IT 2672 - Income tax: deductibility of costs of amending a superannuation fund trust deed

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Taxation Ruling
Income tax: deductibility of costs of amending a superannuation fund trust deed

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What this Ruling is about

1. This Ruling explains whether costs incurred by a:

(a) trustee; or

(b) sponsoring employer,

of a superannuation fund in amending the deed of trust under which the fund is established and governed are allowable income tax deductions under subsection 51(1) of the *Income Tax Assessment Act 1936 (ITAA)*.

Ruling

(a) Amendment costs incurred by a trustee

2. As a general rule, costs incurred by a trustee of a superannuation fund in amending the fund's trust deed are not deductible under subsection 51(1). They are not incurred in gaining or producing the fund's assessable income nor are they necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Moreover, they are outgoings of capital or of a capital nature.

3. Costs incurred by a superannuation fund trustee in amending the trust deed of the fund are also ordinarily not deductible under subsection 69(1) (tax-related expenses) because they are expenditure of a capital nature.

4. Examples of amendment costs which are not deductible are costs incurred in:

- establishing a trust; and
- executing a new deed for an existing fund; and
- amending a deed to enlarge or significantly alter the scope of the trust's activities.

5. However, costs incurred by a trustee of a superannuation fund in amending a trust deed are deductible under subsection 51(1) if the amendments are necessitated by changes in Government regulations and are made to ensure that the fund's day to day operations continue to satisfy the Insurance and Superannuation Commission's (ISC) requirements for a complying superannuation fund.

(b) Amendment costs incurred by an employer sponsor

6. Costs of amending a superannuation fund trust deed incurred by an employer sponsor of a superannuation fund are deductible under subsection 51(1) whether or not the amendments are necessitated by changes in Government regulations.

Date of effect

7. This Ruling sets out our current practice and is not concerned with a change in interpretation. Consequently, it applies (subject to any limitations imposed by statute) for years of income commencing both before and after the date on which it is issued.

Explanations

(a) Amendment costs incurred by a trustee

8. A superannuation fund is generally evidenced by a deed of trust and is administered by a trustee or trustees appointed under the deed. The trust deed provides for the investment of money held in the fund to obtain income to add to the fund. Benefits are generally paid from the accumulated contributions and income in the fund. The deed specifies who is to make contributions to the fund and who is to receive benefits from the fund and in what circumstances.

9. A superannuation fund is entitled to concessional tax treatment (i.e., is subject to tax at the rate of 15% on its income) for a particular income year if the ISC has given written notice to the trustee for the year stating that the fund has, or should be treated as though it has, fully satisfied the superannuation fund conditions required for that year by the *Occupational Superannuation Standards Act 1987*. The Commissioner of Taxation is advised that the fund has a notice of compliance. The fund is then entitled to concessional tax treatment in accordance with Part IX of the ITAA.

10. It therefore becomes necessary at times to amend the trust deed governing the superannuation fund to enable the fund to continue to

qualify as a complying superannuation fund entitled to concessional tax treatment.

11. Subsection 51(1) allows the deductibility of losses and outgoings to the extent that they are incurred in gaining or producing assessable income or necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. However, the subsection disallows expenditure of capital or of a capital, private or domestic nature or expenditure incurred in gaining or producing exempt income.

12. Broadly speaking, expenses connected with establishing, enlarging or replacing a business or the profit-yielding structure of an organisation are not deductible under subsection 51(1) (*Sun Newspapers Ltd v. FC of T* (1938) 61 CLR 337; 5 ATD 87). These expenses do not come within the positive limbs of subsection 51(1) because they lack the necessary connection with, and relevance to, producing income to bear the character of operating, working or business expenses or to have the character of income-producing expenses. The expenses are, in any event, excluded from the subsection because they are capital expenses or expenses of a capital nature.

13. The costs of initially registering a business or trade name, for example, are not deductible under subsection 51(1). Nor are the costs incurred in preparing or amending the constituent documents of a company or trust ordinarily deductible under subsection 51(1) (*Case F17*, 74 ATC 80; 19 CTBR(NS), *Case 35*; *Fanmac Ltd v. FC of T* 91 ATC 4703 at 4709; (1991) 22 ATR 413 at 421). In each case, the costs do not come within the positive limbs of the subsection (for the same reason as expressed in paragraph 12) and they are capital or of a capital nature.

14. This analysis indicates that most costs incurred by a trustee in creating or amending a superannuation fund trust deed are not deductible under subsection 51(1) because they do not come within the positive limbs of the subsection and because they are capital costs. Amendment costs which are non-deductible for these reasons include those costs involved in:

- establishing a trust (*Sun Newspapers* case);
- executing a new deed for an existing fund (*Case F 17*; *Case 35*, and *Fanmac* case);
- amending a deed to enlarge or significantly alter the scope of the trust's activities (*Sun Newspapers* case).

15. Costs incurred by a trustee in creating or amending a superannuation fund trust deed are also not ordinarily deductible under subsection 69(1)(tax-related expenses). That subsection

excludes from deduction expenditure of a capital nature. As stated in paragraph 14, these costs are considered to be outgoings of a capital nature. Subsection 69(3) does not preclude the relevant costs from being regarded as expenditure of a capital nature because the reason they are capital outgoings is not dependent on the income tax affairs concerned relating to matters of a capital nature.

16. Under regulation 18 of the Occupational Superannuation Standards Regulations, a superannuation fund is required to amend its trust deed if a change in the regulations necessitates it. This enables the fund to maintain its status as a complying superannuation fund. Regulation 18 envisages that the necessary amendments may be required on a regular basis.

17. Amendment costs incurred because of regulation 18 are close to the borderline of deductibility but fall on the side of being deductible. We consider that amendment costs incurred by a trustee as a result of regulation 18 are deductible under subsection 51(1) for the following reasons:

Within positive limbs of subsection 51(1)

- The amendment costs are incurred in, or in the course of, the superannuation fund's activities or operations by which it gains or produces its assessable income and the costs are both relevant and incidental to those activities or operations. They have, in our view, the essential character of an income-producing expense (*FC of T v. Consolidated Fertilizers Ltd* 91 ATC 4677 at 4688; (1991) 22 ATR 281 at 293). Alternatively, for those superannuation funds which carry on a business, the amendment costs have the character of an operating or working expense of the business or are an essential part of the cost of the fund's business operations.
- The compulsory nature of the amendments required by regulation 18 is not, of itself, a material factor. The amendments recurringly alter the fund's rules, however, so that its day to day operations may continue to comply with the ISC's requirements.

Not outgoings of capital or of a capital nature

- The amendment costs are recurrent costs and can be expected to recur in the future.
- The amendment costs constitute, in our view, expenditure which the nature of the superannuation fund's income-producing or business activities require as part of the prudent management of those activities.

(b) Amendment costs incurred by an employer sponsor

18. If a sponsoring employer of a superannuation fund pays or reimburses the cost of amending the fund's trust deed, the costs are deductible to the employer under subsection 51(1). The costs are necessarily incurred by the employer in carrying on its business for the purpose of gaining or producing its assessable income. By incurring the costs the employer is, in effect, providing a benefit to its employees. The costs represent a normal incident of carrying on the employer's business and are therefore a working or operating expense of the business. They are not capital outgoings because they do not establish, enlarge or alter the employer's profit-yielding structure.

Example

19. The trustees of The Taskmasters Superannuation Fund incur legal expenses and printing costs to amend the terms of their trust deed in the 1991-92 year of income. The amendment was necessary because new standards under the Occupational Superannuation Standards Act and the Occupational Superannuation Standards Regulations impose, for the 1991-92 income year and later years, limits on the tax deductible contributions that may be received by a complying superannuation fund in respect of each member.

20. The costs incurred by the trustees are deductible under subsection 51(1).

Commissioner of Taxation

3 December 1992

ISSN 0813 - 3662

ATO references
NO 91/ 10125-4
BO

Previously released in draft form as EDR 52

Price $0.50

FOI index detail
reference number
I 1013091

subject references
- deed amendment costs
- superannuation
- trust deeds

legislative references
- ITAA 51(1); ITAA 69(1); ITAA 69(3)

case references

- FC of T v. Consolidated Fertilizers Ltd 91 ATC 4677
  (1991) 22 ATR 281
- Fanmac Ltd v. FC of T 91 ATC 4703
  (1991) 22 ATR 413
- Sun Newspapers Ltd v. FC of T
  (1938) 61 CLR 337
  5 ATD 87
- Case F17, 74 ATC 80
  19 CTBR(NS) Case35