



TD 2025/D1 - Income tax: application of Part IVA of the Income Tax Assessment Act 1936 to certain early stage innovation company investment arrangements

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Status: **draft only – for comment**

Draft Taxation Determination

Income tax: application of Part IVA of the *Income Tax Assessment Act 1936* to certain early stage innovation company investment arrangements

❗ Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

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Ruling

1. Taxpayer Alert TA 2024/1 *Early stage investor tax offset claimed using circular financing arrangements* describes and sets out concerns with arrangements which appear designed to artificially meet the conditions for claiming the maximum tax offset, allowing individuals to benefit with minimal (if any) risk on their investment. Entities promote, orchestrate, and finance these schemes primarily for the individuals to obtain the tax offset, with the refunded offset shared with those entities.
2. While the application of Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) to any particular arrangement depends on a careful weighing of all the relevant circumstances, Part IVA is likely to apply to arrangements similar to that described in TA 2024/1.
3. If Part IVA of the ITAA 1936 applies to an arrangement, it follows that the qualification in paragraph (e) of table item 1 of subsection 170(1) of the ITAA 1936 will usually apply to disqualify an individual from the 2-year period of review limitation.
4. All legislative references in this draft Determination¹ are to the ITAA 1936, unless otherwise indicated.

¹ For readability, all further references to 'this Determination' refer to the Ruling as it will read when finalised. Note that this Determination will not take effect until finalised.

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Date of effect

5. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation

28 February 2025

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Appendix 1 – Explanation

❶ *This Explanation is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Early stage innovation company investment arrangements

6. TA 2024/1 issued on 10 December 2024, describes arrangements which typically display all or most of the following features.

- The individual (investor) becomes or is made aware of an opportunity to invest in a start-up company.
- The company is held out to qualify as an early stage innovation company under section 360-40 of the *Income Tax Assessment Act 1997* (ITAA 1997).
- A financing arrangement is offered to fund the individual's share subscription amount, less any nominal deposit required. This enables the individual to acquire shares, typically up to an amount that qualifies for the maximum tax offset.
- The company places the subscription amount back on deposit with the financier who controls the use of the subscription monies by the company. This includes limiting that amount which the company can directly apply to further its stated innovation and commercialisation activities.
- The individual claims the early stage tax offset under Subdivision 360-A of the ITAA 1997 (tax offset) in their tax return and receives a refund. This refund is typically available as the tax offset reduces the individual's tax liability on their salary and wage income, enabling a refund of pay as you go withholding or other credits.
- The tax offset refund is used to partially repay the finance.
- The remainder of the financing is repaid by the individual within a short period out of subscription monies returned to the individual by the company. This returned amount is typically by way of selective share buy-back (or other disposal) of some or all of the individual's shares.
- In substance:
 - the individual has paid no amount for any residual shareholding they might continue to have in the company, and
 - the refunded tax offset is shared between the individual, the company and the entities facilitating and financing the individual's share subscription.

7. For sophisticated investors, the terms of the arrangement typically allow for an extended period. This extension provides a greater benefit by enabling a longer duration for the investor to claim tax deductions for interest expenses under their borrowing.

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Application of Part IVA

8. Under Part IVA, the Commissioner may cancel all or part of a tax benefit that has been obtained, or would, but for section 177F, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies. Part IVA applies if:

- a tax benefit, as identified in section 177C, was or would, but for subsection 177F(1), have been obtained
- the tax benefit was or would have been obtained in connection with a scheme as defined in section 177A, and
- having regard to section 177D, the scheme is one to which Part IVA applies.

9. The precise description of the scheme for the purposes of Part IVA will depend on the facts of the particular case. However, in the context of the arrangements described in this Determination, the scheme under section 177A would normally consist of some or all of the features described in paragraph 6 of this Determination. It is specifically noted that while these arrangements may assure investors of their ability to repay their financing through returned subscription monies by way of share buy-back or otherwise, the actual return of subscription monies to the investor is not essential for Part IVA to apply.

10. In identifying the tax benefit, where the company in which the investor has acquired shares:

- is a qualifying early stage innovation company under subsection 360-40(1) of the ITAA 1997 and the company has received from the investor an amount for the issue of shares, it is considered that the scheme would give rise to a tax benefit under paragraph 177C(1)(bbaa), and
- had a history or expectation for assessable dividends to be paid on its shares, it is considered that the scheme would give rise to a tax benefit under paragraph 177C(1)(b).

11. Furthermore, on annihilating the scheme under subsection 177CB(2), it can be concluded that the tax effects in paragraphs 177CB(1)(daa) and 177CB(1)(b) respectively would not have been obtained if the scheme had not been entered into or carried out.²

12. The tax benefit is the amount of the tax offset as an innovation tax offset³ and the deduction amount for interest expense respectively.

13. Having identified the scheme and tax benefit, the enquiry is whether that scheme or any part of the scheme was entered into for the dominant purpose⁴ of enabling the 'relevant taxpayer' to obtain the tax benefit.⁵ This is to be undertaken by reference to the 8 matters set out in subsection 177D(2) and is the conclusion of a reasonable person. Notably, subjective purposes are not relevant. What is relevant is the objective conclusion that can be drawn from a consideration of the 8 matters.

14. The examination as to purpose under section 177D can look to that of any person or persons who entered into or carried out the scheme (or part of it). In the present context, this could be that of the taxpayer investor, the start-up company, the finance entity, or any other entity that is a party to, or has facilitated or orchestrated, the arrangement. It can also

² For completeness, paragraph 6 of TA 2024/1 sets out the possible concerns with these arrangements in satisfying the requirements of Division 360 and section 8-1 of the ITAA 1997. The application of Part IVA will be a supplementary argument to these substantive issues.

³ Paragraph 177A(1)(b) definition of 'innovation tax offset'.

⁴ Subsection 177A(5).

⁵ Subsection 177D(1).

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extend to the purposes of a promoter in obtaining a tax benefit for the taxpayer.⁶

15. The application of section 177D to any particular scheme depends on a careful weighing of all the relevant circumstances of the scheme and the relative weight that should be attached to each of those circumstances.

16. However, having regard to the matters set out in subsection 177D(2), there are several aspects of the arrangements described in TA 2024/1 that point to a conclusion of there being a dominant purpose of obtaining a tax benefit.

- The manner in which the scheme was entered into or carried out suggests a dominant purpose of obtaining a tax benefit.⁷ When considered objectively, the promotion, underlying activities (and agreements), circular funding, budget and corporate control, multi-party orchestration, and assured mechanism for investor exit (which covers the repayment of investor borrowing and ensures there is little or no financial risk) make the subscription of shares by the investor explicable only by reference to the obtaining and maximizing of the promoted tax benefits for the investor, and the indirect sharing of the economic value of those benefits between the investor and the other parties.
- There is a significant difference in the form and substance of the scheme.⁸ While the form indicates the investor borrows money that is invested in the start-up company and the money will be applied by the start-up company to its innovation and commercialisation activities, in substance:
 - the investor bears little (if any) financial risk for their borrowing and share investment, and
 - the subscription monies are placed under the strict control of the finance entity under a secondary deposit arrangement limiting the use of those monies by the start-up.
- The time at which the scheme was entered into and length of the period during which the scheme was carried out suggest a dominant purpose of obtaining a tax benefit.⁹
- The financial position of the investor¹⁰, start-up company and entities facilitating and financing the scheme is better than it would have been if the scheme had not been entered into, and this improved position depends entirely on the tax benefits¹¹, noting:
 - the investor:
 - receives a net financial benefit by the end of the Investment Period¹² following repayment of the subscription amount, as the tax refund received by the investor for claiming the tax offset is greater than the total amount paid by the investor to the start-up, facilitators and financiers under the scheme, and
 - on conclusion of the scheme, may also retain a residual shareholding in the start-up that has, in effect, been wholly

⁶ See *Puzey v Commissioner of Taxation* [2002] FCA 1171.

⁷ Paragraph 177D(2)(a).

⁸ Paragraph 177D(2)(b).

⁹ Paragraph 177D(2)(c).

¹⁰ Paragraph 177D(2)(e).

¹¹ Paragraph 177D(2)(f).

¹² As described in TA 2024/1.

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funded out of the tax offset

- any seed capital for the start-up company on the conclusion of the scheme has, in effect, been wholly funded out of the tax offset, and
- the facilitating and financing entities have each received financial benefits under the arrangement (including administration and management fees, interest on loans to the investor or other financial benefits), with the investor's tax refund being applied directly or indirectly to fund these financial benefits.

17. In these circumstances, the Commissioner is likely to exercise his powers under subsection 177F(1) to cancel the tax benefits and determine that neither the tax offset nor general deduction for interest expense are available.

Adjustments to period of review

18. Table item 1 of subsection 170(1) provides that:

The Commissioner may amend an assessment of an individual for a year of income within 2 years after the day on which the Commissioner gives notice of the assessment to the individual.

19. However, the qualifications in paragraphs (d) and (e) of table item 1 of subsection 170(1) state that the item does not apply:

- (d) if the individual is a beneficiary of a trust estate at any time in that year unless the trust is a small business entity ... for that year or the trustee of the trust (in that capacity) is a full self-assessment taxpayer for that year; or
- (e) if it is reasonable to conclude that any person entered into or carried out a scheme (either alone or with others) for the sole or dominant purpose of the individual obtaining a scheme benefit in relation to income tax from the scheme for that year

20. Table item 4 of subsection 170(1) provides that:

If item 1, 2 or 3 does not apply, the Commissioner may amend an assessment within 4 years after the day on which he or she gives notice of the assessment to the taxpayer.

21. Where Part IVA applies to an arrangement, it will usually follow that for the purposes of subsection 170(1), it is reasonable to conclude that the scheme was entered into or carried out (either alone or with others) for the sole or dominant purpose of the individual obtaining a scheme benefit in relation to income tax from the scheme for that year. Consequently, if Part IVA applies to participant individual investors in early stage innovation company investment arrangements as described in TA 2024/1, the qualification in paragraph (e) of table item 1 of subsection 170(1) will generally apply to disqualify those individual investors from the 2-year period of review limitation.

22. The Commissioner is therefore able to amend an assessment within 4 years after the day on which the Commissioner gives notice of the assessment to the investor.

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Appendix 2 – Your comments

23. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

24. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 28 March 2025
Contact officer: Kevin Hu
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Phone: 03 9247 0703

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References

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936 Part IVA
- ITAA 1936 170(1)
- ITAA 1936 170(1)(e)
- ITAA 1936 177A
- ITAA 1936 177A(1)(b)
- ITAA 1936 177A(5)
- ITAA 1936 177C
- ITAA 1936 177C(1)(b)
- ITAA 1936 177C(1)(bbaa)
- ITAA 1936 177CB(1)(b)
- ITAA 1936 177CB(1)(daa)
- ITAA 1936 177CB(2)
- ITAA 1936 177D
- ITAA 1936 177D(1)
- ITAA 1936 177D(2)
- ITAA 1936 177D(2)(a)
- ITAA 1936 177D(2)(b)

- ITAA 1936 177D(2)(c)
- ITAA 1936 177D(2)(e)
- ITAA 1936 177D(2)(f)
- ITAA 1936 177F
- ITAA 1936 177F(1)
- ITAA 1997 8-1
- ITAA 1997 Div 360
- ITAA 1997 Subdiv 360-A
- ITAA 1997 360-40
- ITAA 1997 360-40(1)

Cases relied on:

- *Puzey v Commissioner of Taxation*
[2002] FCA 1171; 2002 ATC 4853;
50 ATR 595; 194 ALR 615

Other references:

- TA 2024/1
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ATO references

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