TD 93/D162 - Income tax: employment agreement: are costs associated with an employment agreement deductible to an employee under subsection 51(1) of the Income Tax Assessment Act 1936 (ITAA) where the employee commences employment with a new employer?

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This document has been finalised by TD 93/162.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: employment agreement: are costs associated with an employment agreement deductible to an employee under subsection 51(1) of the *Income Tax Assessment Act 1936* (ITAA) where the employee commences employment with a new employer?

1. No. Costs incurred by an employee in obtaining employment are not an allowable deduction under subsection 51(1) of the ITAA. See *Federal Commissioner of Taxation v. Maddalena*, 71 ATC 4161; (1971) 2 ATR 541.

2. The expenditure is incurred by the employee in getting and setting conditions for a new job, not in carrying out the duties as an employee. The expense has been incurred too soon to be considered as having been incurred in the production of assessable income. In addition, the expense is considered to be an initial expense and is therefore of a capital nature. Subsection 51(1) of the ITAA specifically excludes deductions for expenses of a capital nature.

3. Under the Employee Relations Act (Vic) 1992 relationships between employers and employees are governed by employment agreements. Existing award conditions are to be phased out.

4. An employment agreement is a written, legal and binding confirmation of the employer/employee relationship. The agreement covers rates of pay, working conditions, leave entitlements and many other special provisions. Agreements are for a fixed term, not exceeding five years.

5. Costs may be incurred by both the employer and the employee and include:
- representation (which could be a union, an accountant, a lawyer or any other representative) during negotiation;
- costs associated with the drawing up of the agreement;
- lodgement fees; and
- costs associated with settlement of disputes.

Example 1:
James, who has not been employed previously, obtains a job with Retail Pty Ltd in April 1993. They arrange for an employment agreement to be drawn up to comply with the new legislation. James takes his agreement to his lawyer who checks the agreement and suggests some alterations. He sends James an account for $200 for services rendered.

James is not entitled to a deduction as the expense was incurred in gaining a new job and establishing conditions for that new job. It is an initial expense of a capital nature.

Example 2:
Tim leaves Manufacturing Pty Ltd, to join Wholesaling Pty Ltd. The new job is an advancement for him, as he will be paid a much higher salary and has much better long term prospects. They arrange for an employment agreement to be drawn up to comply with the new legislation. Tim takes the agreement to his lawyer who checks it. He sends Tim an account for $150 for services rendered.

Tim is not entitled to a deduction as the expense was incurred in connection with the conditions of a new job. Despite the fact that he obtained an increase in income, the expense is still an initial expense of a capital nature.

Commissioner of Taxation
24/6/93

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Related Determinations: TD 93/D161, TD 93/D163, TD 93/D164, TD 93/D165
Related Rulings:
Subject Ref: employement agreement
Legislative Ref: ITAA 51(1)
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