


***TD 2001/D12 - Income tax: is a payment by a taxpayer to a fighting fund deductible to the taxpayer under section 25-5 of the Income Tax Assessment Act 1997 ('the Act') where it is set up to fund litigation, negotiate a settlement outcome, or to otherwise manage an income tax dispute arising from an investment or scheme?***

 This cover sheet is provided for information only. It does not form part of *TD 2001/D12 - Income tax: is a payment by a taxpayer to a fighting fund deductible to the taxpayer under section 25-5 of the Income Tax Assessment Act 1997 ('the Act') where it is set up to fund litigation, negotiate a settlement outcome, or to otherwise manage an income tax dispute arising from an investment or scheme?*

This document has been finalised by TD 2002/1.



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## Draft Taxation Determination

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**Income tax: is a payment by a taxpayer to a fighting fund deductible to the taxpayer under section 25-5 of the *Income Tax Assessment Act 1997* ('the Act') where it is set up to fund litigation, negotiate a settlement outcome, or to otherwise manage an income tax dispute arising from an investment or scheme?**

### *Preamble*

*Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.*

1. Yes, to the extent to which payments by the fund are for 'tax-related expenses' of the contributors under section 25-5. A deduction will be allowable subject to the criteria set out in paragraph 3 below.
2. A payment made to fighting fund by a taxpayer is expenditure incurred in managing the taxpayer's tax affairs where the purpose of the payment is to deal with the disallowance of a deduction relating to an investment or a scheme in which the taxpayer is a participant. However payments made to a fighting fund set up for other purposes such as to defend criminal charges for alleged tax offences will not be deductible. If a fighting fund is set up for more than one purpose, some of which are tax-related expenses for the purpose of section 25-5, the payment will need to be apportioned between deductible items and non-deductible items.
3. The payment is incurred and is an allowable deduction in the year in which the contribution is made to the fighting fund where the following conditions are met:
  - the fighting fund is set up for the purpose of funding litigation, negotiating a settlement outcome or to otherwise manage an income tax dispute in relation to an investment or scheme;
  - a taxpayer contributing to the fund and seeking a deduction:
    - is a participant in the investment or scheme;
    - has claimed or will claim a deduction in relation to the investment or scheme;
    - has had or will have a deduction disallowed; and

- is disputing or will dispute the disallowance of the deduction.
- It is reasonable to expect that any decision to be given in the case and/or any settlement outcome will apply to the contributor;
- The fighting fund is a properly administered trust fund such that:
  - contributions received are held in trust to meet the costs of litigation, the costs of negotiating a settlement outcome, or other tax-related expenses of the contributors, and can only be applied towards meeting such costs and expenses;
  - any funds not applied to funding litigation, negotiation, or other tax-related expenses (i.e., any surplus funds after the costs are paid) will be returned to the contributors in proportion to their contributions;
  - any costs recovered are to be paid to the fighting fund and any surplus will be passed on to the contributors once all the expenses are met;
  - the trust fund will be wound up and all trust funds returned to the contributors when the matter in dispute is resolved; and
  - the trustee of the fund properly accounts for all amounts received and paid, and can demonstrate to the satisfaction of the ATO that the above four conditions are satisfied.

4. Any amounts recouped from the trustee will be assessable income under section 20-30 of the Act.

#### **Example:**

5. The 'ABC Trust' is set up to fund litigation resulting from a disallowance of deductions in the B Investment Venture. The litigation involves Betty who is a participant in the B Investment Venture. John, a participant in the scheme, contributes \$5000 to the fighting fund during October 2001. John is entitled to claim a deduction for the \$5000 in the year in which the payment was made.

The total contribution from all contributors is \$110,000.

At the completion of the litigation there is a surplus amount in the 'ABC Trust'. The surplus must be returned to the contributors. John will receive 5000/110,000 of the surplus, which he will include in his assessable income.

#### **Your comments**

6. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

**Comments by date:** 7 December 2001  
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**Commissioner of Taxation**

7 November 2001

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*Previous draft:*

Not previously issued in draft form

*Subject references:*

- managing your tax affairs
- tax-related expenses
- tax affairs

*Legislative references:*

- ITAA 1997 25-5
  - ITAA 1997 20-30
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ATO references:

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