



TR 95/28 - Income tax: life insurers and friendly societies - effect of 1994 amendments to Division 8 and Division 8A of the Income Tax Assessment Act 1936

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Taxation Ruling

Income tax: life insurers and friendly societies - effect of 1994 amendments to Division 8 and Division 8A of the *Income Tax Assessment Act 1936*

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*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.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Ruling is about

Class of person/arrangement

1. This Ruling answers questions which have been raised concerning the amendments to Division 8 and Division 8A of Part III of the *Income Tax Assessment Act 1936* ('the 1936 Act') contained in *Taxation Laws Amendment Act 1994* ('the 1994 amendments'), dealing with the taxation treatment of life insurers and registered organisations (such as friendly societies). In particular, it deals with the taxation treatment of expenses incurred by life insurance companies in obtaining superannuation premiums and the investment component of life premiums before and from 1 January 1994.

2. Generally speaking, the registered organisations provisions in Division 8A mirror the provisions of Division 8. In so far as the 1994 amendments relating to registered organisations are expressed in similar terms as those relating to life companies, the answers below apply similarly to them. References to Division 8A are provided in parentheses where appropriate.

Ruling

To which years of income does the 'negative list' of expenses which are not allowable to life insurance companies under section 112BA (section 116HAD) of the 1936 Act apply?

3. The negative list applies to assessments in respect of income of the year of income in which 1 July 1988 occurred and all later years of income (subsection 112BA(5) of the 1936 Act). In other words, the negative list continues to apply even after 1 January 1994 when the 'positive lists' contained in sections 111AC and 111AD of the 1936 Act come into operation. As section 112BA of the 1936 Act applies despite any other provision of the Act (subsection 112BA(1)), an item of the negative list is not deductible even if it would be otherwise deductible under the positive lists in sections 111AC or 111AD or under any other section.

What do amounts paid in settlement of a dispute on the liability of a life insurance company under a policy include for the purposes of paragraph 112BA(1)(d) (paragraph 116HAD(1)(d)) of the 1936 Act?

4. No deduction is allowable to a life insurance company in respect of an amount paid or payable to the holder of a life assurance policy, or an associate, in settlement of a dispute as to the liability of the company under the policy. The provision includes any amount paid or payable in settlement of a dispute, regardless of whether the dispute is between the company and the policyholder, or between the company and another party (e.g., a third party). If the original claim by the policyholder causing the dispute does not involve a claim for interest but the amount paid by the company in settlement of the dispute does include an amount of interest, that amount is not deductible because it is part of the settlement amount (including if it is payable under a Court order). However, if the interest is not part of the amount paid in settlement of the dispute but rather it is paid separately, it does not fall within paragraph 112BA(1)(d) of the 1936 Act. Therefore, where interest is separate to the settlement amount, section 51 applies to determine the deductibility of the interest.

What is the meaning of 'a refund or in the nature of a refund' in paragraph 112BA(2)(a)(v) (paragraph 116HAD(2)(e)) of the 1936 Act?

5. The word 'refund' is not defined and, therefore, has its ordinary meaning of 'repayment'. An amount can be a refund or in the nature of a refund even though it is not the same monies which are repaid.

Amounts 'in the nature of a refund' are amounts which although not falling within the meaning of 'refund' are sufficiently similar to that concept. The intention of the paragraph is that if a premium has not been included in the assessable income of the life insurer because of section 111 of the 1936 Act, and if that amount or part of that amount is returned to the payer of the premium, no deduction is allowable to the company.

6. To allow a deduction in this type of case would allow companies to artificially inflate their deductions (e.g., if a company received 200% of the premium required and then refunded half to the payer, providing a deduction for the refund would distort the calculation of taxable income and would not give the correct result).

7. The paragraph applies regardless of what the amount repaid is called, i.e., whether it is called a 'refund' or not. We do not accept the argument that payments such as 'participating' or 'experience' commissions paid by a reinsurer to a life insurer are not refunds or amounts in the nature of a refund. Such commissions are obviously not included in the term 'commissions' in paragraph (a) of the positive lists which is to be interpreted **ejusdem generis** with the words 'salaries, wages, bonuses, allowances, or similar benefits' being the type of benefits provided to the company's sales force in respect of their selling activities. The term 'commission' possesses the connotation of an amount payable in respect of things being done and, therefore, cannot describe the return of part of the premium by the reinsurer to the life insurer to recognise a good claims record.

Are general management expenses included in the 'positive lists' in sections 111AC and 111AD of the 1936 Act?

8. No, because of the operation of subsections 111AC(5) and 111AD(6). Those sections and section 113 of the 1936 Act are mutually exclusive. The interaction of the relevant provisions of Division 8 is addressed in the Attachment to this Ruling (at page 19).

What is the treatment of general management expenses from 1 January 1994?

9. Section 113 of the 1936 Act was amended with effect from 1 January 1994 to ensure that the expression 'assessable income' in the general management formula contained in subsection 113(2) included superannuation premiums and the investment component of certain life premiums (no equivalent provision was required before the 1994 amendments because sections 111A and 111AA of the 1936 Act operated to treat certain premiums as assessable income for the purposes of determining deductions, including deductions for general

management expenses). Prior to the amendment, section 113 of the 1936 Act did not allow deductions for general management expenses exclusively incurred in gaining superannuation premiums or the investment component of life insurance premiums; deductions for these expenses were allowed under the ordinary provisions of the 1936 Act. The amendments to section 113 of the 1936 Act do not change this position; deductions are not allowable under existing section 113 of the 1936 Act for general management expenses exclusively incurred in gaining superannuation premiums or the investment component of life insurance premiums. However, these expenses are now deductible under section 113A of the 1936 Act instead of the ordinary provisions of the Act. The new definition of 'assessable income' in section 113 of the 1936 Act simply ensures that the same percentage of general management expenses is allowed as a deduction even though sections 111A and 111AA of the 1936 Act have been replaced with new sections 111AC and 111AD of the 1936 Act. There are no changes in substance to the treatment of general management expenses in the 1994 amendments.

To what expenditure does section 113A of the 1936 Act apply?

10. This section was introduced to deal with general management expenses **exclusively** incurred in gaining or producing assessable income (including deemed assessable income such as superannuation premiums or the investment component of certain life premiums) and which are, therefore, not deductible as general management expenses because of the operation of paragraph 113(3)(b) of the 1936 Act. See Example 1 at paragraphs 55 and 56. An expense is exclusively incurred in gaining or producing assessable income only if the **whole amount of the expenditure** (before any allocation is made between assessable and exempt income) is incurred in gaining or producing assessable income. Paragraphs 11 and 12 deal with this sort of expenditure.

11. Between 1988 and the end of 1993, subject to the 'negative list', some of these expenses would have been deductible under section 51 of the 1936 Act, because of sections 111A and 111AA of the 1936 Act, if incurred in relation to obtaining superannuation premiums or the investment component of certain life premiums. From 1 January 1994, such expenses are not allowed as a consequence of the repeal of sections 111A and 111AA of the 1936 Act, nor, being general management expenses, are they deductible under sections 111AC and 111AD of the 1936 Act. Therefore, they are made expressly deductible under section 113A of the 1936 Act unless they would not have been deductible before the 1994 amendments (subsection 113A(2) of the 1936 Act). Deductions allowable under section 113A of the 1936 Act are not subject to section 111C of the

1936 Act because they relate exclusively to the company's assessable income (paragraph 111C(1)(b) of the 1936 Act).

12. An example of the type of expense deductible under section 113A of the 1936 Act is rent treated as a general management expense and payable in respect of a building which is used by the company solely for staff dealing with superannuation policies only. The section provides a deduction for expenditure exclusively incurred in gaining or producing assessable income, but only 'to the extent to which' it was incurred in gaining or producing the superannuation premiums or the investment component of the life premiums. It follows that if the expenditure also relates to another purpose, it will need to be apportioned (on a basis similar to the section 8-1 of the *Income Tax Assessment Act 1997* ('the 1997 Act') (formerly subsection 51(1) of the 1936 Act) – apportionment): for example, if the expenditure also relates to gaining income from the investment of superannuation premiums, then to this extent it will be deductible under section 8-1 rather than under section 113A of the 1936 Act.

13. In relation to friendly societies and other registered organisations, paragraphs 116HAB(2)(f) and 116HAC(3)(f) of the 1936 Act allow a deduction for expenses in the general management of the taxpayer's business to the extent to which the expenses are incurred in gaining or producing superannuation premiums or the investment component of life premiums respectively. The difference in drafting approach is due to the fact that the registered organisations provisions in Division 8A of the 1936 Act do not contain a 'general management' provision equivalent to section 113 of the 1936 Act.

Can expenses incurred partly for the purposes specified in paragraphs 111AC(2)(a), (b), (d) and 111AD(3)(a), (b), (d) of the 1936 Act (paragraphs 116HAB(2)(a), (b), (d) and 116HAC(3)(a), (b), (d) of the 1936 Act) and partly for another purpose be apportioned under those paragraphs?

14. No. Those items of the positive lists apply to make certain expenses deductible only if the expenses are exclusively incurred for the purposes described in the paragraphs. If expenditure is incurred for more than one purpose, it may be apportioned under paragraphs (c) and (e) of the positive lists provided it satisfies the requirements of those provisions.

How are expenses deductible under paragraphs (c) and (e) of the positive lists apportioned?

15. Paragraph (e) of the positive lists provides that a deduction is allowable for any other loss or outgoing **to the extent to which** they

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are incurred in preparing, selling or issuing the relevant policies or collecting premiums. The paragraph uses the words 'to the extent to which' as used in section 8-1 and which refer to the possibility of apportionment. The issue of apportionment is a question of fact to be determined in the individual circumstances of each case. Clearly, in the case of section 8-1, the basis of apportionment varies depending on the type of expenditure and on the circumstances of the case - examples of bases of apportionment include the time basis and the proportion of business basis.

16. In the case of apportionment under paragraph (e) of the positive lists, appropriate bases would include any fair and reasonable basis depending on the circumstances; for example, the percentage of business handled by the relevant staff, time basis (time spent on different types of products), the proportion that the relevant premiums bear to total premiums, or any other accepted accounting basis of apportionment. A similar approach may be taken to apportionment under paragraph (c).

17. As the positive lists in Division 8 of the 1936 Act do not apply to expenses of general management, it is not open to a company to claim a proportion of an expense under paragraphs (c) and (e) of the positive lists and the rest of the expense under section 113 of the 1936 Act. As sections 111AC and 111AD of the 1936 Act on the one hand and section 113 of the 1936 Act on the other are mutually exclusive, an expense must be characterised in its entirety as either an expense of general management or as a different type of expense.

If expenses are apportioned under paragraphs (c) and (e) of the positive lists, are they also subject to apportionment under section 111C of the 1936 Act?

18. Section 111C of the 1936 Act applies to apportion deductions which do not relate exclusively to assessable income and which are allowable under a specific provision of the Act; for example, deductions allowable because of the operation of subsections 111AC(3) and 111AD(4) of the 1936 Act. Expenditure which is deductible because of subsections 111AC(1) and 111AD(2) of the 1936 Act is not subject to section 111C of the 1936 Act (this is similar to the pre-1994 amendments operation of section 111C of the 1936 Act which specifically excluded deductions allowable under section 51). However, the amount allowed under subsections 111AC(1) and 111AD(2) cannot exceed the amount which would have been allowed before the 1994 amendments (subsections 111AC(6) and 111AD(7) of the 1936 Act) - therefore, if section 111C of the 1936 Act would have limited deductions before 1994, the deduction allowable under subsections 111AC(1) and 111AD(2) is reduced to that limited amount. It should be noted that this limitation **does not** mean that two sets of accounts must be kept to determine the amount of deduction allowable. Subsections 111AC(6) and 111AD(7) are designed to ensure that restrictions operating under the old provisions continue to apply; for example, deductions are not allowable for entertainment expenses or club fees. Deductions allowable under section 113 of the 1936 Act continue to be excluded from the operation of section 111C of the 1936 Act.

Are staff 'on-costs' such as long service leave and other provisions, workers' compensation premiums, payroll tax, fringe benefits tax, and actual fringe benefits provided to staff deductible to a life insurance company under sections 111AC and 111AD of the 1936 Act (sections 116HAB and 116HAC of the 1936 Act)?

19. The cost to the company of providing fringe benefits to an employee falls within the description of 'similar benefits' contained in paragraphs 111AC(2)(a) and (c) and 111AD(3)(a) and (c) of the 1936 Act. As to provisions such as long service leave, they are not included in any of the items in the positive lists and would in any case be excluded under subsections 111AC(6) and 111AD(7) of the 1936 Act.

20. Amounts paid by the company in relation to the employment of staff (e.g., payroll tax or workers' compensation premiums) are not 'benefits' and are, therefore, not allowable as 'similar benefits'. If the expenses are not expenses of general management, they may be allowable under paragraphs 111AC(2)(e) or 111AD(3)(e) of the

1936 Act to the extent to which they relate to staff involved in the prescribed activities. The total expense must be apportioned on a reasonable basis: for instance, the total amount of payroll tax paid by the company must be apportioned between staff involved in preparing, selling or issuing policies and other staff. Once the total amount has been apportioned on that basis, then if staff are involved in preparing selling and issuing policies as well as in other activities, the apportioned amount must be apportioned again, eg on the basis of time spent on the specified activities as a proportion of total time.

What is the meaning of 'commissions' in the positive lists? Does it include reinsurance commissions?

21. It has been argued that payments such as 'participating' or 'experience' commissions paid by a reinsurer to a life insurer are not refunds or amounts in the nature of a refund, but rather are included in the term 'commissions' in paragraph (a) of the positive list. We do not agree with that view. The term 'commission' in paragraph (a) is to be interpreted **eiusdem generis** with the words 'salaries, wages, bonuses, allowances, or similar benefits' being the type of benefits provided to a life insurer's sales force in respect of their selling activities.

What is the meaning of 'preparing, selling, or issuing' policies in paragraph (e) of the positive lists?

22. The three terms refer to different steps in the process of getting policies to the public. The first step refers to the writing and printing of the policy (it does not include expenditure of a revenue nature in developing or engaging in research in relation to policies which is specifically referred to in paragraph (d)). The second step is the selling of the policy and refers to expenses such as advertising expenses and other selling expenses, such as sales force expenses, which cannot be apportioned under the other paragraphs of the positive list. It would not include 'termination' commissions as these do not relate to the sale of policies. The final step is issuing, ie the physical act of mailing, sending out or giving out the policy to policyholders.

Are superannuation contributions paid in respect of sales support staff deductible and to what extent?

23. In the absence of section 82AAR of the 1936 Act, superannuation contributions would qualify for a deduction under paragraphs 111AC(2)(e) and 111AD(3)(e) of the 1936 Act to the extent to which they relate to staff involved in preparing, selling or issuing policies or collecting premiums. Section 82AAR, however,

states that deductions for superannuation contributions for employees are not deductible under any provision other than that contained in the subdivision; therefore, these amounts are deductible only under section 82AAC of the 1936 Act.

Are agency development loans written off after 1 January 1994 allowable deductions under the positive lists?

24. Whether agency development loans written off after 1 January 1994 are allowable deductions depends on whether they are of a capital nature and, therefore, excluded from the positive lists by subsections 111AC(4) and 111AD(5) of the 1936 Act. This issue is being considered and will be addressed in the final Taxation Determination based on TD 94/D47.

Date of effect

25. 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).

Note: The Addendum to this Ruling that issued on 18 August 1999 amends this Ruling in relation to the 1997-98 or a later income year.

Explanations

26. As indicated in paragraph 2, generally corresponding mirror provisions relate also to registered organisations including friendly societies. The provisions of the 1994 amendments operate to provide 'positive' lists of expenses which are allowable deductions to a life company from 1 January 1994 (sections 111AC and 111AD of the 1936 Act) and a 'negative' list of expenses which are non-deductible to the company before or after 1 January 1994 (section 112BA of the 1936 Act).

Effect of the 1994 amendments before 1 January 1994

27. Subsection 111(1) of the 1936 Act provides that premiums are excluded from the assessable income of a life assurance company. This means that in the absence of the introduction of section 111A by the *Taxation Laws Amendment (Superannuation) Act 1989* and of section 111AA by the *Taxation Laws Amendment Act (No 5) 1989*

('the 1989 amendments'), and in the absence of the 1994 amendments, section 51 of the 1936 Act or other sections would not allow a deduction for the cost of obtaining those premiums. Sections 111A and 111AA of the 1936 Act were introduced in 1989 to allow life assurance companies to claim a deduction for the direct costs of obtaining exempt Australian life assurance premiums, e.g., advertising, commissions and administrative costs. The sections operated by treating superannuation premiums and the investment component of life premiums as assessable income for the purposes of determining allowable deductions under section 51 and the specific deductions provisions of the 1936 Act. Section 111A applied to life assurance company superannuation business from the year of income in which 1 July 1988 occurred and section 111AA applied to the investment component of life assurance business from 1 January 1990.

28. The 1994 amendments were introduced to limit the allowable deductions to those originally intended. They operate by denying the operation of sections 111A and 111AA of the 1936 Act to premiums received on or after 1 January 1994. However, the treating of premiums as assessable income remains in the sections for the purposes of determining deductions from the period from their introduction to their repeal on 1 January 1994.

Section 112BA of the 1936 Act (section 116HAD of the 1936 Act)

29. For the period from the year in which 1 July 1988 occurred to **all** later years, a list of non-deductible expenses was included under the new section 112BA of the 1936 Act to deny expressly deductions for expenditure that was not intended to be deductible. The negative list overrides any other provision of the Act and includes:

- benefits paid or payable under a life assurance policy (see 112BA(2) of the 1936 Act for items included in 'benefits');
- reserves for future liabilities;
- reinsurance premiums;
- amounts paid to the policyholder or an associate for the settlement of a dispute.

Settlement amounts

30. As to amounts paid or payable in settlement of a dispute about the liability of a life assurance company under a life policy, subsection 112BA(4) of the 1936 Act gives the term 'associate' in paragraph 112BA(1)(d) of the 1936 Act the same wide meaning as in subsection 26AAB(14) of the 1936 Act. This is to ensure that amounts paid to a person other than the policyholder are also included

in the negative list. Whether interest is included as a non-deductible item under paragraph 112BA(1)(d) will depend on whether it is part of the total amount payable in settlement of the dispute or whether it is payable separately from that amount. If it is payable separately from that amount, the ordinary provisions of the 1936 and 1997 Acts apply.

Benefits

31. Subsection 112BA(2) of the 1936 Act states that the term 'benefit' includes an amount paid or payable:

- in respect of claims, bonuses or annuities under the policy;
- that is related to the surrender, cancellation, forfeiture, termination or disposal of the policy or any rights under the policy;
- that is a refund of premiums that are excluded from assessable income of the life assurance company by section 111; or an amount that is in the nature of a refund of such premiums.

32. The reference to benefits does not include any interest payable by a life assurance company in respect of a late claim or benefit under section 57 of the *Insurance Contracts Act 1984*. In other words, the negative list does not operate to exclude a deduction for interest payable to policyholders for late payment of claims under the *Insurance Contracts Act*.

33. Another exclusion from the benefits in the negative list is supplementary benefits known as rider benefits attached to life assurance policies that are paid in respect of non-life insurance risks where the premiums received are assessable to the company (subsection 112BA(3) of the 1936 Act). Examples of rider benefits are accident and disability benefits, sickness benefits and trauma benefits. These supplementary benefits are not considered to be life assurance policies for the purposes of Division 8 of the 1936 Act and continue to be deductible to life insurance companies.

Reinsurance

34. Paragraph 112BA(1)(c) of the 1936 Act includes as a non-deductible item, for the period from the year in which 1 July 1988 occurred to all later years of income, premiums paid or payable by a life assurance company in respect of the reinsurance of the whole or any part of a life assurance policy.

35. Paragraph 112BA(2)(v) of the 1936 Act ensures that an amount that is a refund or an amount in the nature of a refund of a premium

that, under section 111, is not assessable as income, is a non-deductible 'benefit' paid under a life assurance policy. This means that any amounts that are, in substance, refunds of premiums or in the nature of refunds of premiums are included in the non-deductible list in subsection 112BA(1) of the 1936 Act and are, therefore, not deductible. Examples of these are 'experience' or 'participating' profits or other repayments by a reinsurer back to the life assurance company in respect of premiums paid for reinsurance of a life assurance policy.

36. If the reinsurance premiums paid or payable by a company are not an allowable deduction because of paragraph 112BA(1)(c) of the 1936 Act, the assessable income of a life assurance company does not include reinsurance recoveries or refunds of the reinsurance premiums (subsection 111AB(1) of the 1936 Act). Subsection 111AB(1) applies from the year of income in which 1 July 1988 occurred to all later years.

Foreign expenses

37. The 1994 amendments operate to ensure that deductions for the foreign costs in deriving foreign premiums are not allowed. The insertion of the new provisions contained in subsections 111A(1A) and 111AA(1A) of the 1936 Act excludes as deemed assessable premiums, superannuation or life assurance premiums received in respect of policies issued by life assurance companies in the course of a business carried on at or through a permanent establishment in a foreign country. The new provisions also cover non-resident life assurance companies which have derived foreign superannuation or life assurance premiums that are exempt from tax under the former paragraph 23(r) of the 1936 Act. These new provisions in sections 111A and 111AA of the 1936 Act apply to premiums received on or after the year of income in which 1 July 1988 occurred for foreign superannuation premiums and on or after 1 January 1990 for foreign life insurance premiums, up to the end of the 1989-90 year of income.

38. For assessments for the 1990-91 year of income up until the repeal of the sections, subsections 111A(3) and 111AA(1B) of the 1936 Act ensure that the deemed assessable premiums in subsections 111A(1) and 111AA(2) of the 1936 Act do not include:

- (a) superannuation or life insurance premiums received in respect of eligible non-resident policies, i.e., premiums included in the foreign branch income of an Australian life insurance company which relate to the provision of superannuation or life insurance for the benefit of unrelated policyholders who are not residents of Australia;

- (b) superannuation or life insurance premiums which are exempt from tax under section 23AH of the 1936 Act, i.e., premiums derived by a resident company from carrying on business at or through a permanent establishment of that company in a foreign ('listed') country; and
- (c) foreign superannuation or life insurance premiums received by a non-resident life insurance company which are exempt from tax in Australia by the former paragraph 23(r) of the 1936 Act.

From 1 January 1994, sections 111AC and 111AD of the 1936 Act apply to exclude foreign premiums from superannuation and life assurance premiums for the purpose of calculating deductions under the positive lists.

Section 112 of the 1936 Act

39. The exclusion of foreign premiums from those premiums which were deemed to be assessable income necessitated consequential changes to section 112 to ensure that the same restriction of foreign premiums contained in the 1994 amendments to sections 111A and 111AA of the 1936 Act apply in section 112 of the 1936 Act.

Actuary's certificate

40. If a life assurance company included foreign life assurance premiums in the premiums to which section 111AA previously applied, the premiums to which the amended section 111AA applies may be different to the premiums on which the life assurance company obtained an actuary's certificate under subsection 111AA(3) of the 1936 Act. In this case, unless the life assurance company lodges an amended return and obtains a new certificate from an actuary in relation to the amended section, section 111AA as amended is taken not to have applied to the investment component of life assurance premiums received by the company in that year and, therefore, no amount representing the investment component would be deemed assessable income for deduction purposes (subsection 70C(4) of the 1994 amendments to the 1936 Act).

Effect of the 1994 amendments after 1 January 1994

41. The negative list contained in section 112BA of the 1936 Act and discussed above expressly overrides any other section of the Act and continues to operate after 1 January 1994. It follows that if an expense which would be allowable under any section including sections 111AC or 111AD is also in the negative list, section 112BA of the 1936 Act operates to make the expense not allowable.

Sections 111AC and 111AD of the 1936 Act (section 116HAB and 116HAC of the 1936 Act)

42. Section 111AC of the 1936 Act relates to expenses incurred in connection with getting in superannuation premiums which may be broadly defined as premiums received from the sale of a life policy to a superannuation fund, an ADF, or a PST and which exclude premiums in respect of foreign business, where the investment earnings are exempt from Australian tax.

43. Section 111AD of the 1936 Act refers to expenses incurred in connection with getting in relevant life insurance premiums, to the extent that the expenses relate to the investment component of those premiums. Such premiums exclude those premiums in respect of foreign business, where the investment earnings are exempt from Australian tax. Also excluded are superannuation premiums, premiums received in respect of certain immediate annuity income and specified roll over amounts.

44. The expenses which are expressly stated to be allowable deductions under section 111AC of the 1936 Act and section 111AD of the 1936 Act (i.e., the 'positive lists') are:

- (a) salaries, wages, bonuses, allowances, commissions and similar benefits paid or payable to a salesperson or to a life agent, for the sale, renewal or continuation of superannuation or relevant life policies. Expenses allowable include amounts incurred in obtaining future sales;
- (b) expenditure in recruiting or training salespeople or life agents in selling policies;
- (c) salaries, wages, allowances and similar benefits paid or payable to employees of the life company **to the extent to which** the expenses relate to the provision of administrative or technical assistance or support to the salesperson or agent;
- (d) expenditure incurred in developing superannuation or relevant life policies or engaging in research in connection

with such policies, provided it is not of a capital nature. Whether such expenditure is of a capital or revenue nature is clearly a question of fact;

- (e) any other losses and outgoings **to the extent to which** they are incurred in preparing, selling or issuing policies or in collecting premiums.

45. The words **to the extent to which** in paragraphs (c) and (e) clearly mirror the provisions of section 8-1 and indicate that a similar apportionment approach is required under those paragraphs. The appropriate basis of apportionment will depend on the individual facts of each case and on the type of expenditure being claimed: thus in some cases, apportionment on a time basis may be appropriate, in other cases it may be more relevant to apportion on the basis of volume of business conducted.

46. The words 'preparing, selling or issuing' refer to a series of steps which a life company will follow in order to get their insurance products out to the market. The first step is preparation, i.e., the writing out and printing phase (after the product has been developed). The second step is the selling of the policies and would include, for instance, advertising expenses as well as any salespeople's expenses that need apportionment (and are, therefore, not allowable under paragraphs (a), (b) or (d) above). Issuing refers to the physical action of distributing the policies to the policy holder (e.g., mailing out). Issuing does not include processing proposals and renewals. These items may be deductible under paragraph (c) where the expenses are salaries, wages, allowances or similar benefits payable to sales support staff. 'Collecting' premiums relates to the costs of physically getting the money in; for example, debt collection expenses.

47. The expenses in paragraphs (a), (b) and (d) have to be exclusively or solely incurred as they contain no apportioning mechanism. Expenditure which relates to more than one purpose is not deductible under these paragraphs but may be apportioned under paragraphs (c) or (e) where the expenditure is of the type outlined in those paragraphs.

48. Unlike sections 111A and 111AA of the 1936 Act which treated certain exempt premiums as assessable income for the purpose of determining deductions under the other provisions of the 1936 Act (such as sections 51, 53, 54 etc), sections 111AC and 111AD of the 1936 Act allow a deduction for the expenses specified in the sections. After the 1994 amendments, there can be no deduction the former subsection 51 of the 1936 Act for the cost of obtaining life insurance premiums as these premiums continue to be exempt premiums under section 111 for section 51 purposes.

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49. However, subsections 111AC(3) and 111AD(4) of the 1936 Act deem superannuation premiums, and the investment component of a life premium, to be assessable income for the purpose of determining deductions under other specific provisions of the Act (other than sections 8-1, 111AC and 111AD). That would include, for example, deductions for depreciation (section 42-15 of the 1997 Act (formerly section 54 of the 1936 Act)), rates (section 8-1 of the 1997 Act (formerly section 72 of the 1936 Act)), superannuation contributions for employees (section 82AAC of the 1936 Act) and capital write-offs for the costs of certain buildings under Division 43 of the 1997 Act (formerly Division 10D of the 1936 Act).

50. Where a double deduction arises under sections 111AC or 111AD and a specific provision of the Act, the Commissioner will choose to apply section 111AC or 111AD of the 1936 Act (as provided by the Commissioner's discretion in section 8-10 of the 1997 Act (formerly section 82 of the 1936 Act)). However, where there is something preventing the Commissioner from doing this, the specific provision will apply; for example, because section 82AAR of the 1936 Act states that deductions for superannuation contributions for employees are not deductible under any provision other than the provisions of that subdivision, superannuation contributions will be deductible under section 82AAC of the 1936 Act rather than section 111AC or 111AD of the 1936 Act. In the case of research and development activities, if an expense qualifies for deduction under section 73B of the 1936 Act and section 111AC or 111AD of the 1936 Act, the Commissioner will choose to apply section 73B; this gives a greater deduction to the taxpayer.

51. The positive lists of expenses which may be allowable to a company under section 111AC and 111AD of the 1936 Act expressly exclude general management expenses allowable under sections 113 or 113A (subsections 111AC(5) and 111AD(6) of the 1936 Act) as well as expenses of a capital nature, other than expenses that may be allowable under a provision of the Act other than sections 8-1, 111AC or 111AD.

52. The positive lists are subject to subsections 111AC(6) and 111AD(7) of the 1936 Act which provide that expenses, losses or outgoings or part thereof which would not have been allowable before the 1994 amendments (e.g., club fees, entertainment, the excess of superannuation contributions above the statutory limit contained in section 82AAC of the 1936 Act) are still not allowable. The two subsections operate by assuming that the 1994 amendments had not been enacted and that sections 111A and 111AA of the 1936 Act continued to apply. If, based on these assumptions, a deduction was not allowable (because, for example, Division 32 of the 1997 Act (formerly section 51AE of the 1936 Act) excluding deductibility of

entertainment expenses applied), then it is still not allowable under the new provisions. Thus, if a deduction was not allowable before 1 January 1994 including under sections 111A and 111AA of the 1936 Act, then it will not be allowable under the new provisions.

53. If expenditure is deductible under subsections 111AC(1) and 111AD(2) of the 1936 Act as well as under a specific provision of the Act (when read with subsections 111AC(3) and 111AD(4) of the 1936 Act), the deduction is generally allowable under sections 111AC and 111AD of the 1936 Act and not the specific provision (refer to paragraph 51). In these circumstances, subsections 111AC(6) and 111AD(7) of the 1936 Act will operate to limit any deduction under sections 111AC and 111AD of the 1936 Act to the same amount that would have been allowable under the specific provision of the Act.

Examples

Example 1 - section 113A of the 1936 Act

54. A life company rents a building occupied by staff who only administer superannuation policies. If the rent is treated as a general management expense and relates exclusively to assessable income (because it relates solely to superannuation business), it is deductible under section 113A of the 1936 Act. It is not deductible under section 113 of the 1936 Act because paragraph 113(3)(b) of the 1936 Act excludes expenditure exclusively incurred in gaining or producing assessable income from its definition of general management expenses.

55. If the building was also used by staff involved in the investment of the superannuation policies and in the gaining of investment income, then the expenditure would be apportioned under section 113A of the 1936 Act and a deduction would be allowable for the amount relating to the superannuation premiums. The balance of the expenditure would be deductible under section 8-1.

Example 2 - section 116CF allocation

56. [Deleted]

Detailed contents list

57. Detailed contents list

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Interaction of Division 8 provisions

Type of expense	Relevant section	Comments
General management expense	113	
General management expense exclusively incurred in gaining or producing assessable income (e.g., salary of superannuation business manager)	113A	-specifically excluded from 111AC and 111AD -not subject to 111C
Expense not allowable pre-1994 amendments	Not allowable even if specifically included in the positive list because 111AC(6) and 111AD(7)	-specifically excluded from 111AC, 111AD and 113 -not subject to 111C because of 111C(1)(b)
Expense allowable under 111AC(1)/111AD(2) as well as another specific section (because of 111AC(3)/111AD(4))	Deductible under 111AC(1)/111AD(2)	e.g., club fees, entertainment expenses These expenses are subject to 111AC(6) and 111AD(7)
Deductions subject to 111C before 1994 amendments	Amount of the deduction under specific section (because of 111AC(3)/111AD(4)) is limited to the amount that would have been allowable without the 1994 amendments	No change as deductions under specific sections (because of 111AC(3)/111AD(4)) remain subject to 111C
Deductions under 111AC(1)/111AD(2)	Not subject to 111C	specifically excluded - 111C(1)(a)