THE TAX INSTITUTE

5 December 2019

Ms Kim Hall
Technical Leadership and Advice
Individual & Intermediaries / Small Business
Australian Taxation Office
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BRISBANE QLD 4001

By email: kim.hall@ato.gov.au

Dear Ms Hall,

Draft Taxation Ruling TR 2019/D4 Income Tax: employees: deductions for work expenses under section 8-1 of the *Income Tax Assessment Act 1997*

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office in relation to draft *Taxation Ruling TR 2019/D4 Income Tax: employees: deductions for work expenses under section 8-1 of the Income Tax Assessment Act 1997* (**Draft Ruling**).

Summary

We have made some general comments in relation to the Draft Ruling and specific comments in relation to certain paragraphs and examples in the Draft Ruling, both of which are detailed below.

Discussion

General Comments

- *Appendix 1 – Further Guidance* at pp 14 – 21 is a useful resource.

- **References to authority** - As a general observation, where cases have been cited, we suggest the exact paragraph in the case be referred to or preferably, that the relevant quote referred to be reproduced

- **Required nexus** - The Draft Ruling cites *FCT v Payne* [2001] HCA 3. However, the Draft Ruling should also cite the more recent decision in *FCT v Day* [2008] HCA 53 where the High Court repeatedly expresses the need for expenditure to be 'productive of income' to be deductible.

- **In gaining or producing assessable income (paragraphs 13 – 36)** - The examples given in this section under the heading 'in gaining or producing assessable income' are all very straightforward. We suggest some additional examples representative of less obvious scenarios:

  - An example of a diesel mechanic leading a team of say, 8 mechanics, and undertaking an MBA will be more helpful than a practice manager doing a diploma of practice management; or
  - a medical practitioner (general) working part-time and undertaking study in specialist anaesthetics.

Specific Comments on individual paragraphs

- **The occasion of the expenditure** - Paragraph 19 makes reference to the quote 'the occasion of the expenditure is to be found in the income-earning activity itself'. Please include a reference for the quote. As the quote is from *FCT v Payne* (2001) HCA 3, we also consider that the whole paragraph which the quote comes from should also be included in the Draft Ruling.

- **Not 'in the course of'** – We refer to Example 4 in paragraph 24 and consider that a more detailed explanation as to why the expenses of public transport costs to travel to work and child care costs are not considered to be incurred 'in the course of' the income-earning activities should be included in the preceding paragraph 23. The explanation should reference cases such as *Payne* and *Lunney*[1] where the expenses were not deductible and compared with other cases including *Ballesty*[2], *Vogt*[3] *and Collings*[4] where the particular circumstances meant the expenses were deductible.

  An expanded explanation could also include statements to the effect that:

  - 'while these costs may be necessary to put a taxpayer in the position of earning income, they are not necessarily part of the income earning activity itself'; and
  - 'the deduction is only available for specific expenses directly related to the income-earning activities of the taxpayer'.

- **Paragraph 25** - The reference to 'education expenses to obtain qualifications for new employment' in paragraph 25 should be footnoted with the relevant authorities. We suggest reviewing the old IT series Rulings that will likely contain the relevant references.

- **Private in nature:** At paragraphs 26 – 28, the Draft Ruling says that a private expense does not become deductible only because the employer requires it to be incurred. Paragraph 48 portrays the other half of the picture regarding expenses incurred that are typically private in nature even though an employer encourages an employee to incur them. However, it is located in another part of the Draft Ruling, far from paragraphs 26 – 28.

  A more balanced statement regarding expenses that an employer requires an employee to incur would be to express it along the lines of 'it is relevant whether an employer has required an employee to incur a particular expense but is not on its own determinative of whether the expense is deductible to

[1] *Lunney v FCT* (1958) 100 CLR 478
[2] *FCT v Ballesty* (1977) 15 ALR 522
[3] *FCT v Vogt* 75 ATC 4073
[4] *FCT v Collings* 76 ATC 4254

the employee. The expense must still have a legitimate work purpose to be deductible.' The expenses incurred in relation to travel home from the remote site in *John Holland*[5] case demonstrates this. We suggest including this additional comment in paragraph 26 and also making reference to the later commentary in paragraph 48.

We note that *Mansfield, Jill Honor v FCT* [1995] FCA 1008*,* which is the case relied on in the Draft Ruling*,* actually said the following when the Court determined that a flight attendant could obtain a deduction for moisturiser:

> *41. … the mere fact that a particular expenditure may be required to be made by the employer, while relevant will not be determinative of deductibility. The additional feature present in the present case is the fact that the occasion of the expenditure is to be found in Mrs Mansfield's working in the cabin, that is to say, in the dehydration brought about by pressurisation of the cabin at altitude.*

We recommend the above quote be included in the Drat Ruling at paragraph 28 as it clearly demonstrates the two elements required for an expense an employer requires an employee to incur to be deductible to the employee that may otherwise only be considered to be private in nature and not deductible.

- **Driver's licence (paragraph 30) –** we consider that the cost of a driver's licence should be deductible, at least in proportion to the extent it is used to enable certain employees to perform their duties. For example, a driver's licence is required for a courier or taxi driver (where they are considered to be employees), for example, to perform their roles. In this regard, the cost of the licence is not wholly a personal or private expense.

  We ask that the Commissioner reconsider his views for these and similar specific circumstances. In the event the Commissioner maintains his view, we consider that legislative or case law authority be provided for this proposition. If the Commissioner adopts our view, then we consider any apportionment principles adopted should be consistent with those in draft Taxation Ruling *TR 2019/D6 Income tax: application of paragraph 8-1(2)(a) of the Income Tax Assessment Act 1997 to labour costs related to the construction or creation of capital assets*.

- **Time-based apportionment (holiday added to work a trip)** – Paragraphs 39 and 40 suggest a time-based apportionment is applicable to travel expenses where an employee takes some leave in connection with work-related travel. Example 9 suggests that the cost of the airfares becomes non-deductible based on applying a time-based apportionment approach in such cases.

  In our view, this is overly simplistic and is not correct. Such an approach would have significant implications for fringe benefits tax. We consider that the appropriate test should be whether the trip has a predominant business purpose or not, and if it does then 100% of the airfare cost is deductible, even where an employee may take some leave associated with the trip. The full deductibility presumption should only be displaced where the leave component is sufficiently disproportionate to the work component so as to displace the presumption that work is the predominant purpose.

[5] *John Holland Group Pty Ltd & Anor v FCT* [2015] FCAFC 82

We refer to Example 9 on the ATO webpage (https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Vehicle-and-travel-expenses/Other-travel-expenses/). The distinction here is that the original purpose of the travel was private in nature and a work-related component was subsequently added by the employer. In the case of Example 9 in the Draft Ruling, the original purpose of the trip was work-related and the private travel was subsequently added.

In our view, an employee taking advantage of a work trip to add a short holiday should not alter the character of the travel expenses incurred for the work-related travel required by the employer. We suggest the ATO expand the example to consider where the work-related travel required Toby to be in Sydney on a Friday and the following Monday and he took a 'holiday' on the intervening Saturday and Sunday and stayed in Sydney.

We also suggest the ATO consider the Draft Ruling the relevant authorities on this issue, such as *FCT v Finn* [1961] HCA 61.

- **Example 10 at paragraph 54** – we query why a bank statement proving the expense has been incurred (assuming the entry on the statement is clear as to the expense it relates to) is not sufficient to be 'acceptable substantiation' for an expense for which a deduction is being claimed.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

Tim Neilson
President