


CR 2003/55 - Income tax: Subscriptions paid by POVB members to the Prison Officers' Legal Fund

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Class Ruling

Income tax: Subscriptions paid by POVB members to the Prison Officers' Legal Fund

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this ruling is section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Class of persons

3. The class of persons to which this Ruling applies is members of the Prison Officers Vocational Branch ('POVB') of the Public Service Association of NSW ('PSA') who are members of the Prison Officers' Legal Fund ('Legal Fund').

Qualifications

4. The Commissioner makes this Ruling on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 9 to 26 in this Ruling.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2002. However, the Ruling does 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 Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette; or
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Arrangement

9. The arrangement that is the subject of the ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into the description of the arrangement are:

- PSA POVB Legal Fund Constitution;

- Registered rules of Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales.

10. The PSA is a registered union and has a number of prison officers (also referred to as correctional officers) employed by the NSW Department of Corrective Services among its members. These members belong to the Prison Officers Vocational Branch (POVB) of the PSA.

11. The corrections industry can be a difficult and dangerous one. Uniformed staff members are often accused by inmates or members of the public of criminal behaviour. The most common alleged offence is assault.

12. The PSA cannot directly provide financial assistance to members who have been charged with a criminal offence which is associated with employment.

13. However, the PSA rules have been altered to allow it to operate a legal aid fund to provide financial assistance for the payment of legal expenses for members belonging to the POVB who are criminally charged with respect to any matter which occurs whilst on duty as a prison officer. The amended rules were certified by the Industrial Registrar NSW on 21 August 2001.

14. The Legal Fund's objects as stated in the constitution are:

- (a) To provide legal assistance and representation and information to any Member of the Prison Officers Vocational Branch (POVB) of the Public Service Association (PSA) in relation to any alleged criminal offence arising out of or in the course of his/her employment with the Department of Corrective Services.
- (b) To provide legal assistance to a member to make a claim under the provisions of the *Victims Compensation Act 1996* in the event that a claim or prospective claim arises out of or in the course of his/her employment with the Department of Corrective Services.

15. The Legal Fund does not assist any member in respect of any matter relating to libel and/or defamation or equal opportunity and/or sexual harassment whether such claim arises out of or in the course of his/her employment or otherwise.

16. The Legal Fund does not assist members in relation to criminal charges which arise outside of the normal course of their duties even where the charge may impact on their employment activity. For example, a drink driving charge.

17. The Legal Fund does not provide assistance in relation to any personal legal affairs of members.

18. If any member is charged with any criminal offence arising out of or in the course of his/her employment that member shall immediately advise the PSA or the POVB in full of the following:

- (1) the nature of the charge;
- (2) the date of the alleged offence;
- (3) the location of the alleged offence;
- (4) any other material fact relating to the alleged offence.

19. Approval for the provision of legal assistance is at the discretion of the trustees of the Legal Fund. The trustees of the Legal Fund are the persons at any given time holding the positions of General Secretary of the PSA, President of the PSA and chair of the POVB.

20. Legal assistance is only provided if the alleged offence is as a consequence of the member acting reasonably and in good faith in the performance of their duties. The trustees must meet within seven days of an application for assistance. At least two trustees must be present.

21. The constitution provides that the Legal Fund will enter into an agreement with a legal firm which shall be the sole legal firm with which the Legal Fund shall deal.

22. Any person who is a member of the PSA and is employed as a correctional officer by the Department of Corrective Services may apply for membership of the Legal Fund.

23. Any new class of person to be admitted into the Legal Fund can only be admitted by a majority vote of the members of the POVB management committee and of the Executive of the PSA.

24. Any member may remain in the Legal Fund even if they move to a position not comprehended by paragraph 22 above provided the member remains in the employment of the Department of Corrective Services.

25. Membership fees are examined yearly and set by and in the absolute discretion of the Trustees following consultation with the POVB Executive. The current membership fee is \$3.30 per fortnight. There is no joining fee.

26. On an annual basis the trustees of the legal fund determine the maximum amount of financial assistance to an individual member. The maximum amount is currently \$5000. On occasions, and in exceptional circumstances, the Trustees may decide however to increase the maximum amount of financial assistance to a member, depending on the merits of the case.

Ruling

27. The contributions paid by members of the Legal Fund are deductible under section 8-1 of the ITAA 1997.

Explanation

28. Subsection 8-1(1) of the ITAA 1997 allows a deduction for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income. However, subsection 8-1(2) of the ITAA 1997 provides that where the outgoings are of a capital, private or domestic nature, or relate to the earning of exempt income no deduction is allowable.

29. Broadly the test for deductibility under subsection 8-1(1) of the ITAA 1997 is whether the payment to the Legal Fund is an outgoing which is incidental and relevant to the derivation of the member's assessable income.

30. To come within the subsection there needs to be sufficient connection between the loss or outgoing and the production of assessable income.

31. Prison officers work in a dangerous and sometimes violent environment and officers are faced with the likelihood of being charged with a criminal offence in the normal course of performing their employment activities. The most common alleged offence is assault. The subscriptions by prison officers to the Legal Fund arise out of a need for the officers to have some form of financial assistance in the event that they are accused of a criminal offence whilst performing their employment duties. The Legal Fund also provides for financial assistance where an officer who is a victim of a crime wishes to seek compensation. The expenditure incurred in contributing to the Legal Fund arises because of the very act of the member performing the work by which they earn assessable income and is incidental and relevant to the earning of that income. Refer *FCT v Rowe* (1995) 60 FCR 99; 31 ATR 392; 95 ATC 4691. There is sufficient connection between the expense and the earning of assessable income for a deduction to be allowed under section 8-1.

32. Where the outgoing has been voluntarily incurred the member's purpose in incurring that expenditure may constitute an element of its essential character, stamping it as expenditure of a business or income earning kind. *Magna Alloys & Research Pty Ltd v FCT* (1980) 11 ATR 276; 80 ATC 4542.

33. In determining the purpose of the members in incurring the expense, it is necessary to have regard to the objects and activities of the Legal Fund: *FCT v Gordon* (1930) 43 CLR 456.

34. The purpose of the Legal Fund is to provide prison officers with assistance where they are required to defend themselves in relation to an alleged criminal offence or in relation to a claim under the *Victims Compensation Act 1996* arising out of or in the course of their employment. The Legal Fund does not provide assistance in all cases presented to it. The trustees must be satisfied that the need for funding arose as a consequence of the member acting reasonably and in good faith in the performance of their duties. The purpose of the Legal Fund is consistent with the members purpose of incurring the expenditure being primarily to ensure that they are able to if the need arises defend the way in which they have carried out their income earning activities.

35. Section 8-1 of the ITAA 1997 does not require that the purpose of the expenditure shall be the gaining of the income of that year so long as it was made in the given year and is incidental and relevant to the operations and activities regularly carried on for the production of income: *FCT v Smith* (1981) 147 CLR 578; 11 ATR 538; 81 ATC 4114. The payment to the Legal Fund may not directly result in the production of any assessable income in the relevant year. However, the purpose of the expenditure is incidental and relevant to the income producing activities regularly carried on by prison officers.

36. The outgoing does not involve the acquisition of any enduring or tangible asset and therefore is not capital in nature and precluded from deductibility by subsection 8-1(2) of the ITAA 1997. In an indirect way the incurring of the expense may in the future protect the member's job as a prison officer. However, this is only an indirect consequence that may or may not happen.

37. The subscriptions are paid on a fortnightly basis. The periodic nature of the payments also points towards the characterisation of the payments being revenue rather than capital in nature.

38. The occasion of the expense arises from the income earning activities of the member. The contribution to the Legal Fund is not associated with the personal legal affairs of the member. The expense is therefore neither private nor domestic in nature for the purpose of subsection 8-1(2) of the ITAA 1997.

Detailed contents list

39. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

30 July 2003

Previous draft:

Not previously released in draft form.

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 95/13; TR 97/16; TR 2000/7;
TR 2002/7

Subject references:

- allowable deductions
- work related expenses
- association and membership expenses

Legislative references:

- ITAA 1997 8-1
- ITAA 1997 8-1(1)

- ITAA 1997 8-1(2)

- TAA 1953

- TAA 1953 Pt IVAAA

- Copyright Act 1968

- Victims Compensation Act 1996

Case references:

- *FCT v Rowe* (1995) 60 FCR 99; 31
ATR 392; 95 ATC 4691

- *Magna Alloys & Research Pty Ltd v
FCT* (1980) 11 ATR 276; 80 ATC
4542

- *FCT v Gordon* (1930) 43 CLR 456.

- *FCT v Smith* (1981) 147 CLR 578; 11
ATR 538; 81 ATC 4114

ATO References

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