

***TD 2011/D8 - Income tax: does a taxpayer's purpose of 'paying their home loan off sooner' mean that Part IVA of the Income Tax Assessment Act 1936 cannot apply to an 'investment loan interest payment arrangement' of the type described in this Taxation Determination?***

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This document has been finalised by TD 2012/1.

 There is a Compendium for this document: TD 2012/1EC .



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## Draft Taxation Determination

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Income tax: does a taxpayer's purpose of 'paying their home loan off sooner' mean that Part IVA of the *Income Tax Assessment Act 1936* cannot apply to an 'investment loan interest payment arrangement' of the type described in this Taxation Determination?

**❗ This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendices) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. No. A taxpayer's purpose of 'paying their home loan off sooner' does not mean that Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936)<sup>1</sup> cannot apply to an 'investment loan interest payment arrangement' of the type described in paragraph 3 of this draft Determination.

### Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

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### Commissioner of Taxation

29 June 2011

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<sup>1</sup> All legislative references are to the ITAA 1936 unless otherwise indicated.

## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Explanation

#### ***Investment loan interest payment arrangements***

3. While investment loan interest payment arrangements may vary in the precise loan and security details, they all have similar financial and purported tax effects. An investment loan interest payment arrangement will exhibit all or most of the features set out as follows:

- (a) The taxpayer(s) own at least two properties: one property is the taxpayer(s)' residence and the other is used to derive rent ('investment property').
- (b) The taxpayer(s) have an outstanding loan which was used to acquire the residence (or refinance an earlier loan used to acquire the residence) ('home loan'), an outstanding loan which was used to acquire the investment property (or refinance an earlier loan used to acquire the investment property) ('investment loan') and a line of credit or similar borrowing facility with an approved limit ('line of credit'). All three loan products are typically (but not always) provided by a single financial institution.
- (c) The respective interest rates on the home loan and investment loan are typically at or about the same rate. The interest rate on the line of credit is typically (but not always) higher by a small margin (for example, 0.15%).
- (d) The investment loan is typically an interest-only loan for a specified period with principal and interest repayments required thereafter, or the interest-only period may be extendable.
- (e) The line of credit typically has no minimum monthly repayment obligations provided the balance remains below the approved limit. Alternatively, it may require minimum monthly repayments equal to the accrued interest.
- (f) The home loan, investment loan and the line of credit are each secured against the taxpayer(s)' residence and/or investment property.
- (g) The line of credit is drawn down to pay the interest on the investment loan as it falls due. Where no repayments are required on the line of credit, the taxpayer(s) do not make any repayments, which results in interest on the line of credit being capitalised and compounded. Where monthly interest repayments are required on the line of credit, the taxpayer(s) meet such repayments from their cash flows.
- (h) Typically all the taxpayer(s)' cash inflows (including that which the taxpayer(s) otherwise might reasonably be expected to use to pay the interest on the investment loan) are deposited into their home loan or an 'acceptable loan account offset account',<sup>2</sup> which has the effect of reducing the interest otherwise payable on the home loan.

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<sup>2</sup> See Taxation Ruling TR 93/6.

- (i) If the line of credit reaches its approved limit before the home loan has been repaid, the taxpayer(s) may apply to increase the limit on the line of credit in conjunction with a corresponding decrease in the available 'redraw' amount in the home loan.

4. A key feature of the investment loan interest payment arrangement is the use of the line of credit to pay the interest on the investment loan. This results in interest on the investment loan, in effect, being capitalised and thus its payment deferred in order to enable the taxpayer(s) to repay an equivalent amount on the home loan. Therefore, the real effect and substance of the investment loan interest payment arrangement is to purportedly make the payment of interest on the capital sum paid in reduction of the home loan tax deductible.

5. It is often said that taxpayers who enter into a investment loan interest payment arrangement do so for the purpose of 'paying their home loan off sooner' or 'owning their own home sooner'.

6. Taxpayers who have entered into an investment loan interest payment arrangement have sought to claim deductions for the interest incurred on the line of credit under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

### ***Can Part IVA apply?***

7. Part IVA is a general anti-avoidance rule. Part IVA gives the Commissioner the discretion to cancel a 'tax benefit' (or part of a 'tax benefit') that has been obtained, or would, but for section 177F, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies.

8. In broad terms, Part IVA will apply where the following requirements are satisfied:

- there is a scheme<sup>3</sup> (see section 177A);
- a taxpayer has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme (see section 177C); and
- the dominant purpose of a person who entered into or carried out the scheme, or any part of the scheme, was to enable the relevant taxpayer to obtain a tax benefit in connection with the scheme, or to enable the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (paragraph 177D(b)).

9. The application of Part IVA depends on a careful weighing of all the relevant facts and surrounding circumstances of each case. Therefore, in the absence of all relevant information it is not possible to state definitively whether a particular arrangement or transaction will attract Part IVA. However, an investment loan interest payment arrangement is capable of attracting the operation of Part IVA.

10. The precise definition of the scheme for the purposes of Part IVA will depend on the facts of the particular case. However, in the context of considering whether Part IVA applies to an investment loan interest payment arrangement the scheme would normally include the key elements of that arrangement as described in paragraph 3 of this draft Determination.

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<sup>3</sup> The scheme must have been entered into after 27 May 1981, or carried out, or commenced to be carried out, after 27 May 1981 (other than a scheme that was entered into on or before that date): see section 177D.

11. In relation to this type of scheme it might reasonably be expected that if the scheme had not been entered into or carried out, the taxpayer(s) would have met the interest payments on the investment loan out of their own cash flow rather than use the line of credit ('counterfactual'). Thus, the taxpayer(s) would not have incurred any interest on the line of credit referable to the payment of interest on the investment loan and so would not have been entitled to any deductions in respect of that. Accordingly, the relevant tax benefit obtained by the taxpayer(s) in connection with the scheme under paragraph 177C(1)(b) is (or includes) any allowable deduction for such interest incurred on the line of credit.

12. A key question, for Part IVA purposes, is whether the identified scheme was entered into or carried out by a person for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme.

13. Paragraph 177D(b) requires the drawing of a conclusion about purpose from the eight objective matters identified in that provision. The conclusion to be reached is the conclusion of a reasonable person.<sup>4</sup> The provision does not require, or even permit, any inquiry into the subjective purpose or motive of the relevant taxpayers or others who entered into or carried out the scheme.<sup>5</sup>

14. An objective purpose of the taxpayer(s) of 'paying their home loan off sooner' does not prevent Part IVA from applying to an investment loan interest payment arrangement. As was noted in the joint judgment of the High Court in *Spotless*:<sup>6</sup>

A particular course of action may be...both 'tax driven' and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Part IVA, a person entered into or carried out a 'scheme' for the 'dominant purpose' of enabling the taxpayer to obtain a 'tax benefit'.

15. Further, Gleeson CJ and McHugh J of the High Court noted in *Hart*<sup>7</sup> that:

...a transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in s 177D is required, even though the particular scheme also advances a wider commercial objective.

16. Callinan J in *Hart*<sup>8</sup> similarly distinguished between objectives that are 'entirely irreproachable and proper' and the 'means adopted to achieve these results'.

17. Therefore, the means by which the taxpayer(s) achieve their objective of 'paying their home loan off sooner' may enliven Part IVA.

18. In the context of applying paragraph 177D(b) to an investment loan interest payment arrangement the following general observations can be made:

- (a) The manner in which the scheme is entered into or carried out is generally explicable only by the taxation consequences. For instance, apart from the purported availability of additional tax deductions, it makes little (if any) financial sense for the taxpayer(s) to, in effect, fund repayments on a home loan using a line of credit with a higher interest rate than the home loan.
- (b) The total interest deductions purportedly available to the taxpayer(s) under the scheme are greater than under the counterfactual.

<sup>4</sup> *FC of T v. Spotless Services Ltd & Anor* (1996) 186 CLR 404 at 421; 96 ATC 5201 at 5210.

<sup>5</sup> *FC of T v. Hart & Anor* [2004] HCA 26 at [65]; 2004 ATC 4599 at [65].

<sup>6</sup> *FC of T v. Spotless Services Ltd & Anor* (1996) 186 CLR 404 at 416; 96 ATC 5201 at 5206.

<sup>7</sup> *FC of T v. Hart & Anor* [2004] HCA 26 at [16]; 2004 ATC 4599 at [16].

<sup>8</sup> *FC of T v. Hart & Anor* [2004] HCA 26 at [96]; 2004 ATC 4599 at [96].

- (c) Apart from the purported availability of additional tax deductions, the taxpayer(s)' financial position under the scheme is generally no better (and possibly worse) than under the counterfactual.
- (d) If the taxpayer(s)' residence is used as security for either the investment loan or the line of credit, the taxpayer(s) will not actually own an unencumbered home any faster under the scheme than under the counterfactual.
- (e) Where a single financial institution is involved, the financial institution's financial position is substantially the same under the scheme and the counterfactual in terms of its total lending exposure and interest income earned across the three loan products.

19. Accordingly, it is open for a reasonable person to conclude, having regard to the matters in paragraph 177D(b), that one or more of the parties that entered into or carried out the scheme did so for the dominant purpose of enabling the taxpayer(s) to obtain a tax benefit in connection with the scheme. If such a conclusion is reached, Part IVA applies to the scheme and the Commissioner would be entitled to determine under paragraph 177F(1)(b) that any deduction for the relevant interest incurred on the line of credit shall not be allowable to the taxpayer(s).

## Appendix 2 – Your comments

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20. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

21. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO website at [www.ato.gov.au](http://www.ato.gov.au)

Please advise if you do not want your comments included in the edited version of the compendium.

|                         |                                                                         |
|-------------------------|-------------------------------------------------------------------------|
| <b>Due date:</b>        | <b>29 July 2011</b>                                                     |
| <b>Contact officer:</b> | <b>Ruth Geary</b>                                                       |
| <b>Email address:</b>   | <b><a href="mailto:Ruth.Geary@ato.gov.au">Ruth.Geary@ato.gov.au</a></b> |
| <b>Telephone:</b>       | <b>02 6058 7165</b>                                                     |
| <b>Facsimile:</b>       | <b>02 6058 7642</b>                                                     |
| <b>Address:</b>         | <b>Australian Taxation Office<br/>PO Box 9977<br/>Albury NSW 2640</b>   |

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10, TR 93/6

*Subject references:*

- borrowings & loans
- cancellation of tax benefits
- deductions & expenses
- expenses of borrowing
- interest expenses
- Part IVA
- rental property loan interest expenses
- schemes & shams
- tax benefits under tax avoidance schemes
- tax planning, avoidance & evasion

*Legislative references:*

- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177C(1)(b)
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 177F
- ITAA 1936 177F(1)(b)
- ITAA 1997 8-1

*Case references:*

- FC of T v. Hart & Anor [2004] HCA 26; 2004 ATC 4599; (2004) 55 ATR 712
- FC of T v. Spotless Services Ltd & Anor (1996) 186 CLR 404; 96 ATC 5201; (1996) 34 ATR 183

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ATO references

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