TR 97/24 - Income tax: relief from the effects of failing to substantiate

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Generated on: 4 November 2026, 10:03:59 PM

Taxation Ruling
Income tax: relief from the effects of failing to substantiate

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

*[**Note:** This is a consolidated version of this document. Refer to the ATO Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. The Tax Law Improvement Project is restructuring, renumbering and rewriting the income tax law in plain language. The Parliament is amending the income tax law progressively to reflect these aims. As new laws come into effect, Taxation Rulings about old laws are being brought into line with them.

2. This Ruling explains the operation of Subdivision 900-H of the *Income Tax Assessment Act 1997* ('the Act'). It also explains the other provisions that may grant relief from the effects of a failure to substantiate expenses (hereafter referred to as 'relief').

Class of person/arrangement

3. This Ruling provides guidance on the three circumstances in which Subdivision 900-H of the Act may apply to grant relief where expenses have not been substantiated. These are:

- where there is **sufficient evidence** to indicate that the taxpayer has incurred the expense and is entitled to a deduction;
- where the only reason for the failure to substantiate was a **reasonable expectation** that substantiation would not be needed; or
- where documents have been **lost or destroyed** despite the taxpayer taking reasonable precautions.

4. This Ruling applies to income tax deductions for expenses subject to the substantiation provisions where they are incurred in the 1997 and subsequent income years. These expenses are:

- work expenses;
- car expenses calculated under the 'one third of actual expenses' method;
- car expenses calculated under the 'log book' method; and
- business travel expenses.

5. It does not apply to car expense deductions calculated under the 'cents per kilometre' method or the '12% of original value' method.

6. This Ruling applies to individuals and partnerships that include at least one individual. It does not apply to an individual as trustee or any other entity.

7. The general conditions for the deductibility of expenses are not discussed in detail in this Ruling.

8. [Omitted].

Date of effect

9. This Ruling applies from 1 July 1997.

10. This 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).

11. [Omitted].

Ruling

Sufficient evidence for the exercising of the Commissioner's discretion to grant relief from the effects of a failure to substantiate

12. Section 900-195 of the Act provides the Commissioner with the discretion to grant relief in particular circumstances. For this discretion to apply, the nature and quality of the evidence available to substantiate an expense must satisfy the Commissioner that a taxpayer incurred the expense and there is an entitlement to deduct the amount claimed under another provision of the Act. It is a question of fact and degree as to whether the evidence available satisfies these criteria.

13. It is the Commissioner's view that relief is not available where there is no supporting documentation or factual material evidencing the expense. It follows that a taxpayer's estimate of an expense supported only by an assertion that the estimate is reasonable does not constitute evidence of a nature and quality to satisfy the Commissioner to exercise the discretion. (See paragraphs 30 to 45 for further information.)

14. The Commissioner may exercise the discretion before an assessment is made or on review. Where an assessment is subject to review, the taxpayer may supply relevant information and seek the application of this discretion. Conversely, the Commissioner, on reviewing an assessment, can initiate a request for relevant information and consider applying relief. A taxpayer may apply for a private ruling requesting the Commissioner to exercise this discretion before an assessment is made. Full details should be provided of the supporting evidence held and the circumstances surrounding the failure to substantiate an expense.

Reasonable expectation that substantiation would not be required

15. Section 900-200 of the Act provides relief where the only reason for a taxpayer's failure to observe the substantiation requirements was a reasonable expectation that the substantiation requirements would not need to be met. A taxpayer needs to demonstrate that the only reason for the failure was a genuine belief that those requirements did not need to be met and that this belief was reasonable in all the circumstances. An entitlement to claim a deduction must exist under another provision of the Act.

16. This may occur where the taxpayer had a reasonable expectation at the time of incurring the expenses that they would not need to be substantiated because one of the exception categories applied, e.g., work expenses less than $300; reasonable travel allowance expenses; reasonable award overtime meal allowance expenses; award transport payment expenses; laundry expenses of $150 or less. Section 900-200 of the Act provides relief and any right to deduct those expenses is not affected. (See paragraphs 48 to 52 for further information.)

17. An expectation that the substantiation requirements would not apply based on a lack of knowledge of the law does not attract the operation of this provision. There is an expectation that taxpayers have a knowledge of the operation of the law. There are a number of generally available sources of information, including TaxPack, to provide assistance to taxpayers. The section may operate if a reasonable expectation that substantiation is not required is created by the advice or conduct of the Australian Taxation Office ('the ATO'). This section does not grant relief where a taxpayer has carelessly or recklessly disregarded whether an exception to the substantiation requirements would apply.

If documents are lost or destroyed

18. Section 900-205 of the Act provides for relief, subject to certain conditions, if documents are lost or destroyed. The conditions for relief depend on whether the lost or destroyed document is written evidence of an expense under Subdivision 900-E of the Act. An entitlement to claim a deduction must exist under another provision of the Act.

19. The conditions for relief are as follows:

- if a taxpayer has a complete copy of a document that is lost or destroyed during the retention period, it is treated as the original from the time of loss or destruction.
- if a taxpayer does not have such a copy, any entitlement to claim a deduction is not affected if the Commissioner is satisfied that the taxpayer took reasonable precautions to prevent the loss or destruction and, if the document was written evidence, it is not reasonably possible to obtain a substitute document.

20. A copy or substitute document is treated as the original document if it is:

- a complete copy of the document (subsection 900-205(1)); or
- a substitute that meets all the original requirements for substantiation (subsection 900-205(5)).

21. However, if such a copy or substitute is not obtained, the granting of relief is subject to the following conditions:

- the Commissioner must be satisfied that reasonable precautions were taken to prevent loss or destruction (subsection 900-205(2)); and
- where the document was written evidence of an expense, it needs to be shown that it is not reasonably possible for the taxpayer to get a substitute document (subsections 900-205 (4) and (7)).

22. It is necessary for the taxpayer to show that reasonable precautions were taken to protect documents. What might be 'reasonable precautions' depend upon the facts of each case. However, relief is not granted if the circumstances indicate that the loss or destruction resulted from the taxpayer's carelessness or recklessness.

23. What might be 'reasonably possible' in obtaining a substitute document also depends upon the facts of each case. A taxpayer needs to show that a bona fide attempt had been made to obtain a substitute document; or there were reasonable grounds for believing that such

efforts would not be successful. (See paragraphs 55 to 60 for further information.)

Commissioner's discretion to grant relief where it is unreasonable to expect written evidence to be obtained

24. Relief is also available where the Commissioner considers it unreasonable to expect a taxpayer to have obtained written evidence of an expense in any other way permitted by Subdivision 900E of the Act. In these circumstances section 900-130 of the Act allows a taxpayer to make a record of the expense. These expenses can be recorded using the method specified in section 900-125. In such cases the taxpayer is required to make a record of those expenses instead of getting a document from the supplier. For example, a taxpayer can record the details in a diary or on a travel itinerary. The record must be made as soon as possible after the expense is incurred and contain all the details required on a receipt. Such an expense may be more than $10 and does not count towards the $200 limit for small expenses recorded by a taxpayer under section 900-125 of the Act.

25. Examples of where the Commissioner exercises this discretion include toll bridge fees, parking meter fees, cash payments made by police officers to informants and entrance fees to shows where the entry ticket must be handed in on entry. An entitlement to claim a deduction must exist under another provision of the Act.

Explanation

Background

26. The substantiation provisions of Division 900 of the Act require that certain written evidence be maintained in respect of work expenses, car expenses and business travel expenses. Consistent with the self-assessment environment, taxpayers are not required to furnish written evidence when lodging their income tax returns. A taxpayer must supply it to the Commissioner when called upon to do so. If the required written evidence is not available, generally the expenses cannot be claimed as deductions under the other provisions of the Act.

27. However, in three limited sets of circumstances, subdivision 900-H of the Act provides relief from the effects of a failure to observe strictly the substantiation requirements. For the purposes of subdivision 900-H, subsection 28-150(6) of the Act states that not doing something required by Division 28 of the Act in calculating deductions for car expenses, e.g., keeping a log book or retaining a log book, is treated in the same way as not doing something necessary to follow the rules in Division 900 of the Act.

28. The three sections of the Act that may grant relief are:

- Section 900-195 which provides a discretion to grant relief provided the nature and quality of the evidence available to substantiate a claim satisfies the Commissioner that a taxpayer incurred the expense and that there is an entitlement to deduct the claimed amount.
- Section 900-200 which grants relief where the only reason for the failure to substantiate an expense was a reasonable expectation that this would not be needed in order to deduct that amount.
- Section 900-205 which grants relief where documents have been lost or destroyed despite a taxpayer taking reasonable precautions to prevent loss or destruction.

29. Subdivision 900-H of the Act does not diminish the general operation of the substantiation provisions, but does specify particular exceptional circumstances where relief may be granted. While the circumstances used in the examples included in this Ruling provide general guidance, they do not replace the need for decisions on the granting of relief to be based on all the relevant facts. Rarely is the presence of one factor determinative.

Commissioner's discretion to grant relief

History

30. Following the introduction of the substantiation provisions in 1986 it was found that those provisions may, in some circumstances, produce an unreasonably harsh result. Accordingly, section 82KZAA was added to the *Income Tax Assessment Act 1936* (the 1936 Act) by an amendment in the Taxation Laws Amendment Bill (No 4) 1990. That amendment was introduced by the Government in the Senate. When the Bill, as amended, was debated and agreed to in the Senate, it was stated in the second reading speech that '[t]here will be no relaxation of the substantiation requirements in anything other than exceptional individual circumstances' and 'the Government is concerned to ensure that the integrity of the substantiation provisions [is] not threatened'.

31. The discretion in section 82KZAA was enacted to counter specific concerns that unreasonable hardship might otherwise arise. The discretion in the rewritten law reflects similar policy considerations. This discretion allows a common sense approach to the administration of the substantiation provisions. It provides for a balancing of the need for the just and equitable treatment of taxpayers confronted with exceptional circumstances, and the maintenance of an effective regime to only allow taxpayers deductions for expenses they have actually incurred. It supplements the general operation of Division 900 of the Act that requires taxpayers to retain specified documents, as a prerequisite to the allowance of a deduction in respect of that expense under another provision of the Act.

Administrative Appeals Tribunal decisions on section 82KZAA

32. Decisions of the Administrative Appeals Tribunal ('the AAT') have provided guidance on the operation of the substantiation provisions. In *Case 7/93* 93 ATC 135; *AAT Case 8590* (1993) 25 ATR 1066, the AAT considered that the purpose and design of the substantiation provisions were to end the practice of making an estimate of deductible expenses without getting receipts or other evidence. The general requirement of the legislation is that if a deduction is sought, the substantiation requirements must be met. In that case the AAT, based on the nature and quality of the evidence, decided not to exercise the discretion under section 82KZAA.

33. In *Case 1/93* 93 ATC 101; *AAT Case 8378* (1992) 24 ATR 1175, a truck driver produced a diary that the AAT concluded was a sham and it was decided there were no special circumstances to warrant exercising the discretion under section 82KZAA.

34. In *Case 2/95* 95 ATC 107; *AAT Case 9918* (1994) 30 ATR 1041, relief from substantiation requirements was granted by the AAT to a truck driver who, based on advice from the ATO, relied on log book entries to support his claim for travel expenses. On the basis of evidence given by the taxpayer and the nature of his employment, it was accepted by the AAT that the expenses had been incurred. It was also accepted that the taxpayer had a reasonable expectation, because of the advice given by the ATO, that the evidence kept was sufficient to substantiate his claims. The deduction allowed by the AAT was less than the daily rate the ATO considered 'reasonable'.

35. Similarly, in *Case 9/96* 96 ATC 186; *AAT Case 10666* (1996) 31 ATR 1349, a truck driver produced a diary that did not strictly comply with the substantiation requirements. The diary format had been accepted by the ATO on a previous occasion. While the case was decided against the taxpayer on the basis of insufficient evidence to establish deductibility under subsection 51(1) of the 1936 Act, the AAT would have exercised the discretion under section 82KZAA to provide relief from the effects of failing to substantiate those expenses. The AAT formed the views that the amounts claimed were incurred by the taxpayer, that he had substantially complied with the substantiation provisions, and that he also had a reasonable belief his diary was acceptable to the ATO based on previous acceptance of a similar record.

Rewrite of the substantiation discretion

36. Section 8-1 of Schedule 2B of the 1936 Act replaced section 82KZAA with effect from 1 July 1994 as a result of the *Tax Law Improvement (Substantiation) Act 1995*. Section 8-1 of Schedule 2B no longer required the Commissioner to consider the extent to which a taxpayer attempted to comply with the substantiation provisions and whether any failure to do so was deliberate. It also removed the requirement that the discretion could only be considered on review. However, the requirement that the Commissioner take into account the nature and quality of the evidence a taxpayer provides was retained. Consequently, decisions reached by the AAT on the nature and quality of evidence required in order to attract the application of the previous discretion in section 82KZAA are still relevant to the application of the rewritten law in section 900-195.

37. Schedule 2B also introduced a number of practical changes that have made it easier for taxpayers to meet their substantiation obligations. These changes include the removal of the need to sign diary entries; a description of goods and services provided could be recorded by the taxpayer on a receipt or document; amounts shown on a group certificate could be evidence of payment; and bank statements could be used to show when a payment was made. Accordingly, a number of situations which previously may have required consideration of the Commissioner's discretion under the 1936 Act have been eliminated. From 1 July 1997, section 8-1 of Schedule 2B of the 1936 Act was incorporated as section 900-195 of the Act.

New Act

38. Section 900-195 of the Act gives the Commissioner discretion to grant relief where the nature and quality of the evidence available to substantiate a taxpayer's claim satisfies the Commissioner that:

(a) the expense was actually incurred by the taxpayer; and

(b) the taxpayer is entitled to deduct the amount claimed.

39. In reaching this decision, the Commissioner is directed to have regard to the nature and quality of the evidence that the taxpayer has available to substantiate the claim. It is consistent with the terms of the law that no relief is available in respect of a claim where there is no supporting documentation or factual material evidencing the expense.

Sufficient evidence

40. The central issue in deciding whether this discretion ought to be exercised is whether the evidence available:

(a) satisfactorily quantifies the amount of the expense; and

(b) establishes the extent to which the taxpayer is entitled to claim a deduction.

41. It is not possible to specify the nature and quality of supporting evidence that satisfies the Commissioner in all circumstances. Each case must be considered on its own merits and a common sense approach applied.

42. When deciding whether to exercise this discretion, the Commissioner is not limited to considering documentary evidence. A wide variety of factual information can be relevant. For example, in deciding whether the Commissioner is satisfied that car expenses have been incurred and are deductible to the extent claimed, a relevant piece of evidence might be that a particular motor vehicle is used in operating a driving school rather than merely occasionally in producing assessable income.

43. A bona fide attempt to comply with the substantiation requirements is likely to assist taxpayers in relation to the nature and quality of the evidence they hold.

44. If a taxpayer has made little or no attempt to comply with the substantiation requirements, the nature and quality of supporting evidence available is likely to be poor. It is the clear intention of the substantiation provisions that deductions are generally not allowed where there is no supporting documentation or factual material evidencing the expense.

45. In cases where there has been a failure to comply with the substantiation requirements, the taxpayer may face practical difficulties in satisfying the Commissioner that the claimed amount of an expense has been incurred and is deductible. Such cases frequently involve estimates by the taxpayer of expenses incurred. An unsupported statement by a taxpayer as to the amount of an expense

incurred does not, of itself, constitute evidence of a nature and quality to satisfy the Commissioner that the discretion should be exercised.

Example 1

46. Tom, a truck driver, has been requested to substantiate his meal expense claim of $4,000 made in respect of the 1995 income year. He was not paid any allowance in respect of these meals which were incurred when required to sleep away from home while on work trips. Tom maintained a log book that shows he was required to sleep away from home on 100 occasions during the year. Tom has a combination of receipts and diary entries to support the amount of meal expenses for 95 of the 100 work trips he was required to sleep away from home. However, for five nights the diary entries did not record all required information, but Tom states that the cost of meals was similar to other trips. His diary entries show that he spent at least $40 a day on food and drink when required to sleep away from home and this is supported by the receipts he has available. In respect of the five trips where diary entries were not fully completed, his receipts, log book and diary support the fact that he spent at least $40 a day on meals on similar trips to those destinations.

47. Tom requests the Commissioner to exercise the discretion to accept that $200 was incurred for work-related meals on the five trips where diary entries were not fully completed. He claims he is entitled to this deduction in addition to the amount of $3,800 that has been substantiated. Since Tom can show that on similar trips he continued to spend $40 a day, in light of the nature and quality of the evidence available by way of log book entries, diary entries, receipts and the taxpayer's statements, it would be appropriate to apply the discretion to grant relief from the effects of the failure to substantiate expenses.

Reasonable expectation

48. Section 900-200 of the Act allows for relief where the only reason a taxpayer did not obtain or retain documents or written evidence was a reasonable expectation that they would not need to do so, in order to claim a deduction. A taxpayer needs to demonstrate that the only reason for the failure to meet the substantiation requirements was a genuine belief those requirements did not need to be met and that this belief was reasonable in all the circumstances.

49. This may occur where the taxpayer had a reasonable expectation that expenses did not need to be substantiated because they were in one of the exception categories, e.g., work expenses of $300 or less; reasonable travel allowance expenses; reasonable award overtime meal allowance expenses; award transport payment

expenses; laundry expenses of $150 or less. This section operates where, due to unforeseen circumstances, the taxpayer is unable to rely upon the exception to the substantiation requirements. In this situation, it must have been reasonable for the taxpayer to believe, at the time the expense was incurred, that circumstances existed allowing the exception to apply.

50. An expectation that the substantiation requirements would not apply, based on a lack of knowledge of the law, is not sufficient to attract the operation of this provision. For example, if a taxpayer failed to substantiate work expenses because of a mistaken belief that only individual expenses over $300 needed to be substantiated, this does not form the basis of a reasonable expectation that substantiation of expenses was not required. There is an expectation that taxpayers have a knowledge of the operation of the law and ignorance of the law is no excuse. There are a number of generally available sources of information, including TaxPack, that provide assistance to taxpayers.

51. Where the advice or conduct of the ATO has created a mistaken belief by a taxpayer that particular records are not required, the belief can form the basis of a reasonable expectation attracting the application of this section. If it is claimed that the failure to substantiate expenses was caused by the advice or conduct of the ATO, full details are to be supplied.

52. This section does not grant relief where a taxpayer has carelessly or recklessly disregarded whether an exception to the substantiation requirements would apply. For example, if a taxpayer failed to retain required documents and had no reasonable basis for believing that work expenses would be below $300, relief would not be available.

Example 2

53. Joe, an employed mechanic, was requested to provide receipts and other documentary evidence for $500 claimed as a deduction for work expenses in the 1996 income year. These expenses comprised $350 for replacement tools and $150 for laundry expenses. Joe has only had to replace approximately $100 worth of tools annually due to wear and tear, as shown in working papers used to prepare his income tax returns for previous years. Late in the financial year the workshop was broken into and $250 worth of Joe's tools stolen. He has a letter from the police about the theft. Joe replaced those tools and while he has a receipt for that expense he does not have any receipts for earlier expenses of $100 spent on replacement tools because he believed, based on his expenses in previous years, that his work expenses would not exceed the threshold of $ 300 below which work expenses need not be substantiated.

54. On the basis of his expenses in past years, Joe had a reasonable expectation that the substantiation provisions would not apply, i.e., that his work expenses would be less than $300, but this was not the case as a result of an unforeseen loss due to theft. In these circumstances, section 900-200 operates to provide relief from the effects of failing to substantiate those expenses and the right to deduct the amount of $100 claimed for the unsubstantiated work expenses other than laundry expenses is not affected. As laundry expenses do not exceed $150, Joe does not require written evidence to substantiate those expenses.

Lost/destroyed documents

55. Section 900-205 of the Act allows relief if documents are lost or destroyed, subject to certain conditions. If a taxpayer has a complete copy of a document that is lost or destroyed during the retention period, it is treated as the original from the time of loss or destruction.

56. If a taxpayer does not have such a copy, and the Commissioner is satisfied that the taxpayer took reasonable precautions to prevent the loss or destruction, the following rules apply:

(a) if the lost or destroyed document was a travel record, log book or other document that is not written evidence of an expense under Subdivision 900-E of the Act, there is no need to replace it and any entitlement to a deduction is not affected by the failure to retain or produce the document;

(b) if the lost or destroyed document was written evidence of an expense under Subdivision 900-E, an attempt should be made to get a substitute document meeting all the requirements applying to the original document, except for the time limit for getting that evidence:

(i) if a substitute document is obtained, it is treated as the original from the time of the loss or destruction. Any entitlement to a deduction is not affected by the failure to retain or produce the original document;

(ii) if it is not reasonably possible to obtain a substitute document, any entitlement to a deduction is not affected by the failure to retain or produce the document;

(iii) if it is reasonably possible to get a substitute document, but it is not obtained, this section

provides no protection from the consequences of failing to retain or produce the original.

57. The taxpayer is expected to have evidence available to show that the loss or destruction has occurred and that reasonable precautions were taken to protect the documents, e.g., evidence that the taxpayer's home was burgled or burnt or that a locked car containing written evidence was stolen.

58. It is not possible to define what may be 'reasonable precautions' to prevent the loss or destruction of documents. However, if the circumstances of a particular case indicate that the loss or destruction of a document resulted from the taxpayer's carelessness or recklessness, this section does not apply to provide relief where the taxpayer does not have a complete copy of the lost or destroyed document.

59. It is also not possible to define what may be 'reasonably possible' in all circumstances in relation to trying to obtain a substitute document if the lost or destroyed document was written evidence under Subdivision 900-E of the Act. However, it is expected that a taxpayer show a bona fide attempt has been made to obtain a substitute document or, alternatively, that there were reasonable grounds for believing that such efforts would have been unsuccessful, e.g., if a supplier who provided the original written evidence has ceased trading and the whereabouts of staff and records are unknown.

60. In deciding whether a taxpayer has taken 'reasonable precautions' to prevent the loss or destruction of a document, or whether it was 'reasonably possible' to obtain a substitute document, each case must be considered on its merits. A common sense approach must be applied.

Example 3

61. Mary changed her address and, while packing and moving, she decided to dispose of old records. She cannot locate her receipts for claimed tax deductions and thinks they may have been thrown out by mistake with some private receipts and paid bills. She cannot get copies of the documents as she is unsure of the names of the suppliers.

62. In these circumstances, it is not appropriate to apply this discretion as the taxpayer is not able to satisfy the Commissioner that she has taken reasonable precautions to prevent the loss or destruction of the documents. Depending on the facts, relief may be available under sections 900-195 or 900-200.

Commissioner of Taxation
3 December 1997

ISSN 1039 - 0731

ATO references
NO 97/2162-2
BO

Previously released in draft form as
TR 97/D3

Price $1.50

FOI index detail
reference number
I 1017386

subject references
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- substantiation

legislative references
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