


***TD 93/D252 - Income tax: when is a taxpayer entitled to a deduction under subsection 51(1) of the Income Tax Assessment Act 1936 for the payment of additional interest to debenture holders made pursuant to a court order that overrules an earlier court order which required the payment of a lesser amount of interest?***

 This cover sheet is provided for information only. It does not form part of *TD 93/D252 - Income tax: when is a taxpayer entitled to a deduction under subsection 51(1) of the Income Tax Assessment Act 1936 for the payment of additional interest to debenture holders made pursuant to a court order that overrules an earlier court order which required the payment of a lesser amount of interest?*

This document has been finalised by TD 94/10.

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: when is a taxpayer entitled to a deduction under subsection 51(1) of the *Income Tax Assessment Act 1936* for the payment of additional interest to debenture holders made pursuant to a court order that overrules an earlier court order which required the payment of a lesser amount of interest?**

1. The additional interest is an allowable deduction in the year of income in which the later court order is made.
2. Interest is deductible in the year of income in which it is incurred. It will be incurred in the year when the taxpayer is definitely committed to the expenditure (*FC of T v. James Flood Pty Ltd* (1953) 88 CLR 492; 10 ATD 240; 5 AITR 579). Gibbs J in *Nilsen Development Laboratories Pty Ltd v. FC of T* 81 ATC 4031 at p 4037; (1981) 144 CLR 616; 11 ATR 505 noted that there must be a present existing liability. To have been incurred by a taxpayer there must arise corresponding entitlement in another to receive payment. The High Court in *Coles Myer Finance Ltd v. FC of T* 93 ATC 4214; 25 ATR 95 said that a presently existing liability is not necessarily sufficient for a deduction to be allowable under subsection 51(1). It is necessary to determine how much of the loss or outgoing is referable to the particular income year.
3. The taxpayer is not under a present existing liability in respect of the additional interest, and the debenture holders are not entitled to receive payment of it, until the court hands down its second orders. Until that time the taxpayer is under a present legal liability to pay the lesser amount of interest.

*Example:*

*A company which issued debenture stock went into receivership on 1 November 1985. As a result all debts became due and payable. The Receiver, before making the first interim distribution to the debenture holders, sought directions from the Supreme Court as to how the distribution should be made. The court in making its orders directed that simple interest accrue on the debt payable to the debenture holders. Between 1986 and 1989 five interim distributions were made pursuant to the court's orders. In 1990 the Receiver realised sufficient assets to repay all debts. The Receiver, before making the final distribution, again approached the court for directions as to the basis upon which the distributions to the debenture holders should be made. On 1 March 1990 the court overruled its first orders and directed that cumulative interest be paid to the debenture holders for the years 1986 to 1990.*

*The additional interest payable as a result of the second order is an allowable deduction to the company in the 1989-1990 income year.*

**Commissioner of Taxation**

30/9/93

---

FOI INDEX DETAIL: Reference No.

Related Rulings: TR 93/27

Subject Ref: allowable deductions; court orders; debentures; interest.

Legislative Ref: ITAA 51(1)

Case Ref: Coles Myer Finance Ltd v. FC of T 93 ATC 4214; 25 ATR 95; FC of T v. James Flood Pty Ltd (1953) 88 CLR 492; 10 ATD 240; 5 AITR 579, Nilsen Development Laboratories Pty Ltd v. FC of T (1981) 144 CLR 616; 81 ATC 4031; 11 ATR 505.

ATO Ref: BAN TD 38

---

ISSN 1038 - 8982