TR 2020/2EC - Compendium

Public advice and guidance compendium – TR 2020/2

Relying on this compendium

This Compendium of comments provides responses to comments received on draft Taxation Ruling TR 2019/D3 *Income tax: deductions for expenditure on environmental protection activities*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	**Replacement of ATO Interpretative Decisions (ATO IDs)** Please provide a list of the ATO IDs which were consolidated into this Ruling.	The following ATO IDs (now withdrawn) have been incorporated into this Ruling: • ATO ID 2008/71 *Income Tax: Capital allowances: environmental protection activities – payment to purchaser of mining tenement to assume liability and indemnify taxpayer* • ATO ID 2008/43 *Income Tax: Capital Allowances: environmental protection activity – subscribing for shares in a company* • ATO ID 2006/276 *Income Tax: Capital Allowances: environmental protection activities – cleaning up and removing waste – site rectification* • ATO ID 2004/720 *Income Tax: Capital Allowances: environmental protection activities – lessor's expenditure demolishing shed constructed of asbestos* • ATO ID 2004/44 *Income Tax: Capital Allowances: environmental protection activities – septic tank system* • ATO ID 2003/17 *Income Tax: Environmental Protection Activity – vegetating area for visual effect and prevention of erosion*.
2	**Application of other deduction provisions** In Example 3 of the draft Ruling, while the $60,000 may not be deductible under section 40-755 (cost for creating visual effect	The examples are intended to illustrate the application of section 40-755. Whether the expenditure is otherwise allowable or is included in the cost base of an asset will depend on the particular facts and circumstances of each case.

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	and preventing erosion) of the *Income Tax Assessment Act 1997*[*], wouldn't section 8-1 of the ITAA 1997 still be available to Motorway Co? Likewise, for Example 1 of the draft Ruling, MineCo could include the lump sum of $20 million as part of the cost base of the asset?	
3	**Apportionment for domestic dwellings** Is it possible to state explicitly in the final Ruling that an owner-occupier may benefit from this Ruling under apportionment if they work from home or rent out a portion of the affected property?	This proposed change has not been made. Should such a scenario arise for consideration, a specific advice product (such as a private ruling) would be more appropriate than a public ruling. There is no general principle that a portion of environmental expenses can be claimed as a deduction where a location is used partially for income-producing purposes. Whether a deduction is available under section 40-755 in these circumstances would depend on careful consideration of the criteria in section 40-755, including the 'sole or dominant purpose' of the environmental activity and the 'site' of the relevant income-earning activity. This will be dependent on the particular scenario.
4	**How would the cost of 'testing' for the presence of asbestos be treated?** Is it possible to state explicitly in the final Ruling that the costs of engaging an asbestos hygienist/surveyor to check if asbestos is in a property is deductible?	Paragraph 12 of the final Ruling expands on the principles for considering when testing for actual or likely pollution (for example, where asbestos is expected) will be integral to undertaking the environmental protection activity.
5	**Environmental protection activities undertaken as a result of being convicted of a pollution offence** Are the costs of environmental protection activities undertaken as a result of the person being convicted of an offence in relation to the pollution (thus being required to undertake the activities as a consequence of the enforcement and prosecution process), capable of being claimed as a deduction? There is no justification for applying an incentive to a person who has been convicted of pollution (or a like offence) under	A payment pursuant to a court order may be subject to section 26-5, which may prevent a deduction under section 40-755. However, it is beyond the scope of this Ruling to identify those situations where section 26-5 would apply, or to consider other specific provisions that may limit the operation of section 40-755. Paragraph 38 of the final Ruling explains the rule in subsection 40-760(3) more generally.

[*] All legislative references are to the ITAA 1997 unless otherwise indicated.

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	environmental laws. Where other provisions in either the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* prevent such costs being claimed, it would be useful to reference such provisions in the draft Ruling.	
6	**Pollution resulting from the activities of more than one person** A useful example to include would be one that considers the impact of undertaking environmental protection activities to remedy pollution that has occurred as a result of the activities of more than one person. For example, if Company A decides to remedy soil and groundwater contamination on its site and the contamination has occurred both as a result of the company's own activities and the activities of a neighbouring Company B (that is the contamination has migrated onto Company A's site). In many cases it is not physically possible to delineate the clean-up activities along the lines of who is responsible for each particular element of contamination. How would the costs incurred by Company A be treated?	Example 2 has been added to the final Ruling to clarify this point.
7	**Prevention of erosion is not merely a visual pollution issue** Example 3 of the draft Ruling states that costs incurred in planting vegetation for visual effect and to prevent erosion would not be deductible expenditure as it 'does not involve an environmental protection activity'. There are many examples of prosecutions by environmental regulators where the failure to prevent erosion has given rise to a pollution offence. A simple example is where erosion leads to sediment entering a waterway and has substantial impacts on fish and vegetation dependent on that waterway. Undertaking works to prevent erosion of the site, on which the earning activity is undertaken, is an activity that prevents pollution as it is defined in the state and territory	The meaning of 'pollution' for the purposes of section 40-755 is limited to its ordinary meaning, which would not include visual pollution and/or eyesores (see paragraph 7 and footnote 6 of the final Ruling). This is not necessarily the case in relation to state and territory environmental protection legislation (which may define 'pollution' in broader terms for a statutory context). However, the scenario submitted extends beyond visual pollution to actual harm to the environment by introducing physical substances into the waterways causing harm to fish and vegetation. This would be covered by the ordinary meaning of pollution as explained in paragraph 6 of the final Ruling. To mitigate confusion about costs incurred on works to prevent erosion and recognising that such work may not be for aesthetics, references to 'prevent erosion' have been removed from this example (now Example 4 of the final Ruling). Example 4 of the final Ruling is based on ATO ID 2003/17 (now withdrawn). In that ATO ID, it stated that 'the mere erosion of sediment, by

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	environmental protection legislation. Some clarification on this example would be useful.	water or wind does not cause pollution as that term is used in ITAA 1997' on the basis that there is no contamination. However, the example provided in the submission involves contamination to the waterways from erosion. Example 5 has been added to the final Ruling to clarify that multiple-purpose activities undertaken to prevent contamination of waterways may include anti-erosion activities.
8	**Is replacement of an asbestos wall an 'improvement'?** In Example 6 of the draft Ruling, what degree of 'improvement' has arisen as a result of the replacement cladding being described as 'superior' in nature in paragraph 74 of the draft Ruling thereby going to Division 43? There have been taxpayers who had to remove asbestos from a wall and then consider replacing the wall cladding and/or re-cladding the wall in order to restore it to its 'former state' but that wouldn't necessarily be considered in any other context to be an 'improvement' but for the removal of hazardous material. This would more closely align with something more minor or incidental in the nature of the alteration (paragraphs 42 and 44 of the draft Ruling). Is it possible to provide another example as a variation to Example 6 of the draft Ruling to describe a situation where replacing part of a building structure (for example, to remove asbestos) occurs but that is still considered to be a minor or incidental degree of alteration or improvement?	Example 9 has been added to the final Ruling to illustrate that replacing an asbestos wall by restoring it to its 'former state' results in a minor or incidental degree of alteration or improvement.
9	**Example 6 of the draft Ruling: why is the alloy-coated metal roofing considered an improvement?** A site had several buildings which were clad (both walls and roof) in 'super six' (asbestos-containing) sheeting. In each case, these buildings had the sheeting removed and replaced with colorbond material. Colorbond is considered a modern-day equivalent for super six sheeting. On this basis, it is believed any 'improvements' arising from the replacement of the asbestos sheeting with the (non-pollutant) colorbond	We have replaced the words 'alloy-coated metal roofing of superior quality' with 'roofing material of a superior quality' in this example (now Example 8 of the final Ruling), to purposefully ensure it is sufficiently broad enough to accommodate potential changes in assessing the quality of replacement materials and industry practices. Example 9 has been added to the final Ruling to illustrate a scenario where a replacement is not an improvement.

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	material would be minor or incidental. Guidance is sought on why the alloy-coated metal roofing in Example 6 of the draft Ruling is an improvement. Could an example be added to the final Ruling where the remediation of pollutant materials involves replacing/recladding a wall or roof in a functional and utilitarian way that is simply a 'replacement' with a modern-day equivalent and any improvement is 'minor or incidental' only?	