


TR 95/1 - Income tax: deductibility of advertising that opposes the passing of legislation

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Taxation Ruling

Income tax: deductibility of advertising that opposes the passing of legislation

other Rulings on this topic

| | |
|----------------------------------|----------|
| contents | para |
| What is this Ruling about | 1 |
| Rulings | 2 |
| Date of effect | 3 |
| Previous Rulings | 4 |
| Explanations | 5 |

*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling considers whether advertising costs associated with opposing legislation is a deductible expense. It has been issued as a result of the decision of the Federal Court in the case of *FC of T v Rothmans of Pall Mall (Aust) Ltd* 92 ATC 4508; (1992) 23 ATR 620.

Ruling

2. The Australian Taxation Office accepts the decision of the Federal Court that advertising costs involved in opposing the passing of legislation that affects, but does not threaten the existence of, the market share of a taxpayer may be allowable under subsection 51(1) of the *Income Tax Assessment Act 1936* (the Act).

Date of effect

3. 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).

Previous Rulings

4. This Ruling replaces Taxation Ruling IT 2491. That Ruling (withdrawn on 15 September 1994) was withdrawn on the basis that the ATO accepts that the decision in the *Rothmans* case applies where the relevant findings of fact are present.

Explanations

5. In the *Rothmans* case, it was reported that during the 1987 income year two State governments announced impending legislation that was intended to raise tobacco licence fees and to restrict certain forms of advertising and marketing which could be used to promote tobacco products. The proposed legislation restricted, amongst other things, the advertising of these products to point of sale advertising in licensed premises, to print media advertising and to the sponsorship of certain international and national sporting events.

6. In response, three tobacco companies made a special contribution to the Tobacco Institute in order to fund a television and print campaign that opposed the legislation. The taxpayer contributed \$449,406 to the fund. Nevertheless, the campaign was unsuccessful and the legislation was passed by the respective parliaments.

7. The appropriateness of the deductibility of these payments was raised and Taxation Ruling IT 2491 was issued. This ruling stated that the payments would not be deductible and cited the case of *Sun Newspapers Ltd & Associated Newspapers Ltd v. FC of T* (1938) 61 CLR 337 in support of this view.

8. The question of deductibility came before the Federal Court on appeal from a decision of the Administrative Appeals Tribunal. The issue was whether the payment by Rothmans of the sum of \$449,406 during the year of income ended 30 June 1988 to the Tobacco Institute in order to fund the campaign against the passing of the legislation was capital expenditure and fell within the exception contained in subsection 51(1) of the Act.

9. The Federal Court considered that the expenditure incurred by the company was made to defeat the passage of legislation that would curtail advertising of tobacco products and that probably would result in a loss of market share for the company. However, there was no threat to the existence of its business or to any capital asset of that business. Lockhart J distinguished the decision of the Privy Council in *Ward and Company Ltd v. Commissioner of Taxes* (NZ) [1923] AC 145.

10. The Court decided that the nature of the expenditure incurred by the company was, in the present commercial environment, an ongoing part of the circumstances in which companies carry on business. Accordingly, it was incidental to the carrying on of its business and did not involve the acquisition of an enduring asset. Lockhart J relied upon the decisions of the High Court in *FC of T v. Snowden & Willson Pty Ltd* (1958) 99 CLR 431 and of the Federal Court in *Magna Alloys and Research Pty Ltd v FC of T* 80 ATC 4542; (1980) 11 ATR 276. His Honour found that the company was not seeking to maintain or preserve an existing capital asset by paying the levy to the Tobacco Institute.

11. According to the above cases, expenditure to the extent that it opposes legislation that threatens the existence of the business framework in some way is not deductible under subsection 51(1) of the Act.

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- FC of T v. Rothmans of Pall Mall (Aust) Ltd 92 ATC 4508; (1992) 23 ATR 620
- Sun Newspapers Ltd & Associated Newspapers Ltd v. FC of T (1938) 61 CLR 337
- Ward and Company Ltd v. Commissioner of Taxes (NZ) [1923] AC 145
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- Magna Alloys and Research Pty Ltd v. FC of T 80 ATC 4542; (1980) 11 ATR 276