & Ors v. FC of T* 91 ATC 4950 at 4957; 22 ATR 613 at 621; *Total Holdings*; *Amalgamated Zinc (De Bavay's) Pty Ltd v. FC of T* (1935) 54 CLR 295).

Use test

15. In our view, the decision of the majority of the Full Federal Court in *FC of T v. Roberts & Smith* does not fundamentally change the use test which has traditionally been applied when determining whether interest is deductible under subsection 51(1). As Hill J stated (ATC 4388; ATR 504):

> 'As the cases, ..., all show, the characterisation of interest borrowed will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put'.

16. Generally, the starting point for determining the essential character of an interest expense is to determine the 'use' to which the borrowed funds have been put, ie, you trace the borrowed funds (*Roberts & Smith* ATC 4388; ATR 504; *Kidston Goldmines Ltd v. FC of T* 91 ATC 4538 at 4546; 22 ATR 168 at 177). However, such a tracing will not necessarily be determinative (*Roberts & Smith* ATC 4388; ATR 504).

17. The use must be looked at from the point of view of the 'entity' borrowing the funds, e.g., from the point of view of the partnership that borrows and not from the point of view of partners to whom payments financed by the borrowings are made.

18. Subject to paragraph 20, interest will be deductible if the borrowed funds are used directly in an assessable income producing activity or used in a business activity which is directed to the production of assessable income (*FC of T v. Munro* (1926) 38 CLR 153 at 170, 171 and 197; *Fletcher* ATC 4958; ATR 622; *Roberts & Smith* ATC 4388; ATR 504). An interest outgoing is sufficiently connected to the income producing activity (ie, incidental and relevant to the end of gaining or producing assessable income) if the funds are borrowed for the purpose of gaining that income and the borrowed funds are laid out (ie, used or applied) for that purpose in the future (*Munro* and *Texas Co (Australasia) Ltd v. FC of T* (1940) 63 CLR 382). For example, interest on borrowed funds used to purchase trading stock (or other circulating capital) or an income producing property is an allowable deduction.

19. If the borrowed funds are not used directly in the production of assessable income, the interest is still deductible provided the use to which the funds are put is sufficiently connected with the operations which more directly gain or produce the taxpayer's assessable income (*Charles Moore & Co. (WA) Pty Ltd v. FC of T* (1956) 95 CLR 344 at 351; *Total Holdings* ATC 4282; ATR 889; *D. P. Smith* CLR 585-6; ATC 4117; ATR 542).

20. Even if the direct use of the funds comes within paragraph 18 this does not necessarily mean that the interest will be deductible. It

may be necessary to have regard to the purpose of the transaction or series of transactions in those cases where the objective facts do not provide a commercial explanation for the incurring of the interest (*Ure v. FC of T* 81 ATC 4100 at 4109; 11 ATC 484 at 494; *Fletcher* ATC 4958; ATR 623). This will be the position if there is no relevant assessable income or if 'the relevant assessable income is less than the amount of the outgoing' (*Fletcher* ATC 4958; ATR 623). In such cases there should be a commonsense or practical weighing of all the circumstances, including the direct and indirect objectives and advantages, to determine whether, objectively, the funds are used in the production of assessable income or in a business which is carried on for the purpose of producing assessable income (*Fletcher* ATC 4958; ATR 623). If, after weighing all the circumstances, including the direct and indirect objectives and advantages, it can be concluded that the borrowed funds are genuinely, and not colourably, used in an assessable income producing activity or used in a business activity which is directed to the production of assessable income, a deduction will be allowed for the interest on those funds (*Fletcher* ATC 4958; ATR 623). However, if it is concluded that the borrowed funds are being used in the independent pursuit of some other objective (eg, exempt income) then the interest must be apportioned between the pursuit of assessable income and the other objective (*Fletcher* ATC 4958; ATR 623).

21. Even if the direct use of the funds does not come within paragraph 18 it does not necessarily mean that the interest will not be deductible. Regard must be had to the principles stated in the Full Federal Court's decision in *Roberts & Smith.*

The principle in *FC of T v. Roberts & Smith*

22. The general principle derived from the decision in *Roberts & Smith* is set out at paragraph 3 above. As Hill J stated:

> 'The issue continues to be whether the interest outgoing was incurred *in* the income producing activity or, in a case falling to be tested under the second limb, *in* the business activity which is directed towards the gaining or producing of assessable income' (*Roberts & Smith* ATC 4388; ATR 504); and
>
> 'The funds to be withdrawn in such a case [where a partner calls up an amount owing to him as undrawn partnership distributions] were employed in the partnership business; the borrowing replaces those funds and the interest incurred on the borrowing will meet the statutory

> description of interest incurred in the gaining or production by the partnership of assessable income.
>
> In principle, such a case is no different from the borrowing from one bank to repay working capital originally borrowed from another; the character of the refinancing takes on the same character as the original borrowing and gives to the interest incurred the character of a working expense. Both these cases would equally satisfy the second limb of s.51(1). In no sense could the interest outgoing in either case be characterised as private or domestic. Similarly, where moneys are originally advanced by a partner to provide working capital for the partnership, interest on a borrowing made to repay these advances will be deductible, irrespective of the use which the partner repaid makes of the funds' (*Roberts & Smith* ATC 4388; ATR 504); and
>
> 'The provision of funds to the partners in circumstances where that provision is not a repayment of funds invested in the business, lacks the essential connection with the income producing activities of the partnership or, in other words, the partnership business. Likewise, the interest incurred on the borrowings will not be incidental and relevant to the partnership business' (*Roberts & Smith* ATC 4390; ATR 506).

23. In our view the approach adopted by Hill J is not limited to partnerships. His Honour undertakes a lengthy analysis of both the principles and cases dealing with subsection 51(1). He then, in the second passage quoted in paragraph 22, uses partnerships to illustrate how those principles operate.

24. Hill J makes it clear in his discussion at ATC 4389, 4390; ATR 504-506; that a partnership cannot claim to be replacing funds contributed as partnership capital when it borrows to make a payment to a partner to the extent that the equity or capital account being reduced by the payment is represented by internally generated goodwill. Interest on borrowings used to make such a payment would not be deductible. In our view, this limitation on a partnership's entitlement to a deduction applies also where the account being reduced is represented by other unrealised asset revaluations.

25. The explanation for this limitation on deductibility of interest is that partnership capital must be contributed and can never exceed the amount contributed. A partnership is not entitled to describe what is, in effect, a revaluation reserve as partnership capital. Similarly, if a partnership dissipates contributed partnership capital as a result of making operating or capital losses, only the remaining part of the

original partnership capital can be returned to partners as partnership capital. It is not possible to reinstate the balance of that capital by revaluing assets.

26. The limitation on interest deductibility should not be relevant to borrowings to repay loans to partners because it would not be possible for a loan account to be enhanced by a revaluation of assets. It would also be unlikely that a partnership, after writing down a loan account (for example, where a partner agreed to convert a loan account to partnership capital), would attempt to reinstate the balance of the account by revaluing assets. If such a reinstatement did occur, interest would not be deductible to the extent borrowings financed a reduction in that part of the account.

27. In theory, this limitation on interest deductibility could also apply to a company or trust estate that sought to use borrowings to make payments to shareholders or beneficiaries in reduction of an account that is represented by revaluations of assets. If the account was represented by realised capital gains, however, interest on the borrowings would not be denied on this basis.

Apportionment

28. Interest on borrowed funds will be fully deductible provided the amount of the 'funds employed in the income producing activity' at the time of the borrowing is equal to or greater than the amount borrowed. If the amount of the 'funds employed in the income producing activity' is less than the amount borrowed it will be necessary to apportion the interest expense (*Roberts & Smith* ATC 4390; ATR 506) on a 'fair and reasonable assessment of the extent of the relation of the outlay to the assessable income' (*Ronpibon Tin NL v. FC of T* (1949) 78 CLR 47). Generally we will accept an apportionment in the proportion which the employed funds bear to the total amount borrowed.

Asset revaluation reserve

29. In relation to paragraph 8 of this Ruling, it is noted that under *Australian Accounting Standards AAS 10* on 'Accounting for the revaluation of non-current assets', a revaluation reserve may represent both realised (by sale of the assets) and unrealised increases in the value of assets. In determining the deductibility of interest we will assume that in this situation the borrowings are first used to replace the part of the reserve that represents realised revaluations. However, the taxpayer must demonstrate how much of that reserve represents realised revaluations. In the absence of such evidence a deduction will not be allowed. This approach is particularly appropriate given that we understand that there is nothing in the standard which prevents the

revaluation increment in respect of an asset that has been sold from being transferred to a realised capital profits reserve.

Change of use of borrowed funds

30. Interest is incurred day to day (*FC of T v. Australian Guarantee Corp. Ltd* 84 ATC 4642 per Beaumont J at 4658-4660, and Toohey J at 4645-4648; (1984) 15 ATR 982 at 1003 and at 986-91). Each income year, therefore, must be considered separately, i.e., to what use have the borrowed funds been put during that year. Additionally, if the use of the funds has changed part way through an income year both uses must be considered in working out the extent to which the interest is deductible. Since interest is incurred on a day to day basis a deduction is allowable for only part of the interest if either the old or new use is neither for the production of assessable income nor in a business activity which is directed to the production of assessable income (see *Total Holdings* ATC 4283; ATR 891; *Riverside Road Pty Ltd*; and *FC of T v. Ilbery* 81 ATC 4661 at 4668; 12 ATR 563 at 571). If there has been a change in the use of only part of the borrowed funds then it may be necessary to apportion the interest expense.

Borrowings used to repay an existing loan

31. Interest on a new loan will be deductible if the new loan is used to repay an existing loan which, at the time of the second borrowing, was being used in an assessable income producing activity or used in a business activity which is directed to the production of assessable income (*Roberts & Smith* ATC 4388; ATR 504).

Examples

Example 1: Partnership

32. A and B are husband and wife. They own the family home and, using $50,000 of their own funds and initial borrowings of $100,000, they jointly purchase a rental property. A and B are partners in respect of the rental property within the extended definition of partnership in subsection 6(1) of the Act as they are in receipt of income jointly.

33. Two years later, the rental property is valued at $180,000. The partnership borrows a further $40,000 which it uses to repay part of the partners' original capital contributions. The repayment is used to renovate the partners' family home.

34. Clearly the use of the borrowed funds in the hands of the partners is of a private nature, but that tracing of the borrowed funds does not preclude the deductibility of the interest.

35. The partnership capital contributed by the partners (i.e., $50,000) is currently employed in the partnership business, and is represented by the assets of the partnership. Once the partners agree to withdraw capital, the partnership has an obligation to repay the partners the amount sought. The borrowed funds replace those funds within the partnership business by being used to make the payments to the partners in reduction of the partnership capital. Therefore the interest on the borrowed funds will be deductible to the partnership (see *Yeung & Anor v. FC of T* 88 ATC 4193; 19 ATR 1006).

36. Because the amount borrowed by the partnership does not exceed the partnership capital, the full amount of interest on the borrowed funds will be deductible to the partnership. However, if the partnership distributed $80,000 of borrowed funds to the partners purportedly in reduction of partnership capital, interest would only be deductible to the extent of the partnership capital:

$$\text{i.e., interest deductible} = \text{interest expense} \times \frac{50{,}000}{80{,}000}$$

37. If, at the time of the second borrowing, the partnership had repaid $10,000 of the original borrowings, funded, for example, from undrawn profit distributions or additional capital contributions, then the partnership's obligation to the partners would be $60,000. This is made up of the original capital contribution of $50,000 and the additional capital contribution or loan from the partners of $10,000 (used by the partnership to make the repayments). Interest on borrowings to repay that additional capital contribution or loan would be deductible.

Example 2: Individual

38. If a rental property (as in Example 1) was owned solely by an individual C, then the interest on the second borrowing would not be deductible (see paragraph 11). This would be the case even if the rental property was used as security for the second borrowing (eg, a second mortgage) (*FC of T v. Munro*).

Example 3: Partner

39. D borrows $25,000 to purchase a share in a partnership. Applying a strict tracing of the borrowed funds, the interest expense on the borrowing is deductible to D, as he has invested that amount in an income producing asset - his share of the partnership.

40. Two years later, the partnership borrows $25,000 to return D's initial capital contribution. The use of the borrowed funds in D's hands will not be determinative of the deductibility of the interest to the partnership. At the time of the borrowing by the partnership, the $25,000 previously contributed by D was being employed in the partnership's assessable income producing activities. On these facts the interest expense will be deductible to the partnership as the borrowed funds can be seen to replace the partnership capital.

41. The funds borrowed by D are no longer invested in the partnership (an income producing asset). Whether or not D will continue to get a deduction for the interest expense on the original borrowings will depend on the use to which the funds returned to him by the partnership are put. If D uses those funds for a private purpose, then no further interest deduction will be allowed.

Example 4: Sole Trader

42. F is a sole trader who has built up his business over many years. His balance sheet shows his proprietorship/capital in the business as $200,000. This amount is represented by the income producing assets of the business, and there is no goodwill or revaluation of assets shown in the accounts.

43. F decides to restructure his business. He purports to withdraw $50,000 of his capital from the business and replace it with borrowed funds. He uses the money to purchase a yacht for his family's personal use. On a strict tracing approach, the use of the funds is private and clearly the interest expense is not deductible

44. Despite accounting entries which show that the borrowed funds were placed into the business, it cannot be shown that the borrowings replaced F's equity in this income producing assets. An individual cannot withdraw equity from his own assets. Therefore, the interest expense is not deductible (see paragraph 11).

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