

TR 97/7A2 - Addendum - Income tax: section 8-1 - meaning of 'incurred' - timing of deductions

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Addendum

Taxation Ruling

Income tax: section 8-1 – meaning of ‘incurred’ – timing of deductions

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 97/7 to make changes to clarify when a loss is incurred and to draw the distinction between losses and outgoings, following the decision in *Bowerman and Commissioner of Taxation* [2023] AATA 3547.

TR 97/7 is amended as follows:

1. Preamble

Omit the preamble; substitute:

❶ Relying on this Ruling

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

2. ATO logo

Omit the logo; substitute ATO logo with Commonwealth coat of arms.

3. Table of contents

Omit ‘Class of person/arrangement’; substitute ‘Class of person or arrangement’.

4. Paragraphs 1 to 14

Omit the page status; substitute ‘Status: **legally binding**’.

5. Paragraph 1

(a) Omit ‘(ITAA)’; substitute ‘(ITAA 1997)’

(b) Omit ‘ITAA’; substitute ‘ITAA 1997’.

6. Paragraph 1A

(a) Omit ‘ITAA’; substitute ‘ITAA 1997’.

- (b) After the paragraph, insert new paragraph 1B:

1B. All legislative references in this Ruling are to the ITAA 1997, unless otherwise specified.

7. Paragraph 2

- (a) In the heading, omit 'Class of person/arrangement'; substitute 'Class of person or arrangement'.
- (b) Omit ' of the ITAA'.

8. Paragraph 6

- (a) In subparagraph 6(e), omit 'liability(where the money ceases to be the taxpayer's funds) the expense is incurred when the money is paid.'; substitute 'liability (where the money ceases to be the taxpayer's funds) the expense is incurred when the money is paid;'.
- (b) After subparagraph 6(e), insert new subparagraph 6(f):
- (f) while the above principles may be applied to both losses and outgoings, the distinct nature of losses must be considered. A loss must be definitively encountered, run into, or fallen upon by the taxpayer. For a loss to be incurred it must be realised and more than impending, threatened or expected. A taxpayer will not have incurred a loss if some contingency means that they are not 'definitively committed' or 'completely subjected' to it.

9. Paragraph 9

Omit the wording of the paragraph; substitute:

The propositions outlined above will assist in determining whether and when a loss or outgoing has been incurred. A taxpayer's accounting system does not determine the timing of when an outgoing or loss is 'incurred'.

10. Paragraph 14

- (a) Omit 'amendment(s)'; substitute 'an amendment'
- (b) Omit 'assessment(s)'; substitute 'assessment'
- (c) Omit '1995/96'; substitute '1995–96'
- (d) Omit all instances of '1996/97'; substitute '1996–97'.

11. Paragraphs 15 to 46

Omit the page status; substitute 'Status: **not legally binding**'.

12. Paragraph 17

In the quote, after 'Section 51(1)', insert ' [of the *Income Tax Assessment Act 1936*]'.

13. Paragraph 18

Omit the second instance of '(CLR at 207)'; substitute '(CLR at 624)'.

14. Paragraph 23

In the quote, after 's.51(1) of the', omit 'Act'; substitute '[*Income Tax Assessment Act 1936*]'

15. Paragraph 25

After the paragraph, insert new paragraphs 25A to 25F, including heading:

Distinction between losses and outgoings

25A. It may be necessary in some instances to make a distinction between losses and outgoings.

25B. In *Amalgamated Zinc (De Bavay's) Ltd v. Commissioner of Taxation (Cth)* (1935) 54 CLR 295 at 303, Latham CJ observed:

'... It is difficult to see how a loss, as distinct from an outgoing can ever gain or produce income. On the contrary a loss, as distinguished from an outgoing, simply and merely reduces income – or capital, as the case may be.'

25C. In *Federal Commissioner of Taxation v. Day* (2008) 236 CLR 163, the High Court stated at 175 (footnotes omitted):

'In *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation*, Latham CJ explained that it was necessary to read "losses and outgoings ... incurred in gaining or producing the assessable income" as incurred "in the course of" gaining or producing that income, in order to make the section intelligible. Outgoings may have an effect in gaining income, but losses cannot, as they simply reduce income.'

25D. In *Sole Luna Pty Ltd (as trustee for the PA Wade No 2 Settlement Trust) v. Commissioner of Taxation* (2019) 110 ATR 307 at 65; 2019 ATC 20-703 at 65, Steward J said:

'To be deductible, the loss must be a realised loss which has been definitively encountered, run into or fallen upon by the taxpayer: *Federal Commissioner of Taxation v James Flood Pty Ltd ...*'

25E. The cases show that the principles underlying when a loss is incurred are the same as when an outgoing is incurred. While it is not possible to provide an exhaustive definition of the term 'incurred' in the context of a loss, for a loss to be incurred it must be 'definitively encountered, run into or fallen upon by the taxpayer'.

25F. For a taxpayer to have 'definitively encountered, run into or fallen upon' a loss, it must be 'more than impending, threatened or expected': *New Zealand Flax* (CLR at 207). A loss will not be incurred if it is contingent, unless the condition giving rise to the contingency can be treated, for practical purposes, as certain to be satisfied: *Coles Myer* (ATC at 4225; ATR at 109).

16. Paragraph 28

Omit 'US'; substitute 'United States'.

17. Paragraph 35

Omit 'section 44'; substitute 'section 44 of the *Income Tax Assessment Act 1936*'.

18. Paragraphs 39, 41, 44 and 46

Omit '1996/97'; substitute '1996–97'.

19. Paragraph 45

(a) Omit '1996/97'; substitute '1996–97'

(b) Omit '1997/98'; substitute '1997–98'.

This Addendum applies before and after date of issue as it merely clarifies when a loss, as distinct from an outgoing, has been 'incurred' for the purposes of subsection 8-1(1) of the *Income Tax Assessment Act 1997*.

Commissioner of Taxation

2 July 2025

ATO references

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