


IT 2649 - Income tax: application of the tax file number arrangements to solicitors

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I 1012806	TAX FILE NUMBERS SOLICITORS	202D, 202DDA, 202DDB, 221YHZA(1A), 221YHZD

OTHER RULINGS ON TOPIC

**TITLE: INCOME TAX: APPLICATION OF THE TAX FILE NUMBER
ARRANGEMENTS TO SOLICITORS**

NOTE: . Income tax rulings do not have the force of law.
. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant rulings.

DEFINITIONS

In this Ruling the following expressions have these meanings -

'investment body remitter number' means the number issued under Income Tax Regulation 57A by the Commissioner of Taxation to investment bodies.

'primary investor' means the investor who deposits money with a solicitor to be invested by the solicitor with a secondary investment body.

'primary investment' means the investment made by a primary investor when the primary investor deposits money with a solicitor to be invested or lent by the solicitor.

'secondary investment' means the investment made by a solicitor, using money deposited with the solicitor by a primary investor, with an investment body (within the meaning of section 202D of the Income Tax Assessment Act 1936 (the Act)).

'secondary investment body' means the investment body with which the solicitor makes the secondary investment.

PREAMBLE

2. Item 4 in the table in subsection 202D(1) of Part VA of the Act includes in the definition of an investment to which Part VA applies, a deposit of money with a solicitor for the purpose of :

- (a) being invested by the solicitor; or
- (b) being lent under an agreement to be arranged by or on behalf of the solicitor.

3. Subsection 202D(1) provides that the investor is the person for whose benefit the money is invested or lent and the investment body is the solicitor.

4. Solicitors (and other investment bodies defined in Part VA) have been included in the tax file number arrangements to improve the income matching system of the Australian Taxation Office. That is, by requiring investment bodies to report tax file number information along with name, address and income details, the Australian Taxation Office will be able to more efficiently match income earned with income declared in tax returns.

BACKGROUND

5. Where an investor deposits money with a solicitor for the purpose of being invested or lent, the solicitor will, subject to the exceptions outlined in this Ruling, have obligations as an investment body. These obligations are:

- . to record and report to the Tax Office tax file numbers provided by investors, and where required, exemptions from quoting a tax file number claimed by investors (IT Regulation 55);
- . to deduct amounts equivalent to the highest marginal tax rate plus medicare levy from income derived from investments in respect of which:
 - the investment body is liable to pay income (subsection 221 YHZC(1A)); and
 - tax file numbers or exemptions are not quoted (paragraph 221 YHZC(1A)(d));
- . to remit to the Tax Office any amounts deducted by the 21st day of the month following that in which the amount was deducted (subsection 221YHZD(1A)); and
- . to provide annual investment income reports in respect of the investments (IT Regulation 56).

6. Where the money is invested by the solicitor with a secondary investment body and income is derived on that investment, the secondary investment body will also be subject to obligations under the tax file number arrangements.

7. As to the expression 'liable to pay income' in paragraph 221YHZC(1A)(a), the ordinary meaning of the word 'liable', according to the Macquarie Dictionary, is 'under legal obligation; responsible or answerable'. This Office takes the view that a

solicitor, as an investment body, is liable to pay income in terms of paragraph 221YHZC(1A)(a) where:

- (a) the solicitor has invested a client's money with a secondary investment body on trust for the client and that body pays income to the solicitor from the investment;
- (b) the solicitor has contracted with a client to invest the client's money with a secondary investment body and that body pays income to the solicitor from the investment; or
- (c) the solicitor has arranged for a client's money to be lent under an agreement and the borrower of the money pays income to the solicitor from the loan.

8. In each of these situations, this Office considers that the solicitor is under a legal obligation to pay income or is responsible or answerable to the client to pay income.

9. The situations in paragraph 7 are not intended to constitute an exhaustive list of all situations in which a solicitor may be liable to pay income in respect of an investment. Where the solicitor is an investment body but is not liable to pay income on an investment, the solicitor is not required to fulfil the deduction obligations of an investment body in respect of that investment.

10. The purpose of this Ruling is to clarify when a solicitor will be an investment body and to assist in determining the tax file number to be quoted in respect of various investments. The Ruling explains, in so far as they affect solicitors, the amendments contained in the Taxation Laws Amendment Act (No 2) 1991 which inserted sections 202DDA and 202DDB into the Act.

RULING

Deposits with a Solicitor

11. The expression 'deposit of money with a solicitor' in subsection 202D(1) (also referred to as investor money) means money paid into:

- (a) the solicitor's trust account; or
- (b) another account coming under the effective control of the solicitor in the course of practice as a solicitor.

Effective Control of the Deposit/Income

12. Where the income derived from an investment made by a solicitor on behalf of an investor is not credited to:

- (a) the solicitor's trust account; or

- (b) another account coming under the effective control of the solicitor in the course of practice as a solicitor,

the solicitor is unable to fulfil the deduction and reporting obligations of an investment body. Therefore, where the income stream from the investment bypasses the solicitor, or the solicitor acts only as a conduit for the payments and does not have effective control of the monies, the solicitor is not an investment body.

Investment Body Remitter Number

13. The investment body remitter number issued by the Commissioner of Taxation will be identical to the non-resident withholding tax number issued to persons or organisations required to deduct and remit non-resident withholding tax. Solicitors that are not registered for the purposes of non-resident withholding tax will be issued a remitter number when they lodge the quarterly tax file number report required under Regulation 55 of the Income Tax Regulations. If a solicitor wishes to obtain a remitter number but does not have any tax file numbers which must be reported, the solicitor may lodge a nil quarterly report and the Australian Taxation Office will issue a remitter number.

14. The solicitor's investment body remitter number may be quoted in place of the solicitor's own tax file number when the solicitor, acting as trustee in respect of the investment, does not have a tax file number for the trust. It is to be noted that the remitter number may only be quoted if the secondary investment has a descriptive title which does not identify the names of all the primary investors (IT Regulation 56A). Where the primary investors are clearly identified, section 202DDB will apply (see paragraph 19 to 22 inclusive).

Item 4(a) investments: Deposits of money with a solicitor for the purpose of being invested by the solicitor.

15. Whether a solicitor will have obligations as an investment body under item 4(a) of the table in subsection 202D(1) of the Act, will depend on the descriptive title of the investment made by the solicitor with the secondary investment body.

16. Where a primary investor deposits money with a solicitor and the solicitor invests that money with a secondary investment body, the investment with the secondary body will normally fall into one of the following three categories:

- (i) money invested in the primary investor's name only;
- (ii) money invested in the names of both the solicitor and the primary investor; or
- (iii) money invested in the solicitor's name only.

(i) Money invested in the investor's name only

17. Where a solicitor invests investor money with a secondary investment body in the investor's name only, the client will be the investor for that investment. The solicitor is not an investment body.

18. Under the terms of subsection 202DC(2) of the Act, a solicitor can pass the tax file number of the investor to the secondary investment body if the investor's tax file number has been quoted to the solicitor. If the investor's tax file number is not quoted to the secondary investment body, tax will be deducted by the secondary investment body from income payments.

(ii) Money Invested in names of both the solicitor and investor

(A) Primary Investor identified in descriptive title of secondary investment.

19. Section 202DDB of the Act provides special rules where a solicitor invests money on behalf of a primary investor and the primary investor is clearly identified in the descriptive title of the secondary investment. The primary investor will be taken to be clearly identified where the descriptive title of the secondary investment identifies the primary investor. If there is more than one primary investor, all of the primary investors should be clearly identified.

20. Examples of such investments include those investments made in the name of 'solicitor in trust for named person', 'solicitor on behalf of named person' or "solicitor re named person".

21. If section 202DDB of the Act applies:

- . the primary investor may quote his or her tax file number directly to the primary investor or it may be quoted to the secondary investment body by the solicitor acting for the primary investor;
- . the solicitor will not be treated as an investment body in respect of the primary investor (i.e. the obligations outlined in paragraph 5 need not be met); and
- . the solicitor may not quote his or her tax file number or remitter number to the secondary investment body.

22. Subsection 202DDB(2) provides that where a solicitor is acting on behalf of two or more primary investors, and each primary investor is identified in the descriptive title investment, at least one investor must quote a tax file number (or exemption) to the secondary investment body to avoid having tax deducted from the income payments.

23. Under the terms of subsection 202DC(2) of the Act, a solicitor may pass the tax file number of the primary investor to the

secondary investment body if that investor's tax file number has been quoted to the solicitor.

(B) Primary Investor not clearly identified in the descriptive title of the secondary investment

24. Where the names of the primary investors are not clearly identified in the descriptive title of the secondary investment, section 202DDB will not apply. Accordingly, the solicitor will be an investment body and should observe the obligations listed at paragraph 5.

25. The solicitor will also be an investor with respect to the secondary investment body and may quote his or her remitter number to the secondary investment body in place of his or her personal tax file number.

(iii) Investments made in the solicitor's name only

26. Where a solicitor invests investor money with a secondary investment body on behalf of the primary investor in the solicitor's name only, the solicitor will be an investment body. The solicitor will be subject to the obligations described in paragraph 5 of this Ruling.

27. The solicitor will be an investor with respect to the secondary investment body, and may quote his or her investment body remitter number or personal tax file number to the secondary investment body.

28. Failure by the solicitor to quote either the solicitor's tax file number or investment body remitter number to the secondary investment body will result in the secondary investment body deducting tax from income derived on the investment.

29. A solicitor will not be an investment body in relation to an investment made by the solicitor of the solicitor's own money.

Summary of Item 4 (a) investments

30. A solicitor will only be held to be an investment body by virtue of item 4 (a) of the table in subsection 202D(1) of the Act where the following elements are present :

- (a) the money is deposited into an account over which the solicitor has effective control;
- (b) the income derived from the investment made by the solicitor is paid into an account over which the solicitor has effective control; and
- (c) the secondary investment is in the solicitor's name alone, or the secondary investment is made in the name of the solicitor and a primary investor whose name is not clearly identified in the descriptive title of the investment.

31. Although a solicitor may not have obligations as an investment body in certain circumstances, the primary investor's tax file number should still be quoted to the secondary investment body to ensure tax is not withheld by the secondary investment body.

Item 4(b) investments: Deposits of money with a solicitor for the purpose of being lent under an agreement arranged by or on behalf of the solicitor.

32. Item 4(b) of the table in subsection 202D(1) the Act states that deposits of money with a solicitor for the purpose of being lent under an agreement to be arranged by or on behalf of the solicitor are investments to which Part VA of the Act applies.

33. To be within item 4(b), the loan must be made from investor money deposited into an account for which the solicitor has effective control (refer paragraph 12). The tax file number arrangements will not apply where the principal of the loan is transferred directly between the lender and the borrower (or person nominated by the borrower).

34. The solicitor will only be an investment body where the income derived from the loan passes through an account for which the solicitor has effective control.

Summary of Item 4(b) investments

35. A solicitor will only be an investment body by virtue of item 4(b) of the table in subsection 202D (1) of the Act if all of the following elements are present:-

- (a) a person deposits money with a solicitor for the purpose of being lent under an agreement arranged by or on behalf of the solicitor;
- (b) the money is deposited into an account over which the solicitor has effective control; and
- (c) the income derived from the loan arranged by the solicitor is paid into an account over which the solicitor has effective control.

COMMISSIONER OF TAXATION

5 September 1991