

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

Social Security (Attribution of Income – Ineligible Deductions) Determination 2017

Purpose

Sections 1208B and 1209C of the *Social Security Act 1991* (the Social Security Act) provide that to calculate the income of a company or trust, for the purposes of Division 7 of Part 3.18, any deductions allowable under the *Income Tax Assessment Act 1936* (ITAA 36) or *Income Tax Assessment Act 1997* (ITAA 97) can be deducted from the gross income of the company or trust, unless the Secretary has determined that they are an ineligible deduction, or an ineligible part of a deduction.

The purpose of this Determination is for the Secretary to determine those tax deductions that are ineligible to be applied against the gross income of a company or trust for social security purposes.

This Determination revokes and remakes the *Social Security (Attribution of Income – Ineligible Deductions) Determination 2004* (the 2004 Determination). The Determination has been updated to address changes made to the ITAA 36 and ITAA 97 since the 2004 Determination was made and to include new ineligible deductions of a similar nature to those deductions that were ineligible under the 2004 Determination.

Background

The *Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Act 2000* amended the Social Security Act to give effect to a measure in the Government's 2000-2001 Budget to revise the means test treatment of private companies and private trusts. The measure aims to ensure that customers who hold their assets in private companies or private trusts receive comparable treatment under the means test to those customers who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

Commencement

This Determination commences on the day after it is registered on the Federal Register of Legislation.

Consultation

Treasury and the Department of Human Services were consulted in the preparation of this Determination.

Regulation Impact Statement (RIS)

This Determination is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

Explanation of the provisions

Part 1

Section 1 of the Determination states the name of the Determination and section 2 states that the Determination commences the day after it is registered on the Federal Register of Legislation.

Section 3 states that this Determination revokes the 2004 Determination.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Section 4 contains the interpretation provisions for the Determination.

Part 2

Section 5 of the Determination provides that for the purposes of subsections 1208B(3) and 1209C(3) of the Social Security Act, those deductions listed in Parts 1 and 2 of Schedules 1 and 2 (respectively) of the Determination, that would normally be allowable deductions under the ITAA 36 or ITAA 97 are ineligible deductions, for the purposes of Part 3.18 of the Social Security Act.

Sections 6 to 11 provide rules that deal with the application of subsections 1208B(5) and 1209C(5) of the Social Security Act in relation to particular types of deductions.

Section 6 provides that, where a company or trust pays wages or a salary to an attributable stakeholder of that entity, or an associate of such a person, then such part of the salary or wages payment that is greater than reasonable remuneration for the work undertaken will be an ineligible part of the allowable deduction.

Section 7 provides that any part of an interest payment to a creditor of a company or trust will be an ineligible part of the allowable deduction in so far as it is greater than a reasonable rate of interest.

Section 8 provides that, where a company or trust artificially depreciates the value of its trading stock by changing its method of valuing the stock from one year to the next in accordance with an election under section 70-45 of the ITAA 97, then any part of the depreciation which is solely attributable to this altered valuation method will be an ineligible part of the allowable deduction.

Section 9 provides that, where a primary production company or trust artificially depreciates the value of its trading stock by changing its method of valuing the stock from one year to the next in accordance with an election under section 70-45 of the ITAA 97, then any part of the depreciation which is solely attributable to this altered valuation method will be an ineligible part of the allowable deduction.

Section 10 provides that, where a company or trust artificially depreciates the value of its trading stock by changing its method of valuing the stock during an income year in accordance with an election under section 70-50 of the ITAA 97, then any part of the depreciation which is solely attributable to this altered valuation method will be an ineligible part of the allowable deduction.

Section 11 provides that, where a primary production company or trust artificially depreciates the value of its trading stock by changing its method of valuing the stock during an income year in accordance with an election under section 70-50 of the ITAA 97, then any part of the depreciation which is solely attributable to this altered valuation method will be an ineligible part of the allowable deduction.

Schedule 1 – Part 1

This part provides a list of deductions, which would otherwise be allowable under ITAA 36, but are determined to be ineligible deductions for the purposes of section 1208B of the Social Security Act.

This list has been updated to reflect amendments to the ITAA 36 since the 2004 Determination was made and to include new deductions of a similar nature to those contained in the 2004 Determination.

Schedule 1 – Part 2

This part provides a list of deductions, which would otherwise be allowable under the ITAA 97, but are determined to be ineligible deductions for the purposes of section 1208B of the Social Security Act.

This list has been updated to reflect amendments to the ITAA 97 since the 2004 Determination was made and to include new deductions of a similar nature to those contained in the 2004 Determination.

Schedule 2 – Part 1

This part provides a list of deductions, which would otherwise be allowable under the ITAA 36, but are determined to be ineligible deductions for the purposes of section 1209C of the Social Security Act.

This list has been updated to reflect amendments to the ITAA 36 since the 2004 Determination was made and to include new deductions of a similar nature to those contained in the 2004 Determination.

Schedule 2 – Part 2

This part provides a list of deductions, which would otherwise be allowable under ITAA 97, but are determined to be ineligible deductions for the purposes of section 1209C of the Social Security Act.

This list has been updated to reflect amendments to the ITAA 97 since the 2004 Determination was made and to include new deductions of a similar nature to those contained in the 2004 Determination.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Attribution of Income - Ineligible Deductions) Determination 2017

The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Sections 1208B and 1209C of the *Social Security Act 1991* (the Social Security Act) provide that to calculate the income of a company or trust, for the purposes of Division 7 of Part 3.18, any deductions allowable under the *Income Tax Assessment Act 1936* (ITAA 36) or *Income Tax Assessment Act 1997* (ITAA 97) can be deducted from the gross income of the company or trust, unless the Secretary has determined that they are an ineligible deduction, or an ineligible part of a deduction.

The *Social Security (Attribution of Income - Ineligible Deductions) Determination 2017* (the Determination) specifies the tax provisions in the ITAA 36 and ITAA 97 that are ineligible to be applied against the gross income of a company or trust for social security purposes.

The ineligible deductions in the Determination are not allowable deductions for social security purposes since they do not relate to the operating expenses of the trust or company in current reporting period. They relate to transactions such as prior year expenses that are allowed under tax rules to be expensed over a number of future years, prior year losses, capital investment, changes in valuation of trading stock for accounting purposes, setup costs, costs involved in changes of ownership.

Social security assessment measures a person's current capacity to contribute towards their own support. As such, these transactions are not relevant in determining the current level of income support a person needs based on their individual circumstances.

Human rights implications

The Determination engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system.

The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The Determination is compatible with human rights as it ensures a person's current resources are appropriately assessed for the purposes of ascertaining the person's assessable income for means testing purposes under Part 3.18 of the Act.

Conclusion

The Determination is compatible with human rights as they do not raise any human rights issues.

Finn Pratt AO PSM

Secretary

Department of Social Services