

# ***TR 93/25A1 - Addendum - Income tax: assessability of proceeds from illegal activities, treatment of amounts recovered and deductibility of fines and penalties***

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# Addendum

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## Taxation Ruling

### Income tax: assessability of proceeds from illegal activities, treatment of amounts recovered and deductibility of fines and penalties

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 93/25 to take into account developments in the law since it was issued. It:

- confirms that income from illegal activities that is gained by an entity directly in pursuit of its own income-producing activities is assessable, and
- sets out the treatment of amounts forfeited, recovered from or repaid.

TR 93/25 is amended as follows:

#### 1. Preamble

Omit the Preamble; substitute:

##### **❶ Relying on this Ruling**

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

#### 2. Page status

- (a) On pages 1 and 2, omit from the header 'FOI status – may be released'; substitute 'Status: legally binding'.
- (b) From page 3 onward, omit from the header 'FOI status – may be released'; substitute 'Status: not legally binding'.

#### 3. Paragraph 1

Omit 'subsection 25(1) of the *Income Tax Assessment Act 1936* (ITAA)'; substitute 'section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)'.

#### 4. Paragraph 2

Omit 'prostitution, SP bookmaking etc'; substitute 'prostitution and illegal bookmaking'.

**5. Paragraph 3**

- (a) After 'amounts that are recovered', insert 'from'.
- (b) After 'fines or penalties that are imposed for the', insert 'associated'.

**6. Paragraph 4**

Omit 'tax'; substitute 'and losses'.

**7. Paragraph 6**

Omit 'must depend'; substitute 'depends'.

**8. Paragraphs 7, 17, 19 and 20**

Omit the paragraphs.

**9. Paragraph 8**

Omit '(see paragraphs 21 and 22 of Taxation Ruling TR 92/20)'; substitute '(see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*)'.

**10. Paragraphs 9 and 12**

Omit 'subsection 25(1) ITAA'; substitute 'section 6-5 of the ITAA 1997'.

**11. Paragraph 11**

Omit 'considering the proceed'; substitute 'considering the proceeds'.

**12. Paragraph 13**

Omit the paragraph, including the heading; substitute:

**Treatment of Amounts Forfeited, Recovered from or Repaid**

13. The deductibility of amounts earned from illegal activities that are subsequently forfeited, recovered from or repaid depends on the circumstances of the case.

**13. Paragraphs 14 and 15**

- (a) Omit the paragraphs, substitute:

14. There is no general principle that amounts forfeited, recovered from or repaid cannot be deductible. However, whether they are deductible in the particular case will turn on whether there is sufficient connection between the payments and income-earning activities to satisfy the requirements of section 8-1 of the ITAA 1997. In some cases, there will be insufficient connection to income-producing activities (or to the carrying on of a business for the purpose of producing assessable income) to justify a deduction. In each case, whether the

repayment gives rise to a deduction under section 8-1 of the ITAA 1997 requires that careful consideration be given to the occasion for that repayment. It does not suffice for deductibility that the illegally-earned income was assessable when derived.

15. It was recognised by the Federal Court in *Zobory v Commissioner of Taxation of the Commonwealth of Australia* [1995] FCA 269 that a taxpayer who had misappropriated funds that were then invested at interest, who held both the misappropriated funds and income derived from those funds on constructive trusts, and who ultimately repaid the misappropriated funds and interest to the victim of the fraud, was not personally liable to tax in respect of the interest. We do not accept, however, that there is a general income tax principle that income earned from illegal activities if repaid is then treated as never having been derived.

15A. Section 59-30 of the ITAA 1997 provides that an amount is neither assessable nor exempt income if you must repay it, you do repay it in a later income year, and you cannot deduct the repayment. In the context of amounts of an income character earned from illegal activity in a particular year, this provision will be engaged if the taxpayer is subsequently ordered to repay those amounts and the other requirements of the section (including non-deductibility of the repayment) are satisfied.<sup>1</sup> However, section 59-30 of the ITAA 1997 only applies to a 'repayment'. It does not apply to the loss or forfeiture of income or amounts that are recovered.<sup>2</sup> That is, it does not apply when the taxpayer is obliged to pay the income to a person other than the person from whom it was derived, or in cases of mere loss.

- (b) At the end of the second sentence in new paragraph 15A, insert footnote 1:

<sup>1</sup> In regard to amendment periods, see table item 22 in subsection 170(10AA) of the *Income Tax Assessment Act 1936*.

- (c) At the end of the third sentence in new paragraph 15A, insert footnote 2:

<sup>2</sup> See also Law Administration Practice Statement PS LA 2011/10 *Waiver of tax-related liabilities in proceeds of crime matters*.

#### **14. Paragraph 16**

Omit the paragraph; substitute:

Generally, fines and penalties are not deductible under section 8-1 of the ITAA 1997 (*Commissioner of Taxation v Madad Pty Ltd* [1984] FCA 311) and they are specifically excluded from being deductible pursuant to section 26-5 of the ITAA 1997.

#### **15. Paragraph 18**

Omit the paragraph; substitute:

Alex was found, pursuant to an audit, to have earned \$20,000 from the misappropriation of company funds during the 2020–21 income year. This amount is assessable income and therefore Alex's income tax assessment was amended to increase income for that year from the amount declared of \$25,000 to \$45,000.

**16. Paragraph 21**

Omit the paragraph; substitute:

Following on from Example 1 of this Ruling, Alex is also fined \$2,000, which is not allowable as a deduction as it is a fine or penalty that is excluded from being deductible pursuant to section 26-5 of the ITAA 1997.

This Addendum applies on and from 15 December 2021.

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**Commissioner of Taxation**

30 March 2022

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## ATO references

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Income tax ~~ Deductions ~~ Other

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