TR 2012/3 - Income tax: taxation of financial arrangements - application of subsections 230-30(2) and 230-30(3) of the Income Tax Assessment Act 1997 to gains and losses relating to exempt income or non-assessable non-exempt income

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There is a Compendium for this document: **TR 2012/3EC** .

Generated on: 2 June 2026, 09:00:33 PM

Taxation Ruling

Income tax: taxation of financial arrangements – application of subsections 230-30(2) and 230-30(3) of the *Income Tax Assessment Act 1997* to gains and losses relating to exempt income or non-assessable non-exempt income

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What this Ruling is about

1. This Ruling explains how subsection 230-30(2) of the *Income Tax Assessment Act 1997* (ITAA 1997)[1] applies to a gain you make from a financial arrangement. Where this provision applies a gain is to some extent exempt income or non-assessable non-exempt income (NANE income).

2. This Ruling also explains how subsections 230-30(2) and 230-30(3) apply to a loss you make, or would have made, from a financial arrangement.

[1] All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise stated.

3. This Ruling explains the principles that apply in deciding whether or not a loss you make, or would have made, from a financial arrangement is made in gaining or producing exempt income or NANE income for the purposes of subsections 230-30(2) and 230-30(3). The application of these principles has been illustrated in examples, including where:

- a gain attributable to foreign currency exchange rate movements is made in relation to an amount that is NANE income.
- a gain attributable to foreign currency exchange rate movements is made in relation to the disposal of a financial arrangement that itself produces gains that are NANE income.
- a gain attributable to foreign currency exchange rate movements is made in relation to the repayment of borrowings used to fund the acquisition of a financial arrangement that itself produces gains that are NANE income.
- a gain made from a financial arrangement entered into to hedge a risk in relation to foreign currency exchange rate movements that arise in relation to:
  - i. gains that are NANE income or losses made in gaining or producing NANE income, or
  - ii. gains from the acquisition or holding of the asset that produces the gains or losses mentioned in (i).

4. Generally, under Division 230 a gain you make from a financial arrangement is included in your assessable income[2] and a loss you make from a financial arrangement is deductible to the extent that the loss is made in gaining or producing your assessable income, or necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.[3]

5. The tax treatment of gains and losses related to exempt income or NANE income are exceptions to this general approach of being assessable or deductible.

6. This Ruling does not consider circumstances where the gain is one that is made from a hedging financial arrangement to which the hedging financial arrangement election applies within Subdivision 230-E. This includes a designated hedge of a net investment in a foreign operation (within the meaning of the Australian accounting standards) that is subject to that election.

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[2] See subsection 230-15(1).
[3] See subsection 230-15(2).

Ruling

Losses made in gaining or producing exempt income or NANE income

7. Subsection 230-30(3) provides that a loss made from a financial arrangement is not an allowable deduction, to the extent it is made in gaining or producing exempt income or NANE income, unless that loss satisfies the description in subsection 230-15(3).

8. Subsection 230-30(2) provides that, despite section 230-15, a gain will be exempt income or NANE income to the extent that, if it had been a loss instead (a 'hypothetical loss'), it would have been made in gaining or producing such income.

9. The words 'in gaining or producing' adopted by subsections 230-30(2) and 230-30(3) reflect the same nexus enquiry as for the deduction test in paragraph 230-15(2)(a), and as for the first positive limb and reflected in the third negative limb of section 8-1, and its predecessor section 51 of the *Income Tax Assessment 1936* (ITAA 1936). These words require an examination of whether or not there is a sufficient nexus or connection between the identified loss and an income producing activity. Whether a sufficient nexus exists will depend on the nature of the loss and the degree of its connection with the activities by which the taxpayer is gaining or producing the relevant income.

10. Case law that has examined the meaning of 'in gaining or producing' in the context of a nexus requirement provides guidance to the application of subsections 230-30(2) and 230-30(3).

11. The words 'in gaining or producing' have a wide application (see *Amalgamated Zinc (De Bavay's) Ltd v. Federal Commissioner of Taxation* (1935) 54 CLR 295 at 309; [1935] HCA 81).

12. A loss is made in gaining or producing exempt income or NANE income if the loss is incidental and relevant to the exempt income or NANE income producing activity of the taxpayer (see *Ronpibon Tin NL and Tongkah Compound NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47; [1949] HCA 15 (*Ronpibon Tin*)).

13. Incidence and relevance requires an examination of the connection that the making of the loss has with the operations which more directly gain or produce the exempt income or NANE income (see *Charles Moore & Co (WA) Pty Ltd v. Federal Commissioner of Taxation* (1956) 95 CLR 344 at 351; [1956] HCA 77 at paragraph 7).

14. Whether a loss has a sufficient nexus to the gaining or producing of exempt income or NANE income is a question of fact and circumstances.

15. The expression 'to the extent that' in subsections 230-30(2) and 230-30(3) makes it clear that apportionment is required in relation to a gain (by reference to a hypothetical loss) or loss (an actual loss), where the relevant loss:

- has a connection with an activity that produces both assessable income, and exempt income or NANE income; or
- has a connection with more than one activity, one of which produces assessable income and at least one other which produces exempt income or NANE income.

16. An appropriate method of apportionment is a question of fact in each case. The method to be adopted in any particular case must be 'fair and reasonable' in all the circumstances (*Ronpibon Tin*[4]; *Adelaide Racing Club Inc v. Federal Commissioner of Taxation* (1964) 114 CLR 517 at 526; [1964] HCA 57 at paragraph 16). There may be more than one fair and reasonable basis for apportionment. The Commissioner will accept the method adopted provided it is fair and reasonable and applied consistently.

Gains which, if they were losses instead, would be made in gaining or producing exempt income or NANE income

17. Subsection 230-30(2) confers exempt income or NANE income status on a gain if that gain had been a loss instead and it would have been made in gaining or producing exempt income or NANE income.

18. Therefore, the character of the gain depends upon the connection that a hypothetical loss would have with the processes by which exempt income or NANE income is produced. Where the gain is capable of being a hypothetical loss under the financial arrangement, then subsection 230-30(2) can apply. For example, currency exchange rate movements on a financial arrangement can produce either gains or losses, but a dividend received by a shareholder can only be a gain.

19. Where a loss corresponding to the gain is not able to be made in fact under the terms of a particular financial arrangement, then the hypothetical loss posited by subsection 230-30(2) must be examined carefully for whether it will satisfy the connection required by that subsection.

[4] (1949) 78 CLR 47 at 59; [1949] HCA 15 at paragraph 18.

Example 1 - Resident holder of redeemable preference share

20. *Bilby Co is an Australian resident company and acquires a redeemable preference share for USD 100 with the intention of holding it as an investment until maturity. The share is redeemed for its face value on the redemption date in five years' time. Returns on the redeemable preference share are non-portfolio dividends with a foreign source and are the only returns Bilby Co expects to make. Due to currency exchange rate movements, the Australian dollar equivalent (ADE) of the amount received on redemption exceeds the ADE of the amount originally paid for the share subscription. The Issuer of the preference share is not a controlled foreign company of Bilby Co and therefore subsection 230-460(12) does not apply. The share is a financial arrangement under Division 230.*

21. The non-portfolio dividends are NANE income to Bilby Co as the requirements of section 23AJ of the ITAA 1936 are assumed to be satisfied and therefore they are NANE income under paragraph 230-30(1)(b) where gains from the share are subject to Division 230.

22. Bilby Co makes a gain from a financial arrangement on redemption of the redeemable preference share. If the gain had been a loss instead, this hypothetical loss would have been made in gaining or producing NANE income. Consequently, the gain is NANE income under subsection 230-30(2) (see Explanation at paragraphs 89 to 92 of this Ruling).

23. If an actual loss arose in these circumstances instead of the gain, such a loss would not be allowable as a deduction by virtue of subsection 230-30(3).

24. If Bilby Co had sold the redeemable preference share prior to maturity to take advantage of favourable market conditions for an amount in excess of the amount subscribed (USD profit) and also makes a gain from disposal for Division 230 purposes (reflecting the difference between the ADE of the proceeds and the cost), then Bilby Co will need to consider the extent to which the gain from disposal is NANE income.

25. Bilby Co must use a basis that is fair and reasonable and applied consistently (see Explanation at paragraphs 94 to 99 of this Ruling).

Example 2 - Foreign resident holder of interest-bearing loan

26. *ForBank Co is a foreign resident which provides a USD 100 loan to an Australian resident borrower. The only gains that ForBank Co expects to make from the loan are by way of interest. ForBank Co does not carry on business at or through a permanent establishment. The interest received by ForBank has an Australian source and satisfies the requirements of section 128D of the ITAA 1936. The interest is NANE income under paragraph 230-30(1)(b) of the ITAA 1997.*

27. *ForBank Co's gains from its financial arrangements with an Australian source are subject to Division 230. ForBank Co makes a gain, due to currency exchange rate movements when the loan is repaid by the borrower as the ADE of the amount received on repayment exceeds the ADE of the amount originally provided under the loan. The gain has an Australian source and no relief is available under a tax treaty.*[5]

28. If the gain had been a loss instead, this hypothetical loss would have been made in gaining or producing NANE income because it has a sufficient connection with activities and processes that more directly produce the NANE income. Consequently, the gain is NANE income under subsection 230-30(2) (see Explanation at paragraphs 100 to 103 of this Ruling).

29. If an actual loss arose in these circumstances instead of the gain, such a loss would not be allowable as a deduction by virtue of subsection 230-30(3).

30. If ForBank Co had assigned the loan prior to repayment to take advantage of favourable market conditions for an amount in excess of the amount loaned (USD profit) and also makes a gain on disposal for Division 230 purposes, then the gain on disposal will be NANE income under paragraph 230-30(1)(b) (to the extent that sections 128D and 128AA of the ITAA 1936 apply).

31. Where the USD profit does not give rise to NANE income under section 128D, ForBank Co will need to apportion the gain on disposal on a fair and reasonable basis for the purposes of subsection 230-30(2) and apply this consistently (see Explanation at paragraphs 106 and 107 of this Ruling).

Example 3 - Borrowing for investment in shares

32. *Aust Co, an Australian resident company borrows USD 1,000 to acquire ordinary shares in a US subsidiary which are reasonably expected to pay dividends that are NANE income. The criteria in section 23AJ of the ITAA 1936 are satisfied in relation to these dividends for the period of the loan. The gains and losses from financial arrangements of Aust Co are subject to Division 230 but none of the elective methods apply. Therefore any gains or losses from the shares will not be subject to Division 230.*

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[5] It is assumed that ForBank Co does not qualify for relief from Australian withholding tax under a tax treaty. For example, Article 11(3)(b) of the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1983] ATS 16, as amended by the Protocol [2003] ATS 14, provides for interest paid to some financial institutions to be excepted from Australian withholding tax.

33. *When the loan is repaid, Aust Co makes a gain attributable to currency exchange rate movements, where the financial benefits received (the ADE of the loan proceeds, USD 1,000) exceed the financial benefits provided upon repayment of the loan principal (the ADE of the USD 1,000 at that time).*

34. A loss made under the loan that is referable to an obligation to provide a financial benefit (that is, the interest incurred under the loan contract) is a loss that is made in gaining or producing NANE income and is not deductible under subsection 230-30(3), unless subsection 230-15(3) is satisfied.

35. If the gain that arises in relation to the repayment of the loan principal had been a loss instead, this hypothetical loss would have been made in gaining or producing NANE income. The interest and the currency exchange rate movement on the principal are together a cost of financing. Consequently, the gain is NANE income under subsection 230-30(2) (see Explanation at paragraphs 109 to 113 of this Ruling).

36. If an actual loss arose in these circumstances instead of the gain, such a loss would not be allowable as a deduction by virtue of subsection 230-30(3).

Example 4 - Foreign currency forward contract – dividend

37. *Following on from Example 3, Aust Co enters into a foreign currency forward contract to sell USD 100 to mitigate the foreign currency risk in relation to a USD 100 dividend which has been declared or determined[6] but not paid by its US subsidiary. The dividend, when paid, is NANE income under section 23AJ of the ITAA 1936.*

38. *Aust Co makes a gain from the forward contract which is not taken into account under the hedging financial arrangements method (Subdivision 230-E) because it has not made the hedging financial arrangement election.*

39. If the gain had been a loss instead, this hypothetical loss would have been made in gaining or producing NANE income. There is a sufficient connection between the entry into the forward contract with activities and processes that more directly produce the NANE dividend income. Consequently, the gain is NANE income under subsection 230-30(2).

40. If an actual loss arose in these circumstances instead of the gain, such a loss would not be allowable as a deduction by virtue of subsection 230-30(3).

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[6] Or the subject of an equivalent step under US law under which the dividend is expected to be paid on the nominated payment date.

41. The conclusion in paragraph 39 above would not follow where the hypothetical loss made on the forward contract was made in the course of pursuing the making of a speculative gain on the forward contract, as distinct from a purpose of mitigating the specific foreign currency risk in relation to the dividend. This might be indicated where the exposure in respect of the forward contract is not matched with the exposure in relation to the NANE dividend, or is for a different period (see Explanation at paragraphs 114 to 119 of this Ruling).

Example 5 - Foreign currency forward contract – forecasted earnings

42. *Following on from Example 3, Aust Co enters into a foreign currency forward contract to hedge the foreign currency risk that arises from translating into AUD the forecasted earnings of its US subsidiary for reporting purposes.*

43. *Aust Co makes a loss from the forward contract which is not taken into account under the hedging financial arrangements method (Subdivision 230-E). Aust Co has not made the hedging financial arrangement election.*

44. The loss is not made in gaining or producing NANE income. The forecasted earnings of the subsidiary are not sufficiently proximate to the NANE income because they do not bear a sufficiently proximate relationship to the quantum and timing of any dividends which might be ultimately received. Therefore the loss on the forward contract is not sufficiently proximate with the activities and processes that more directly produce NANE dividends. Consequently, subsection 230-30(3) does not apply to prevent a deduction under subsection 230-15(2) (see Explanation at paragraphs 120 and 121 of this Ruling).

45. If a gain was made instead of an actual loss such a gain would not be NANE income under subsection 230-30(2). Such a gain would be assessable under subsection 230-15(1).

Example 6 - Foreign currency forward contract – initial cost of investment

46. *Aussi Co, an Australian resident company, borrows AUD 900 and uses the proceeds from the loan to buy USD 1,000 on the money market and acquire further ordinary shares in its US subsidiary. The subsidiary is expected to pay dividends that are NANE income. The gains and losses from financial arrangements of Aussi Co are subject to Division 230 but none of the elective methods apply. Therefore any gains or losses from the shares will not be subject to Division 230.*

47. *Aussi Co enters into a three year foreign currency forward contract to hedge against the currency exchange rate movements relating to the initial cost of its investment (the shares) in the US subsidiary. That is, the hedge is entered into in relation to the risk that the capital committed to the foreign investment will diminish in value over the life of the hedge.*

48. *The investment in the US subsidiary is held as an ongoing investment rather than for trading or speculative purposes. The company makes a gain on expiry of the forward contract attributable to movements in the foreign currency exchange rate. The shares continue to be held.*

49. If the gain had been a loss instead, this hypothetical loss would not have been made in gaining or producing NANE income. The change in fair value of an investment held on an ongoing basis does not affect the NANE income producing potential from that activity. The loss would not be sufficiently proximate with the activities and processes that more directly produce NANE dividends.

50. Consequently, the gain is not NANE income under subsection 230-30(2), and is included in assessable income under subsection 230-15(1) (see Explanation at paragraphs 123 to 130 of this Ruling).

51. If an actual loss arose in these circumstances instead of a gain, subsection 230-30(3) does not apply to prevent a deduction under subsection 230-15(2).

Date of effect

52. This Ruling applies both before and after its date of issue. However, the Ruling will 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 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
13 June 2012

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the proposed binding public ruling.

53. Generally, Division 230 includes a gain you make from a financial arrangement in your assessable income and allows a deduction for a loss you make from a financial arrangement.

54. However, a loss made from a financial arrangement is not deductible, subject to subsection 230-15(3), to the extent that it is made in gaining or producing exempt income or NANE income (subsection 230-30(3)).

55. A gain you make from a financial arrangement is exempt income or NANE income to the extent that the gain, if it had been a loss (a 'hypothetical loss'), would have been made in gaining or producing exempt income or NANE income (subsection 230-30(2)).

56. Accordingly an examination of the connection that a loss (or a hypothetical loss) has to the gaining or producing of exempt income or NANE income is a key requirement of the application of subsections 230-30(2) and 230-30(3).

57. The words 'to the extent that' are words of apportionment.

58. Apportionment is required in relation to a gain or loss, where the relevant loss:

- has a connection with an activity that produces both assessable income, and exempt income or NANE income; or
- has a connection with more than one activity, one of which produces assessable income and at least one other which produces exempt income or NANE income.

59. Whether or not a method of apportionment is appropriate is a question of fact in each case. The method to be adopted in any particular case must be 'fair and reasonable' in all the circumstances (*Ronpibon Tin* (1949) 78 CLR 47 at 59; [1949] HCA 15 at paragraph 18; *Adelaide Racing Club Inc v. Federal Commissioner of Taxation* (1964) 114 CLR 517 at 526; [1964] HCA 57 at paragraph 16). There may be more than one fair and reasonable basis for apportionment. The Commissioner will accept the method adopted provided it is fair and reasonable, and applied consistently.

Subsection 230-30(3)

60. Paragraph 8-1(2)(c) denies a loss or outgoing to the extent that it is incurred in relation to gaining or producing exempt income or NANE income. The language used in this provision and its predecessor subsection 51(1) of the ITAA 1936 is not the same as that used in subsection 230-30(3), although it is similar.

61. Notwithstanding subtle differences in the language used, a loss made 'in gaining or producing' exempt income or NANE income would also be a loss made 'in relation to gaining or producing' exempt income or NANE income under paragraph 8-1(2)(c).

62. Therefore it is relevant to examine the principles governing the application of paragraph 8-1(2)(c) in determining whether or not a loss satisfies subsection 230-30(3).

Subsection 230-30(2) – role and nature of enquiry

63. Subsection 230-30(2) provides that:

> Despite section 230-15, a gain that you make from a *financial arrangement:
>
> (a) to the extent that, if it had been a loss, you would have made it in gaining or producing *exempt income—is exempt income; and
>
> (b) to the extent to which, if it had been a loss, you would have made it in gaining or producing *non assessable non-exempt income—is not assessable income and is not exempt income.

64. Subsection 230-30(2) is designed to provide symmetrical tax treatment between some gains and losses from financial arrangements. Asymmetry is said to arise where, for example, a loss is not deductible under subsection 230-15(2) because it is made in gaining or producing NANE income, but a corresponding gain made in the same circumstances would be included in assessable income under subsection 230-15(1).

65. Symmetry is promoted by conferring exempt income (or NANE income) status to a gain where, if had it been a loss, it would have been made in gaining or producing exempt income (or NANE income). Although this requires an enquiry into a hypothetical, the use of this hypothetical does not introduce a new nexus test or change the nature of the connection required to exist between a particular loss and the production of exempt income (or NANE income).

66. The essential nature of the enquiry is to identify the relevant income producing process (if any) with which the hypothetical loss would have a sufficient nexus.

67. A loss made under a particular transaction may have a close connection to the (expected) making of a gain under that transaction, rather than a connection with another income producing process such as gaining or producing NANE income.

68. Examples of such transactions could be:

- a forward contract entered into for speculative purposes; or
- a foreign currency denominated investment entered into with the expectation of a total return consisting of receiving low periodic returns and also a large foreign exchange gain on disposal or maturity.

69. A gain made in such circumstances is not NANE income under subsection 230-30(2). Any loss would have a sufficient nexus with a potential gain and would not be denied deductibility under subsection 230-30(3). The treatment of such gains and losses are symmetrical. In other words, the making of these other gains would not be incidental and relevant to any NANE income from the underlying investment.

70. Under a different fact pattern, a loss might be found to have a sufficient nexus with some other income producing activity despite not being made from that activity directly. For example, a loss made in relation to the satisfaction of an obligation to pay interest on a loan, the funds from which were used to acquire an asset that produces NANE income, has a nexus with the production of NANE income. In this case, the loss (and any gain made in the same circumstances) is incidental and relevant to some other income producing process.

71. The gain must be capable of being a hypothetical loss under the financial arrangement for subsection 230-30(2) to apply. For example, currency exchange rate movements are capable of generating either gains or losses under a given financial arrangement. By contrast, a dividend received on a share is a gain, but there is no loss corresponding to that dividend that can be made by the holder under the financial arrangement.

72. In some circumstances, a hypothetical loss may not be possible in fact. For example, a particular instrument may contain a feature which effectively eliminates the risk of making a foreign currency loss on redemption, while retaining the ability to make the corresponding gain. In such a case there is a purpose of making that gain and it could not be said that the hypothetical loss is incidental and relevant to any exempt income or NANE income producing activities. Any such gain from the financial arrangement will not be exempt income or NANE income under subsection 230-30(2).

Case law consideration of the term ‘in gaining or producing’

73. Case law that has examined the meaning of ‘in gaining or producing’ in the context of a nexus requirement is relevant to the application of subsections 230-30(2) and 230-30(3).

74. The nature of this nexus or connection has been considered by the courts in dealing with the general deduction test in section 8-1. A loss is incurred in gaining or producing assessable income if it is incidental and relevant to the income producing activity of the taxpayer (see *Ronpibon Tin* cited at paragraph 12 of this Ruling).

75. In *Ronpibon Tin* the Court said at CLR 56; HCA 15 at paragraph 11:

> The words 'incurred in gaining or producing the assessable income' mean *in the course of* gaining or producing such income. (emphasis added)

The Court later said at CLR 57; HCA 15 at paragraph 15:

> [T]o come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income.

76. The question of whether or not a particular loss satisfies the positive limb is a question of fact and degree. In *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344 at 351; [1956] HCA 77 at paragraph 7 (*Charles Moore*), the High Court explained that in deciding whether or not a loss was incidental and relevant to an income producing activity it is necessary to look at its 'connection with the operations which more directly gain or produce the assessable income'.

77. Justice Dixon (as he then was) suggested in *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 309; [1935] HCA 81 at paragraph 18 that 'a very wide application should be given to the expression 'incurred in gaining or producing assessable income''. This was confirmed in later cases,[7] including *Charles Moore*.

Subsection 230-30(1)

78. NANE income is ordinary or statutory income where a provision of any Commonwealth law states that it is not assessable income and not exempt income.[8] Subsection 230-30(1) is one such provision.

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[7] *Federal Commissioner of Taxation v. Green* (1950) 81 CLR 313; [1950] HCA 20; *Federal Commissioner of Taxation v. Day* (2008) 236 CLR 163; 2008 ATC 20-064; (2008) 70 ATR 14; *Spriggs v. Federal Commissioner of Taxation*; *Riddell v. Federal Commissioner of Taxation* (2009) 239 CLR 1; [2009] HCA 22; and *Federal Commissioner of Taxation v. Anstis* (2010) 241 CLR 443; [2010] HCA 40.

[8] See section 6-23.

79. A gain is not included in assessable income under Division 230, to the extent that it reflects an amount that another provision of the Act would treat as exempt income or NANE income if Division 230 were disregarded.[9] For example, a non-portfolio dividend from a foreign company that would be NANE income under section 23AJ of the ITAA 1936 if Division 230 was disregarded, is also capable of being NANE income under Division 230. Similarly, interest received by a foreign resident that would be NANE income under section 128D of the ITAA 1936[10] is capable of being NANE income under Division 230.

80. In this way Division 230 seeks to retain the effect of provisions conferring exempt or NANE status outside Division 230 for equivalent gains under Division 230 (for example, see discussion of the application of Division 775 below at paragraphs 85 to 87 of this Ruling).

81. This is confirmed in paragraph 11.35 of the Explanatory Memorandum to Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008:

> A payment that is subject to withholding tax is non-assessable non-exempt income and so to that extent a gain from the financial arrangement that would otherwise be assessable will not be. To the extent that gains reflect payments that are exempt from withholding tax but are nevertheless non-assessable non-exempt income under section 128D (eg, interest that is exempt from withholding tax by section 128F) they also will not be assessable under Division 230. Clearly, these amounts are not intended to be taxed in Australia. However, in relation to amounts that are exempt from withholding tax but are not made non-assessable non-exempt income by section 128D (eg, interest paid to an Australian permanent establishment of a foreign resident), gains will still be determined in accordance with Division 230 and they will be assessable if they have an Australian source.

82. However, subsection 230-30(1) does not extend exempt income or NANE income status to gains that would be assessable in the absence of Division 230, or are not denoted expressly as being exempt income or NANE income. For example, subsection 118-12(1) provides that a capital gain or loss from a CGT asset used solely to produce NANE income is disregarded. However, the exemption does not apply if the income produced is NANE by virtue of section 23AJ or section 128D of the ITAA 1936: see subsection 118-12(2).

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[9] Paragraph 11.32 of the Explanatory Memorandum to Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008 provides the example of a financial arrangement held by a foreign resident, where the interest received from the arrangement is subject to withholding tax. The gain will not be included in assessable income under Division 230, as the financial benefit (the interest received) reflects an amount that would be non-assessable non-exempt income under section 128D of the ITAA 1936 if the Division were disregarded.

[10] Section 128D of the ITAA 1936 relevantly confers NANE income status on an amount of interest if it is subject to withholding tax, unless this is because of certain inclusions under section 128B of the ITAA 1936, or withholding tax would have been payable but for certain exceptions in Division 11A of Part III of the ITAA 1936.

83. This indicates that the scope of the concession in section 23AJ of the ITAA 1936 is limited to the non-portfolio dividend itself, while the concession in section 128D of the ITAA 1936 is limited to the interest receipt.[11]

84. Other gains (including gains due to currency exchange rate movements) that may arise from arrangements that produce NANE income under section 23AJ of the ITAA 1936 or section 128D of the ITAA 1936 are, in the absence of special provisions, included in assessable income. Subsection 230-30(2) is such a special provision.

Division 775

85. The principles discussed in this Ruling will also provide some guidance in the context of Division 775 which has an analogous provision to subsection 230-30(2) at section 775-25. Division 775 sets out the treatment for particular foreign currency gains and losses (called forex realisation gains and forex realisation losses) and will continue to be relevant where the gains and losses from the financial arrangements of a taxpayer are not subject to Division 230.

86. Broadly speaking, a forex realisation gain is exempt income or NANE income to the extent that, had it been a forex realisation loss, it would have been made 'in gaining or producing' exempt income or NANE income.[12] The nature of the enquiry is similar to the enquiry in subsection 230-30(2).

87. Subsection 230-30(1) provides that a gain you make from a financial arrangement will be exempt income or NANE income to the extent that it reflects an amount that would be exempt income or NANE income if Division 230 was disregarded. Consequently, a gain from a financial arrangement is exempt income or NANE income under subsection 230-30(1) to the extent that the gain would be a forex realisation gain that is exempt income or NANE income under section 775-25, if Division 230 was disregarded. Such a gain may also be exempt income or NANE income under subsection 230-30(2) as well.

Explanation for examples provided in the Ruling

88. The following explanation is provided for the examples in the Ruling. Alternative views are discussed in Appendix 2.

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[11] A discount received by a foreign resident would be subject to withholding tax due to the extended definition of 'interest' in subsection 128A(1AC) of the ITAA 1936. Therefore, the discount is made NANE income under section 128D of the ITAA 1936.

[12] See subsections 775-20, 775-25 and 775-27.

Example 1 - Resident holder of redeemable preference share

89. The redeemable preference share (RPS) is a financial arrangement and subsection 230-460(12) does not apply because the company is not a controlled foreign company of Bilby Co. The gain made on redemption will be assessable under section 230-15 unless the amount is made NANE income under paragraph 230-30(1)(b) or subsection 230-30(2).

90. To determine whether or not subsection 230-30(2) applies, it is necessary to identify what connection a hypothetical loss arising in the same circumstances as the gain would have with the activities and processes that produce the NANE income. In this case, the income producing activity is the acquisition and holding of preference shares. It would also include redemption at maturity as contemplated by the terms of the RPS. The currency exchange rate effect measured at this time is referable to the risk encountered during the whole investment period. This activity is expected to (and does) produce NANE dividends and is capable of producing a gain on redemption due to currency exchange rate movements.

91. Foreign currency risk is a natural and ordinary incident of investing in a RPS that is denominated in a foreign currency. On these facts, Bilby Co has only derived NANE dividend income from holding the RPS and any hypothetical loss due to currency exchange rate movements realised on redemption is incidental and relevant to the production of those NANE dividends. This is because the occasion of the hypothetical loss is found in the holding of the preference shares which produce the NANE dividends.

92. A gain made on redemption of a redeemable preference share due to currency exchange rate movements in these circumstances – where the redeemable preference share is not subject to an exception[13] and is acquired with the intention of being held as an investment until redemption – is NANE income under subsection 230-30(2) (an alternative view is discussed at paragraphs 140 and141 of this Ruling).

93. Similarly, if an actual loss arose in these circumstances instead of a gain, such a loss is not allowable by virtue of subsection 230-30(3) and would not be deductible under subsection 230-15(2).

94. Where an investment is made with some other intention a different conclusion may result. For example, the terms of the RPS may have provided for redemption for more than USD 100. To the extent it is attributable to that excess, a gain upon redemption on maturity, if it were a loss instead, could not be said to be incidental and relevant to the NANE income producing activity.

[13] Subsection 230-460(12).

95. If prior to maturity Bilby Co had sold the RPS to take advantage of favourable market conditions for a foreign currency amount in excess of the amount subscribed (USD profit) and also makes a gain from disposal for Division 230 purposes (reflecting the difference between the ADE of the proceeds and the cost), then Bilby Co will need to consider the extent to which the gain on disposal is NANE income.

96. The activity that produces the NANE income does not include a realisation to take advantage of favourable market movements. The nature of the gain from disposal falls for consideration under subsection 230-30(2).

97. Bilby Co must use a basis that is fair and reasonable in all the circumstances. For example, where the gain from disposal reflects the difference between the financial benefits provided at time of issue and the financial benefits received upon disposal, and that gain is *greater than* the ADE of the USD profit, then the gain from disposal is NANE income under subsection 230-30(2) to the extent it is greater than the ADE of the USD profit. The USD profit is not NANE income; it is not referable to the foreign currency risk encountered in respect of the amount subscribed.

98. Following on from this, where the gain from disposal is *less than or equal to* the ADE of the USD profit then no part of that gain is NANE income under subsection 230-30(2). The gain from disposal already reflects the effect of the foreign currency risk on the amount subscribed.

99. If Bilby Co had sold the RPS in the same circumstances but instead made a loss from disposal for Division 230 purposes, then on this basis Bilby Co does not need to apportion the loss for the purposes of subsection 230-30(3). This is because the USD profit has effectively been taken into account in the measure of the loss from disposal such that the whole amount of the loss reflects the foreign currency risk on the amount subscribed.

Example 2 - Foreign resident holder of interest-bearing loan

100. The gain made on repayment of the loan will be assessable under section 230-15 unless it is made NANE income under paragraph 230-30(1)(b) or subsection 230-30(2).

101. To determine whether or not subsection 230-30(2) applies to the gain, it is necessary to identify what connection the gain, if it were a loss instead, has with activities and processes that more directly produce the NANE income. On these simple facts,[14] the income producing activity includes the creation of the loan receivable. This activity is reasonably expected to (and does) produce interest that is subject to interest withholding tax and is NANE income under

[14] It is assumed that ForBank Co does not qualify for relief from Australian withholding tax under a tax treaty.

subsection 230-30(1). This activity is also capable of producing a gain (or a loss) due to currency exchange rate movements on repayment.

102. Lending funds in a foreign currency involves an exposure to a risk that the ADE of the financial benefits received upon repayment will be less than the ADE of the financial benefits provided upon the original advance due to changes in currency exchange rates. The foreign currency risk is a natural and ordinary incident of lending in foreign currency. ForBank Co has derived only NANE interest income from holding the financial arrangement. Therefore, the making of this hypothetical loss is truly incidental and sufficiently proximate to the activities that have more directly produced the NANE income.

103. Where a loan receivable only produces interest that is NANE income, and a gain is made upon cessation due to currency exchange rate movements alone, that gain is NANE income under subsection 230-30(2). This is because if the gain had been a loss instead, then that hypothetical loss would have been made in gaining or producing NANE income. Consequently, the gain is NANE income under subsection 230-30(2) (an alternative view is discussed at paragraphs 142 to 144 of this Ruling).

104. Similarly, if an actual loss arose in these circumstances instead of a gain, such a loss would be not allowable under subsection 230-30(3) and would not be deductible under subsection 230-15(2).

105. If ForBank Co had disposed of the loan prior to maturity then the difference between the 'transfer price' and the 'issue price' may be taken to be income consisting of interest under section 128AA of the ITAA 1936, and is capable of being NANE income under section 128D of the ITAA 1936 and therefore paragraph 230-30(1)(b). There is no need to apportion where this is the case.

106. However where the excess over the amount lent (USD profit) is not otherwise NANE income, ForBank Co will need to consider apportionment. Where the gain on disposal is greater than the ADE of the USD profit, then the gain on disposal is NANE income under subsection 230-30(2) to that extent. The USD profit is not NANE income.

107. Where the gain on disposal is less than or equal to the ADE of the USD profit then no part of that gain is NANE income under subsection 230-30(2).

108. Assume ForBank Co had disposed of the loan in the same circumstances as paragraph 105 above, but instead made a loss on disposal for Division 230 purposes. ForBank Co does not need to apportion the loss for the purposes of subsection 230-30(3) where the loss relates wholly to the adverse currency exchange rate movement in respect of the amount lent in foreign currency. This is an ordinary risk encountered in the activity of lending of this type.

Example 3 - Borrowing for investment in shares

109. The gain made – being the difference between the financial benefits received (the ADE of USD 1,000) and the financial benefits provided upon repayment of the loan principal (the ADE of USD 1,000 at that time) – is attributable to currency exchange rate movements and will be assessable under section 230-15 unless it is made NANE income under paragraph 230-30(1)(b) or subsection 230-30(2).

110. In determining whether or not subsection 230-30(2) applies to the gain, it is necessary to consider the question of whether a loss made upon repayment of principal of a loan[15] used to acquire a NANE income producing asset is a loss made in gaining or producing NANE income.

111. A foreign exchange loss made under the borrowing is a cost of borrowing, or alternatively a cost of obtaining and securing borrowed funds for use in the business. The borrowing is acquired for the purposes of making the purchase of a US subsidiary. There is no expectation of making a gain from the borrowing. Having regard to the wide nature of the nexus test and assuming there is no issue of the expenditure being too soon or post-derivation, the hypothetical loss is made in the gaining or producing of NANE income. Consequently, a corresponding gain made in the same circumstances will be NANE income pursuant to subsection 230-30(2). (An alternative view is discussed at paragraphs 145 to 151 of this Ruling).

112. This analysis also applies to a foreign currency loss made on a loan taken out to acquire shares that produce exempt income, and the funds continue to be used for that purpose. For example, a loan used to acquire shares in a Pooled Development Fund which is expected to pay distributions that are exempt income under section 124ZM of the ITAA 1936.

113. Similarly, a related foreign currency gain will be exempt income under subsection 230-30(2).

Example 4 - Foreign currency forward contract – dividend

114. The gain made on the forward contract (hedging contract) is attributable to currency exchange rate movements and will be assessable under section 230-15, unless it is NANE income under subsection 230-30(2).

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[15] For example, Aust Co makes a loss of AUD 250 where USD 1000 (AUD 1250) is received and USD 1000 (AUD 1500) is repaid as the exchange rate for AUD 1 has moved from USD 0.80 to USD 0.6667 over the term of the loan.

115. An examination of the process or operations by which the relevant income (the gain that reflects the dividend) is produced reveals that exposure to foreign currency risk is a natural and recognised incident of that process. In these circumstances, the occasion for the loss due to currency exchange rate movements is the entry into the hedging contract to prevent that foreign exchange risk from diminishing the ADE amount of the foreign currency denominated dividend that is reasonably expected to be NANE income.

116. A contract that hedges an amount of NANE dividend income denominated in foreign currency has the potential to produce a gain due to foreign currency fluctuations. In this instance, the purpose of the forward contract is to hedge the foreign currency exposure on the dividend from a decline in the AUD value of the dividend. Although this may involve an expectation that a gain may result from the forward contract, this gain is incidental and relevant to the purpose of hedging the foreign currency risk. Accordingly, the gain has a sufficient connection with the gaining of the NANE dividend income.

117. Assuming that a loss is made instead of a gain (as subsection 230-30(2) requires), the making of that hypothetical loss is incidental and relevant to the income-earning activity by which the NANE income is derived and is therefore made in gaining or producing NANE income. Consequently the gain is NANE income under subsection 230-30(2) (an alternative view is discussed at paragraphs 152 to 157 of this Ruling).

118. Similarly, if an actual loss was made instead of a gain, such a loss would be not allowable under subsection 230-30(3) and would not be deductible under subsection 230-15(2).

119. Where the forward contract is entered into for another purpose, for example with the expectation of making a speculative gain, then a loss under these circumstances will have a closer connection to the making of that expected gain and not to any income producing process that is directed to the making of NANE income.

Example 5 - Foreign currency forward contract – forecasted earnings

120. Where there is a contract to hedge against the foreign currency risk arising from the translation of the forecasted earnings of a foreign subsidiary rather than a declared dividend, an examination of the relevant operations and processes by which the NANE income is produced may reveal that a loss due to currency exchange rate movements on the contract is not sufficiently proximate to the production of NANE income. This is the case in this Example because forecasted earnings of a subsidiary do not bear any real relationship to the quantum and timing of the receipt of any dividends which might be ultimately received.

121. Although the entry into the contract took place in the context of a subsidiary carrying on activities that produce earnings that might eventually be received as NANE income, the contract was not entered into in respect of known, declared or reasonably expected dividends (see Example 4). Therefore the loss is not sufficiently proximate to the production of NANE income (an alternative view is discussed at paragraphs 158 and 159 of this Ruling).

122. If a gain was made instead of an actual loss such a gain would not be NANE income under subsection 230-30(2). Such a gain would be assessable under subsection 230-15(1).

Example 6 - Foreign currency forward contract – initial cost of investment

123. The gain made on the hedge contract will be included in assessable income under section 230-15, unless it is NANE income under subsection 230-30(2).

124. If a hedge contract, entered into to hedge the initial cost of shares denominated in foreign currency, produces a gain due to currency exchange rate movements, and that gain is assumed to be a loss (as required in subsection 230-30(2)), the question to be considered is whether that loss would be incidental and relevant to the production of any NANE income.

125. The exposure being hedged in these circumstances is the risk that the capital committed to the foreign investment will diminish in value over the life of the hedge. By investing in the foreign company, Aussi Co encounters a foreign currency exposure. This exposure relates to the risk that changes in currency exchange rates could reduce the value of the investment in Australian dollars upon the realisation of the investment.

126. In these circumstances, the hypothetical loss made on the forward contract is not made in gaining or producing NANE income as the change in value of an investment held as an ongoing investment does not affect the income-earning potential from that activity. The forward contract does not secure or maintain the use of the capital in the income earning activity, nor does it protect against risks that may imperil that activity. The process by which the NANE income is gained or produced does not include merely minimising the risk of a fall in the Australian dollar value of the capital committed for the period of the hedge or the disposal of the investment at some unknown future time. Therefore the hypothetical loss is too remote from the process of producing NANE income, or any gains from an ultimate disposal of the investment.[16]

[16] These gains are not disregarded for CGT purposes: see subsection 118-12(2) but may be affected by Subdivision 768-G.

127. This is also the case if the entry into the hedge arose from a need for protection less directly connected to the existence of an obligation to repay a borrowing used to acquire the investment. In this Example the borrowing is denominated in AUD and therefore does not contain any foreign currency risk.

128. Consequently, the gain is not NANE income under subsection 230-30(2). Rather the gain would be included in assessable income under subsection 230-15(1).

129. Similarly, if an actual loss arose in these circumstances, subsection 230-30(3) does not apply to prevent a deduction under subsection 230-15(2) (an alternative view is discussed at paragraphs 160 to 162 of this Ruling).

130. If a gain is made upon ceasing to hold the investment (being the foreign currency denominated shares), this is a different gain to that of the expected or actual NANE dividends. At the time of entering into the hedging contract and at the time of making the gain under the hedging contract, it is not known whether there will be a gain on disposal of the shares, or how it will be brought to account for tax.

Foreign exchange gains and losses on derivative contracts

131. The principles set out in this Ruling concerning the application of subsections 230-30(2) and 230-30(3) to gains and losses made from foreign currency forward contracts are not limited to such derivatives and also apply in respect of other types of derivatives. The application of those provisions in respect of the use of other types of derivatives will depend upon the facts and circumstances.

Foreign exchange losses on borrowings

132. This Ruling deals with the connection that a foreign exchange loss (made in relation to a borrowing used to acquire a NANE income producing asset) has with the production of that income.

133. A foreign exchange loss is akin to a cost of borrowing, or of obtaining and securing borrowed funds for use in the business. This characterisation of the loss being a cost of borrowing and having regard to the wide nature of the nexus test (assuming there is no issue of the expenditure being too soon or post-derivation) leads to the conclusion that such a loss is made in gaining or producing NANE income.

134. The proposition that a foreign exchange loss in relation to a repayment of a loan is a cost of the borrowing, akin to a cost of obtaining the use of money, finds support in the judgment of Dixon J in *Texas Co (Australasia) Ltd v. Federal Commissioner of Taxation* (1940) 63 CLR 382; [1940] HCA 9 *(Texas Co)* where his Honour observed at CLR 469:[17]

> The delay increased the chances of a loss expressed in pounds, but the fact that the reason for the delay related to capital does not make the outgoing a capital loss. It is rather a standing contingency representing the recurrent expenditure which must be incurred to obtain the use of the money and is much more like annual outgoings to obtain the use of capital assets, such as rent, hire or interest.

135. This was adopted in the judgment of Mason, Aickin and Wilson JJ in *Avco Financial Services Ltd. v. Federal Commissioner of Taxation* (1982*)* 150 CLR 510; 82 ATC 4246; (1982) 13 ATR 63 *(Avco)* at CLR 530; ATC 4258; ATR 76:

> The true principle is that in the case of a finance company which borrows money overseas in the ordinary course of its business and not for some special purpose, the added cost of repayment in foreign currency caused by the devaluation or depreciation of the Australian dollar is an additional cost of the borrowing and, like other costs of the borrowing, is an allowable deduction under s. 51 (1). Conversely, a saving in the amount of foreign currency needed to repay an overseas loan due to a revaluation or an appreciation in the value of the Australian dollar is to be considered as income arising directly out of the finance company's ordinary business.

136. The observation that a devaluation of the Australian dollar results in an additional cost of borrowing should not be limited to finance companies.

137. Further, the conclusion that the loss referable to the adverse currency exchange rate movements is made in the gaining or production of NANE income finds some support in the principles applied in *Australian National Hotels Ltd v. Federal Commissioner of Taxation* (1988) 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575 (*Australian National Hotels*). Such a conclusion relies on there being a real relationship between that loss and the loss referable to interest outgoings that are made in gaining or producing NANE income.

138. Bowen CJ and Burchett J made the following observations at FCR 240, ATC 4633, ATR 1581-1582 on the nature of loan capital:

> Where capital is committed to a business, it will not in general lose the character of capital, and a loss of the whole or part of it will remain a capital loss. There are exceptions, as for example in the case of the purchase of trading stock or the employment of the

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[17] Starke J in *Texas Co* at CLR 449-450 seemed willing to make the same connection insofar as the exchange loss was a 'cost' of obtaining the advantage of working capital by delaying the payment of a liability incurred to obtain trading stock, and therefore akin to interest. If it is accepted that the foreign exchange loss is akin to interest, then it is reasonably arguable that the use to which the borrowed monies is put is also sufficient to satisfy the nexus in respect of that foreign exchange loss (albeit still needing to be tested for capital in the section 8-1 context).

> capital in the ordinary operations of a bank or a finance company. If the capital is raised by loan, an investment of the borrowed moneys in a business will ordinarily remain an investment of capital, and the same consequences will follow. But there is a special feature of loan capital, which flows from the ephemeral nature of a loan. The cost of securing and retaining the use of the capital sum for the business, that is to say, the interest payable in respect of the loan, will be a revenue item. It creates no enduring advantage, but on the contrary is a periodic outgoing related to the continuance of the use by the business of the borrowed capital during the term of the loan. (emphasis added)

And at FCR 241; ATC 4633; ATR 1582:

> ...While *Dixon* J., in the *Texas case*, used the words 'secure' and 'obtain' in the passage cited above from his judgment, *Latham* C.J. expressed the same conclusion, as has been seen, by the phrase 'a necessary outgoing made in the normal course of the continuance and maintenance of the business...'. It is to be noted that, although the *Texas case* was not concerned with a borrowing at interest, it was concerned with an analogous use of short-term capital, the deliberate withholding of payments in order to utilise the moneys withheld as working capital. In that context, *Dixon* J. treated the consequential costs incurred in relation to exchange as similar to interest paid to obtain the use of capital in a business.

139. On the evidence accepted in that case, the taxpayer was concerned that the low interest payable on the loan plus the cost of the insurance premium should not exceed in total the amount being paid in interest on its Australian dollar borrowings. Commercially, the decision to take the benefit of the relatively lower interest rates needed to take into account the prospect of having to repay the loan in a greater amount of Australian dollars than were received.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.

Example 1 - Resident holder of redeemable preference share

140. An alternative view for Example 1 is that the act of subscribing for the share is the commencement of the income producing activity and merely puts the taxpayer in a position to receive dividends as and when declared by the company. The redemption of the share does not have any bearing on the timing or quantum of any dividends received and is therefore not part of the NANE income producing activity.

141. Any loss made on redemption of the share would not be made in gaining or producing the NANE income, even though it may be seen as affecting the overall return from the investment in the preference share. This alternative view relies on a narrow view of the activities that produce the dividend.

Example 2 - Foreign resident holder of interest-bearing loan

142. Similar reasoning could be used in Example 2 in that the act of lending is the commencement of the income producing activity and merely puts the taxpayer in a position to receive interest payments that are NANE income.

143. An alternative view is that the loan repayment is not part of the NANE income producing activity because it does not have a sufficient nexus to the operations by which the NANE interest income is derived.

144. As with Example 1, this takes a narrow view of the nexus required by the words 'in gaining or producing'.

Example 3 - Borrowing for investment in shares

145. On an alternative view, repayment of the foreign currency denominated loan is not part of the process by which the NANE income is produced.

146. This view relies on a distinction between a financing transaction and a trading transaction: see *Montreal Coke & Manufacturing Co v. Minister of National Revenue* [1944] AC 126 at 134 per Lord MacMillan where his Lordship said that expenditure incurred in relation to the financing of a business was not expenditure incurred in the earning of the income of that business.[18]

147. Although there is a difference between the UK provision being considered and subsection 51(1) of the ITAA 1936[19] this reasoning was accepted as correct in Australia by Mason, Aicken and Wilson JJ in *Avco* at CLR 527; ATC 4256; ATR 74:

> …the speech of Lord Macmillan in *Montreal Coke* recognize[s], rightly in our opinion, that the borrowing of money and the repayment of loans by a finance company in the ordinary course of its business stand in a different situation from borrowings by a company not undertaken in the ordinary course of its income-earning business...

And further on at CLR 527; ATC 4256; ATR 74:

> There is therefore an important and material difference between borrowing by a finance company in the ordinary course of its business and borrowing by a manufacturing or trading company.

Their Honours also said at CLR 529-530; ATC 4258; ATR 76:

> …With respect to those who think otherwise, the proposition that exchange variations affecting the repayment of loans in foreign currencies are always an affair of capital in the case of a finance company is supported neither by principle nor by authority. The true principle is that in the case of a finance company which borrows money overseas in the ordinary course of its business and not for some special purpose, the added cost of repayment in foreign currency caused by the devaluation or depreciation of the Australian dollar is an additional cost of the borrowing and, like other costs of the borrowing, is an allowable deduction under s. 51 (1). Conversely, a saving in the amount of foreign currency needed to repay an overseas loan due to a revaluation or an appreciation in the value of the Australian dollar is to be considered as income arising directly out of the finance company's ordinary business. (emphasis added)

148. A repayment of a loan, the proceeds of which have been used to purchase an investment that is expected to produce NANE income is not an outgoing incurred in the gaining or producing of that NANE income. A repayment of such a loan affects the capital structure adopted by a taxpayer and does not form part of the process by which the NANE income is gained or produced. Accordingly, if a gain made on repayment of the loan that is attributable to currency exchange rate movements had been a loss instead, that loss would not be incurred in the gaining or producing of NANE income.

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[18] See also *Federal Commissioner of Taxation v. Hunter Douglas Ltd* 78 FLR 182; 83 ATC 4562; (1983) 14 ATR 629 (*Hunter Douglas*) per Fisher J at FLR 189-192; ATC 4569-4570; ATR 637-638 and Lockhart J at FLR 197-198; ATC 4576-4577; ATR 645.

[19] As previously stated, subsection 51(1) is the predecessor to section 8-1 of the ITAA 1997.

149. However, the reasoning in both *Avco* and *Hunter Douglas* was concerned with the circumstances in which the negative limb relating to outgoings of capital or of a capital nature would apply.[20]

150. The alternative view also finds support in *Texas Co (Australasia) Ltd v. Federal Commissioner of Taxation* (1940) 63 CLR 382 at 430, where Latham CJ referring to exchange costs and the question of nexus said:

> In so far as the money was expended in the repayment of loans and in payment for plant it was money not expended for the production of assessable income – it was simply a capital expenditure. But in so far as the money was expended to pay the dollar debts for stock-in-trade (oil, & c.) it was money wholly and exclusively expended for the production of assessable income in the ordinary trading activities of the company.

151. However, once it is accepted that a loss due to changes in currency exchange rate movements on the repayment of the borrowing is a cost of borrowing, then having regard to the wide nature of the nexus test, the better view is that the loss is made in the gaining or producing of NANE income (see Explanation at paragraphs 132 to 139 of this Ruling).[21]

Example 4 - Foreign currency forward contract – dividend

152. An alternative view is that the loss due to currency exchange rate movements made on the forward contract is not made in the gaining or producing of NANE income. Consequently, a corresponding gain due to currency movements made on the forward contract will not be NANE income under subsection 230-30(2).

153. The loss does not have the requisite nexus with the NANE dividend income. Any loss under the forward contract is made in the course of producing a possible gain under the forward contract and nothing else. On this view, the forward contract is a separate and distinct transaction that is capable of independently giving rise to a gain or loss. The loss or gain derived from the forward contract does not and cannot affect the amount of NANE income that is produced from holding the NANE dividend producing shares.

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[20] The positive limb was not expressly in question in *Avco*: see Gibbs CJ at 150 CLR 510 at 514; ATC 4249; ATR 66.
[21] Assuming there is no issue of the expenditure being too soon or post-derivation.

154. The distinction between income as an incident of a particular activity and income as an incident of business operations more generally was considered in *Kidston Gold Mines v. Federal Commissioner of Taxation* (1991) 30 FCR 77; 91 ATC 4538; (1991) 22 ATR 168. This case concerned the application of former paragraph 23(o) of the ITAA 1936 which provided an exemption from income tax for income derived from the working of a mining property in Australia.[22] The issue was whether or not interest derived from money invested from the proceeds of gold sales was sufficiently proximate to the activities of working a mining property.

155. In deciding that the interest income could not be described as arising from an activity that is an incident of the working of the mining property, Hill J drew a distinction between activities which directly generate income from the working of a mining property and other activities from the business of working a mining property. Similarly it is arguable that the processes that produce the particular NANE dividend income do not include the processes that produce the loss due to currency exchange rate movements on the forward contract, even though both can be said to arise within the operations of the overall business.

156. Accordingly, a loss due to currency exchange rate movements that arises from the forward contract relates to the general business of the taxpayer and does not have a sufficient connection to the activities which produce the NANE dividend income.

157. This is not the better view because the management of the foreign currency risk is part of the process by which the dividend is brought home to the taxpayer. The loss has a sufficient connection to the operations which more directly produce the NANE income.

Example 5 - Foreign currency forward contract – forecasted earnings

158. An alternative view is that the loss finds its connection with the production of NANE income because a purpose of entering into the forward contract is to mitigate the risk that changes in currency exchange rates could reduce the value of some amount of NANE dividends that might be received at some future time.

159. However, even with the words 'in gaining or producing' having a very wide application, the loss that arises from the forward contract is too remote from the processes yielding NANE income.

[22] Also at issue was whether interest on money borrowed for the purpose of funding the business of the taxpayer, including the operation of the mine, was deductible under subsection 51(1) of the ITAA 1936.

Example 6 - Foreign currency forward contract – initial cost of investment

160. An alternative view is that a loss due to currency exchange rate movements made on the forward contract is the cost of protecting capital invested in a NANE income earning activity and is therefore made in the course of gaining and producing that income.

161. In some circumstances, the cost of protecting capital invested to produce assessable income may be properly regarded as incurred on revenue account – see *Australian National Hotels.*[23] The cost of the hedging operation, through the forward contract, directed to the protection of capital invested for this purpose may be an outgoing incurred in the gaining or producing of assessable income – see *Associated Minerals Consolidated Ltd v. Federal Commissioner of Taxation* (1994) 53 FCR 115; 94 ATC 4008; (1994) 27 ATR 542.

162. However for the reasons set out in the Explanation at paragraphs 123 to 130 of this Ruling, the Commissioner does not accept that this is the better view.

[23] At ATC 4633; FCR 240-1; ATR 1582.

Appendix 3 – Detailed contents list

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- exempt income
- foreign exchange gains and losses
- non-assessable non-exempt income
- taxation of financial arrangements

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NO:	1-37MZEMU
ISSN:	1039-0731
ATOlaw topic:	Income Tax ~~ Taxation of financial arrangements (TOFA) – Non-assessable non-exempt income - Exempt income