PCG 2020/5 - Applying the non-arm's length income provisions to 'non arm's length expenditure' - ATO compliance approach for complying superannuation entities

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Applying the non-arm's length income provisions to 'non arm's length expenditure' – ATO compliance approach for complying superannuation entities

Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

Table of Contents **Paragraph**

What this Guideline is about

1. This Guideline provides a transitional compliance approach for a complying superannuation entity concerning the application of the amendments to section 295-550 of the *Income Tax Assessment Act 1997*[1] where a superannuation entity incurs certain non-arm's length expenditure (or where expenditure is not incurred) in gaining or producing ordinary or statutory income. A complying superannuation entity refers to a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust. For the purposes of readability, a reference in this Guideline to a 'complying superannuation fund' applies equally to a complying approved deposit fund and a pooled superannuation trust.

Date of effect

2. This Guideline applies both before and after its issue in respect of the 2018–19; 2019–20 and 2020-21 income years.

[1] See *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019*.

Background

3. This Guideline should be read in conjunction with draft Law Companion Ruling LCR 2019/D3 *Non-arm's length income – expenditure incurred under a non-arm's length arrangement*.

4. Section 295-550 of the *Income Tax Assessment Act 1997* sets out rules as to when a complying superannuation fund will derive non-arm's length income (NALI). The amendments to section 295-550[2] result in a complying superannuation fund deriving NALI in circumstances where the entity incurs 'non-arm's length expenditure' as described in paragraphs 9 to 12 of LCR 2019/D3.[3] The amendments apply in relation to income derived in the 2018–19 income year and later income years, regardless of whether the scheme was entered into before 1 July 2018.[4]

5. The ATO has previously issued draft Law Companion Ruling LCR 2018/D10 *Non-arm's length income – expenditure incurred under a non-arm's length arrangement* when the amendments were originally introduced. LCR 2018/D10 was withdrawn following the lapsing of Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 when the 45th Parliament was prorogued and the House of Representatives was dissolved on 11 April 2019.

6. As a result of consultation feedback received on LCR 2018/D10, the ATO has provided clarification on particular issues in LCR 2019/D3. One of these issues concerned when non-arm's length expenditure will have a sufficient nexus with income derived by the complying superannuation fund for the NALI provisions to apply. In particular, the Commissioner has set out the preliminary view that certain non-arm's length expenditure incurred by a complying superannuation fund may have a sufficient nexus to all ordinary and/or statutory income derived by the fund for that income to be NALI (for example, fees for accounting services).[5] This can be contrasted to non-arm's length expenditure that has a more direct nexus to particular ordinary or statutory income derived by the fund (for example, expenditure relating to the acquisition of an income-producing asset).

7. The ATO recognises that trustees of complying superannuation funds may not have realised that the amendments will apply to non-arm's length expenditure of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in an income year, noting that it was not explicitly stated in LCR 2018/D10. It is also recognised that the amendments apply in relation to the 2018–19 and later income years which may result in all income derived by a fund during the 2018–19 and 2019–20 income years being classified as NALI where it has incurred non-arm's length expenditure of a general nature.

8. A number of comments were received in respect of LCR 2019/D3 and all these comments are being considered in the finalisation of that draft Ruling.

9. Pending the finalisation of LCR 2019/D3, the ATO considers it is appropriate to apply the transitional compliance approach outlined in paragraphs 10 and 11 of this Guideline.

The ATO's transitional compliance approach

10. The ATO will not allocate compliance resources to determine whether the NALI provisions apply to a complying superannuation fund for the 2018–19; 2019–20 and

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[2] See *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019*.

[3] Further references in this Guideline to 'non-arm's length expenditure' has the same meaning as described in LCR 2019/D3.

[4] See section 4 of Schedule 2 to the *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019*.

[5] See Example 2 of LCR 2019/D3.

2020–21 income years where the fund incurred non-arm's length expenditure (as described in paragraphs 9 to 12 of LCR 2019/D3) of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years (for example, non-arm's length expenditure on accounting services).

11. This transitional compliance approach does not apply where the fund incurred non-arm's length expenditure that directly related to the fund deriving particular ordinary or statutory income.

Commissioner of Taxation
1 June 2020

References

Previous draft:

Previously released in draft format as PCG 2019/D6

ATOlaw topics	Superannuation ~~ Funds ~~ Taxable income ~~ Non-arm's-length components
Legislative references	ITAA 1997 295-550 Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019
Related Rulings/Determinations	LCR 2018/D10W LCR 2019/D3
Other references	Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018
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