TR 94/D10 - Income tax: subsection 51(1) - implications of the High Court decision in Coles Myer Finance

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Draft Taxation Ruling
Income tax: subsection 51(1) - implications of the High Court decision in *Coles Myer Finance*

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TR 93/21

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What this Ruling is about

1. This Ruling sets out the ATO's views on the interpretation of subsection 51(1) of the *Income Tax Assessment Act* 1936 after the decision of the High Court in *Coles Myer Finance Pty Ltd v. FC of T* 93 ATC 4212; 25 ATR 95. In particular, the Ruling considers such matters as:

(a) the interpretation of the word 'incurred';

(b) what is meant by the phrase 'properly referable';

(c) the relevance of accounting principles to subsection 51(1).

2. This Ruling does not cover the timing of deductions for discount expenses in respect of bills of exchange and promissory notes, which is dealt with in Taxation Ruling TR 93/21.

Ruling

Presently existing liability

3. A presently existing pecuniary liability will, in most cases, be a necessary prerequisite to an expense being 'incurred' (*Coles Myer Finance*; *Nilsen Development Laboratories Pty Ltd & Ors v. FC of T* 81 ATC 4031; 11 ATR 505).

4. One exception to this principle may be where the taxpayer makes a purely voluntary prepayment (see *FC of T v. Raymor (NSW) Pty Ltd* 90 ATC 4461 at 4467; 21 ATR 458 at 464). For example

where an employer voluntarily pays a Christmas bonus to employees. Such a payment may be deductible even though there is no presently existing liability. However, not all voluntary payments are deductible (see *FC of T v. Steeves Agnew & Co.* 9 ATD 259 at 264; *Foxwood (Tolga) Pty Ltd v. FC of T* 80 ATC 4096 per Deane J at 4100; 10 ATR 676 at 680-1).

5. Whether there is a presently existing pecuniary liability is a question which must be determined in light of the particular facts of each case, and especially by reference to the terms of the contract or arrangement under which the liability is said to arise (*Nilsen Development Laboratories*; *FC of T v. James Flood Pty Ltd* (1953) 88 CLR 492; *Ogilvy and Mather Pty Ltd v. FC of T* 90 ATC 4836; 21 ATR 841; and *Woolcombers (WA) Pty Ltd v FC of T* 93 ATC 5170). This may require a careful analysis of such things as contracts (*Ogilvy and Mather Pty Ltd v FC of T* 90 ATC 4836; 21 ATR 841; and *Woolcombers*), or industrial awards (*Nilsen Development Laboratories*; *James Flood*).

Properly referable

6. In our opinion there are certain cases in which three criteria must be met before an expense satisfies either of the positive limbs of subsection 51(1):

(a) as previously stated, there is a presently existing liability (called the jurisprudential approach by the High Court in *Coles Myer Finance*);

(b) the loss or outgoing which arises as a consequence of that liability is of a revenue character; and

(c) the loss or outgoing is properly referable to the particular year in question.

7. It will be necessary to satisfy these three criteria in all cases involving:

(a) financing transactions;

(b) a liability accruing daily; or

(c) a liability accruing periodically.

8. There may also be cases, not involving liabilities of the type set out in paragraph 7, where it is necessary to determine 'whether a liability incurred is referable to a particular year of income' (*Australian and New Zealand Banking Group Limited v. FC of T* 94 ATC 4026 per Hill J at 4034)

9. We do not accept the suggestions by Lee J in *Woolcombers (WA) Pty Ltd v. FC of T* (93 ATC 4342 at 4349, 4351; 25 ATR 487 at 495, 496) that the reference in *Coles Myer Finance* to the need for an expense to be 'properly referable' to a particular year is limited to expenses that distort a taxpayer's revenue operations by the introduction of an 'anomalous outgoings extraneous to the taxpayer's usual income earning operations'.

10. The courts have provided very little guidance as to the meaning of 'properly referable'. We believe that 'properly referable' is concerned with the period of time during which the benefit from the liability is put to 'profitable advantage', ie., the period during which the benefit obtained from the liability is used in the taxpayer's assessable income producing activity. Generally, this will be the period in which the goods or services to be provided as a result of the liability are in fact provided. However, if the liability is discharged prior to the provision of the last of the goods or services then the period of profitable advantage will end with the discharge of the liability.

Relevance of accounting evidence to 'properly referable'

11. Accounting principles and practice may be very strong evidence, though never determinative, as to how much of a liability is in fact properly referable to a particular income year.

12. We do not believe that the High Court's approach in *Coles Myer Finance* necessarily extends to specific statements of accounting standards (ie., AASs, ASRB/AASBs) and accounting concepts (SAC's).

13. In *Coles Myer Finance* the High Court gave very little guidance as to which accounting principles, other than a version of the matching principle, are relevant to subsection 51(1). The initial cost assumption (ie., the historic cost) appears to be part of subsection 51(1), since historic cost is the basis of the Act (*Myer Emporium Ltd v. FC of T* 87 ATC 4363; 18 ATR 693). The assumption that a business will continue into the future (ie., the 'continuing business' or 'going concern' assumption) also appears to be relevant as many of the cases dealing with subsection 51(1) talk about the continuing business of the taxpayer. For example, *Herald & Weekly Times Ltd v. FC of T* (1932) 48 CLR 113 and *AGC (Advances) Ltd v. FC of T* 75 ATC 4057, 5 ATR 243. Similarly, it is implicit in the prepayment cases (where the deduction is allowed in an income year prior to the earning of related income) that the business of the taxpayer is a 'going concern'.

14. It is not necessary to have regard to the period to which an expense is properly referable where the liability comes into existence and is discharged in the same year.

Matching

15. *Coles Myer Finance* does not introduce into subsection 51(1) any principle of specific matching, ie., the law does not require that an expense be specifically matched to, and allowed as a deduction in, the same year as the income produced by that expense.

Date of effect

16. This Ruling applies to years commencing both before and after its date of issue. However, the 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).

Explanations

Presently existing liability

17. In *Coles Myer Finance* the joint majority judgment of Mason CJ, Brennan, Dawson, Toohey, and Gaudron JJ, accepted both *FC of T v. James Flood* and *Nilsen Development Laboratories* as authority for the proposition that 'a liability must presently be existing in order to be incurred within the meaning of s.51(1)' (*Coles Myer Finance* 93 ATC 4220; 25 ATR 95).

Properly referable

18. The joint judgment of the High Court in *Coles Myer Finance* also states (93 ATC at 4222, 25 ATR at 105) that:

> 'The relevance of the present existence of a legal liability on the part of the taxpayer to meet the bills and notes at a future date is that *it establishes that the taxpayer has "incurred" in the year of income* an obligation to pay an amount which gives rise to a net loss or outgoing, being the recurrent cost of acquiring working or circulating capital. *But there remains the question: how much of that net loss or outgoing is referable to the year of income*' (emphasis added).

19. In *Woolcombers* (93 ATC 5181) the Full Federal Court stated:

> 'As has been said, the complexity of the scheme in *New Zealand Flax* called for an inquiry of the kind there ordered. In our opinion, there is no such complexity here.

> In *Coles Myer*, because of the special nature of the financing transaction, it was held, by the majority, that apportionment was appropriate. Likewise, in the financial arrangements considered in *Australian Guarantee Corporation Ltd v. FC of T* 84 ATC 4642; 15 ATR 982, apportionment of the total sum of the interest was proper. But there are no similar features in the present matter, which concerns a relatively simple forward contract for sale without any financing aspect; no question arises here of a liability accruing daily, as interest does, or otherwise accruing periodically'.

20. From this it appears that the principles in *Coles Myer Finance* will generally apply to:

(a) financing transactions; or

(b) a liability accruing daily; or

(c) a liability accruing periodically.

21. Additionally, it may be necessary to decide whether a loss or outgoing is 'properly referable' to a particular year of income in cases which do not involve liabilities which accrue periodically. In *Australian and New Zealand Banking Group Limited* the taxpayer was a self insurer for the purposes of the Victorian '*Workcare*' worker's compensation legislation. One of the questions before the Full Federal Court was in what year was the taxpayer entitled to a deduction under subsection 51(1) for claims notified but not paid and claims as yet unnotified. The case did not involve a liability under a financial transaction, or a liability which could be said to accrue periodically. Hill J, with whom the other two judges agreed, stated (94 ATC 4034) that:

> 'The present, however, is an example of a case where accounting evidence may be particularly relevant in determining not *whether a liability is incurred but rather whether a liability incurred is referable to a particular year of income'* (emphasis added).

22. We believe that Lee J's approach in *Woolcombers* to 'properly referable' introduces a new element into subsection 51(1). His Honour states (93 ATC 4349; 25 ATR 495) that:

> 'Having regard to the long standing view that s.51 of the Act does not require a taxpayer to match the loss or outgoing incurred to income gained or produced in the income year ... it may be said that the need for the loss or outgoing to be "properly referable" or "properly attributable" to the income year in which it is sought to be deducted *requires the loss or outgoing not to be so anomalous to the revenue operations of*

> *the taxpayer as to effect a distortion in the results of those operations in the relevant income year*' (emphasis added).

23. His Honour then applied this approach to facts before him and concluded that a full deduction was allowable in 1988. While (93 ATC 4351; 25 ATR 495):

> '... the deduction in that year may appear as a distortion of the taxpayer's operations on revenue account but that will not be an outcome caused by the introduction of an anomalous outgoing extraneous to the taxpayer's usual revenue operations'.

i.e., a full deduction is available even if it would lead to distortions provided that the expense is not an anomalous outgoing which is extraneous to the taxpayer's usual income earning activities.

24. In our view this approach is inconsistent with the approach and result in *Coles Myer Finance.* This approach would have granted *Coles Myer Finance* a full deduction in the year of issue of the bill or note. The High Court specifically found that the raising of finance by way of discounted commercial paper was a normal incident of the taxpayer's business Thus, discount expenses are an ordinary part of Coles Myer Finance's revenue operations, ie., it is not an anomalous expense extraneous to the taxpayer's usual business. Additionally, nothing in the Full Federal Court's decision in *Woolcombers* supports the limitation placed on *Coles Myer Finance*.

What is meant by 'properly referable'

25. In deciding whether the particular expense was properly referable, the joint judgment in *Coles Myer Finance* concentrated on the period in which the benefit from the expenditure was employed in the business. This approach was explained by the phrase 'profitable advantage' (93 ATC 4222; 25 ATR 105):

> ' ... more importantly, the net loss or outgoing represents the cost of acquiring funds which the taxpayer puts to profitable advantage in both years of income. The cost [the discount] is incurred by the taxpayer with a view to acquiring funds with which to engage in its profit-making activities during the currency of the respective bills or notes.'

26. The benefits provided by the liability are not generally considered to extend beyond the point at which the last goods or services are provided. This limitation is considered necessary as, in an economic and commercial sense, the benefits of some liabilities may continue indefinitely (eg., the benefits of advertising expenses). We believe that this limitation is in accordance with the High Court's approach in *Coles Myer Finance* where the joint judgment was

concerned to avoid the distortionary effects of liabilities which are only to be discharged in the future. The joint judgment used the example of a ten year bill (ie., a zero coupon bond) to illustrate their point. Their Honours note (93 ATC 4223; 25 ATR 106) that allowing a deduction up-front for the full amount of the discount would:

> 'if, permitted, ... lead to a *distortion of the taxpayer's operations on revenue account* in the year of income in which the bills are drawn and would open the way to inflating very considerably the amount of allowable deductions under s51 for that year.' (emphasis added)

That is, there was no suggestion that the deduction be spread over a period greater that 10 years, even though, arguably, the benefits of the money provided by the bonds extended over a longer period. To attempt to spread a liability over an indefinite period would also lead to a distortion of revenue operations, this time in favour of the revenue.

27. This approach may be more readily understood by considering a number of examples.

(a) The proceeds of a bill of exchange are used in an income producing activity. This is the *Coles Myer Finance* situation. In this case, the proceeds from the bill are the profitable advantage obtained from the liability to repay the face value of the bill. That advantage is used by the taxpayer in his income producing activities throughout the term of the bill. Consequently, the net loss or outgoing is properly referable to the term of the bill, and where the term extends over more than one income year, only part of that total liability may be properly referable to the particular income year.

(b) The proceeds from a loan are used for income production. In this case the liability to pay interest on the loan comes into existence at the start of the loan. The profitable advantage provided to the taxpayer by this liability to pay interest is the use of the loan funds in his income producing activities. This benefit continues for the period of the loan. Consequently, the interest liability should be apportioned over the full period of the loan as the liability is properly referable to the term of the loan. Where the term of the loan extends over more than one income year, only part of it may be properly referable to the particular year under consideration. This is the situation dealt with in *Australian Guarantee Corp.*

(c) A company contracts for a number of television advertisements. The services to be provided in respect of the liability to pay for the advertisements are the running of those advertisements. Consequently, provided that the cost of the advertisements is not prepaid, the amount of the liability should be spread over the period during which the advertisements are run. The liability is properly referable to this whole period, rather than the period during which the company derives assessable income as a result of the advertisements.

Relevance of accounting evidence

28. In *New Zealand Flax Investments Ltd v FC of T* 61 CLR 179 at 207 Dixon J stated:

> 'There is, I think, no objection to the commissioner's taking into consideration the actual events of the subsequent years in order to see whether, under a method of accounting by which only actual receipts from the bonds are included, the liability for interest would naturally be provided out of revenue from that source accruing in the year when the liability would be met, or whether safe or proper practice required for the purpose an appropriation and retention of part of the sum received in the accounting periods under assessment'.

While somewhat difficult to interpret, this passage clearly gives accounting principles and practice a central role in determining how much of a loss or outgoing is 'properly referable' or 'attributable' to the particular year of income.

29. Support for this view is also found in *Australian Guarantee Corp.* In that case the taxpayer had claimed an amount of interest deduction for each year. Toohey J stated (84 ATC 4648, 15 ATR 991) that:

> 'If such an approach was in accord with sound accountancy practice, designed to give a true picture of the taxpayer's earnings and outgoings, I see no reason why the taxpayer should not be allowed a deduction accordingly, unless there is something in the Act that precludes such a course or indicates a different course'.

Toohey J then concluded that the taxpayer's approach was not 'precluded by the language of the Act' (84 ATC 4650; 15 ATR 992).

30. Toohey J also endorsed (84 ATC 4649, 15 ATR 991) Lee J's approach, at first instance in *Australian Guarantee Corp.*, to the use of accounting evidence:

> ' ... does not mean that accounting practice is being used as a substitute for the true meaning of "incurred" in subsection 51(1). All it means is that accounting practice is identifying in respect of that liability, which is a present liability to pay the *whole* of the interest at a future time, *the amount which is to be treated as an outgoing "incurred" during each year of income*' (emphasis added).

Lee J also stated in *Australian Guarantee Corp.* that:

> 'In this situation it seems to me that accounting practice can be resorted to identify the extent to which a presently existing liability to be discharged in another year, should be treated as an "outgoing incurred" in the year of income.'

31. We also consider that the joint judgment in *Coles Myer Finance* demonstrates the evidentiary importance of accounting in determining how much of a liability is properly referable to a particular year. This view is supported by Hill J's judgment (with whom the other two justices agreed) in *FC of T v. Citibank Ltd & Ors* 93 ATC 4691; 26 ATR 423. In that case Hill J made the comment (93 ATC 4699; 26 ATR 432) that:

> 'Accounting evidence may also have particular significance in determining the timing of a deduction, that is to say not whether it is incurred, but whether it is incurred in respect of a year of income. So much appeared from a short comment in the judgment of Rich J in *New Zealand Flax* ... and Dixon J as well as in the orders made by the Court. A similar approach was taken by the Full Court of this Court in *FC of T v Australian Guarantee Corp.* ... The judgment anticipated the test ultimately applied by the majority of the High Court in *Coles Myer* where the determination of how much of the loss on discounted bills and promissory notes was referable to the year of income was clearly to be resolved by adopting what the majority of the Court ... referred to as the:
>
> "accounting straight line basis over the term of the relevant note or bill"'.

Is matching embodied in 51(1)?

32. There is a long line of authority for the view that in order for a loss or outgoing to be an allowable deduction, it is not necessary to specifically link or match that expenditure to assessable income derived in the same year as the expense is incurred. These cases include: *Tooheys Ltd & Sydney Ferries Ltd v. C of T (NSW)* (1922) 22 NSW SR 432; *Moffatt v. Webb* (1912) 16 CLR 120; *AGC (Advances) Ltd v. FC of T* 75 ATC 4057; *C of T (NSW) v. Ash* (1938) 61 CLR

263; *Amalgamated Zinc (de Bavay's) Ltd v. FC of T* (1935) 54 CLR 295; *Ronpibon Tin NL and Tongkah Compound NL v. FC of T* (1949) 78 CLR 47; *FC of T v. Finn* (1961) 106 CLR 60; *Fletcher & Ors v. FC of T* 91 ATC 4950; 22 ATR 613.

33. In *Fletcher* the Full High Court as currently constituted unanimously stated (91 ATC 4957, 22 ATR 621):

> 'The second introductory point to be made about s51(1) is that the reference in it to "the assessable income" is not to be read as confined to assessable income actually derived in a particular year.'

34. In *Ash* Dixon J, at the same time as rejecting the specific matching concept for the nexus question, appears to accept that business and accounting practice may have some relevance to the timing of deductions. Dixon J stated, as quoted with approval by the majority in *Coles Myer Finance* (93 ATC 4220; 25 ATR 102) that:

> 'Where the reason for allowing a deduction is that it is a normal or recurrent expenditure or an expenditure which is fairly incident to the carrying on of the business, it is evident that it can seldom be associated with any particular item on the revenue side against which to set it, and, as the ground of its allowance is that it is an incident or accident, something concomitant to the conduct of the business, it follows that to deduct it in the year when it falls to be met is consistent with the reason for deducting it and conforms with business principles'.

35. In determining the period to which the discount expense was 'properly referable' the joint judgment did not attempt to match the expense with any specific amount of assessable income. The taxpayer's method of returning its assessable income was not before the Court, and certainly was not considered by the majority in their judgment. This strongly suggests that the period to which an expense is 'referable' is not dependent on when assessable income is derived as a result of the expense being 'incurred'. To interpret *Coles Myer Finance* as requiring a matching of expenses to specific income would be to suggest that the majority had overturned the long line of authority that states that specific matching is not required for the nexus test in subsection 51(1).

36. It is in this context that the later reference to subsection 51(1) being a 'statutory recognition' of the 'matching principle' (as stated by Menhennitt J in *RACV Insurance Pty Ltd v. FC of T* [1975] VR 1; 74 ATC 4169; 4 ATR 610) should be read. That is, the majority does not appear to have given the commercial or accounting practice of matching precedence over the jurisprudential analysis of earlier cases.

It would appear to logically follow that *Coles Myer Finance* cannot be viewed as authority for allowing deductions for accounting provisions generally (such as for employee long service leave) in the absence of a presently existing legal liability. Nor can it be viewed as overturning the other requirements of subsection 51(1) (eg., nexus with the production of assessable income and the negative limbs).

37. It appears that the concept of 'matching' comes into the majority's analysis at the point in time at which the jurisprudential analysis (in the sense of deciding if there is a presently existing legal liability) has been determined. It is also at this stage that the High Court introduced the concept of 'properly referable'. It is arguable the High Court, in talking about matching, was in effect equating the matching concept, as set out in *RACV*, with the concept of 'properly referable'. Thus matching is only really relevant, and can only be said to be part of subsection 51(1), to the extent that it assists in determining how much of a presently existing legal obligation is properly referable to the particular year of income.

38. Indeed the majority's quotation of the passage from *Arthur Murray (N.S.W.) Pty Ltd v. FC of T* (1965) 114 CLR 314 which states that while of assistance in determining whether an item meets the statutory test, accounting practice can never substitute for the statutory test, strongly suggests this is the case. It can also be argued that this limited concept of 'matching' had previously been applied in *Alliance Holdings* and *Australian Guarantee Corp.* in relation to the timing of deductions on deferred interest securities. See, for example, Toohey J in *Australian Guarantee Corp.* (84 ATC 4649; 15 ATR 991-2).

39. Accordingly, we do not believe that the High Court has introduced into subsection 51(1) any principle of specific matching. Rather, the reference to the matching principle is used in a manner consistent with earlier authority, and is applied in *Coles Myer Finance* as evidence of how much of the loss or outgoing is 'properly referable' to the particular year. The ATO has previously accepted the relevance of the matching principle in Taxation Ruling IT 2682 (Interest Rate Swaps) at paragraphs 3 and 76, and Taxation Ruling TR 93/27.

Types of accounting evidence

40. We do not believe that the High Court's approach in *Coles Myer Finance* necessarily extends to specific statements of accounting standards (ie., AASs, ASRB/AASBs) and accounting concepts (SACs). In *Citibank* Hill J stated (93 ATC 4700; 26 ATR 433-4) that:

> ' ... it must be remembered that the role of the accounting standards is in the determining of profit so as to ensure that financial statements, required to be prepared by statute, give a

> true and fair view and not the determination of "income", notwithstanding that those two concepts may, as will be seen, sometimes overlap'.

We believe that given this fundamental difference in purpose between accounting standards and taxation it will often be inappropriate to rely on such standards as evidence of ' ... the ordinary usages and practices of businessmen, of whom accountants represent an informed sub-set ...' (Hill J *Citibank* 93 ATC 4700; 26 ATR 433-4).

Examples

41. Fred Smith, who is a sole trader, employs an accountant to advise him on how to establish a better accounting system. The contract between Fred and the accountant states that Fred has no liability to pay for the services until a bill is presented by the accountant. The accountant provides his final report on 24 June 1994. However, the bill is only presented on 3 July 1994. In these circumstances Fred has not, in the 1993-4 income year, incurred a loss or outgoing in respect of the accountants services as there is no presently existing liability in respect of those services as at 30 June 1994.

42. Fred Smith purchases trading stock for his business. The stock, together with the invoice, is delivered on 20 June 1994. The invoice states that payment must be made within 7 days of delivery of the goods. Fred does not pay the invoice until 1 July 1994. Fred has incurred an outgoing, for the purposes of both subsection 51(1) and (2), in the 1993-4 income year. As at 30 June 1994 Fred has a presently existing liability in respect of the cost of the trading stock.

43. Fred Smith rents his business premises. Under the lease Fred has a liability for the next month's rent as from the 16 of each month. However, under the contract, the rent is payable one month in arrears on the 15 of each month. As at 30 June 1994 Fred has a presently existing liability for the rent covering the period 16 June to 15 July 1994. However, rent accrues from day to day and as such it is necessary to determine how much of the present liability to rent is 'properly referable' to the 1993-4 income year. In our view only 15 of the 30 days are 'properly referable' to the 1993-4 year. Consequently only half the rent payable in respect of the 16 June -15 July period will be deductible in the 1993-4 year of income.

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- Arthur Murray (N.S.W.) Pty Ltd v FC of T 114 CLR 314
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