Australian Government
Australian Taxation Office

ATO Interpretative Decision

ATO ID 2009/92

Superannuation
Income Tax: tax treatment of losses realised by a complying SMSF on disposal of shares

FOI status: may be released

Issue

Have the losses realised by the trustee of the self-managed superannuation fund (SMSF) on the disposal of shares been correctly calculated in accordance with section 295-85 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

Decision

No. The losses realised by the trustee of the SMSF on disposal of shares have not been correctly calculated in accordance section 295-85 of the ITAA 1997.

Facts

The fund is a complying SMSF

The trustee of the fund typically invests in shares for the medium to long term with a view to earning dividend income and capital growth.

In the 2007-08 income year, the trustee buys shares in a mining company with no history of making dividend payments. The trustee anticipates that there will be a favourable movement in the price of gold in the near future which will be reflected in an increase in the company's share price.

The trustee intends to hold the shares for a short period and make a profit when the shares are sold. However, the gold price falls and the trustee sells the shares at a loss.

In the fund's income tax return for the 2007-08 income year, the trustee claims a deduction under section 8-1 of the ITAA 1997 for losses incurred in respect of mining shares sold during the income year on the basis that the shares were purchased for profit by resale and were not intended as a long term investment.

Reasons for Decision

Section 8-1 of the ITAA 1997 provides that a loss or outgoing may be deducted from a taxpayer's assessable income to the extent that it is necessarily incurred in gaining or producing the taxpayer's assessable income.

Section 295-85 of the ITAA 1997 operates to modify the operation of ordinary income and general deduction provisions so that the capital gains tax (CGT) rules are the primary code for calculating gains or losses realised by complying superannuation entities (including SMSFs) on the disposal of CGT assets.

Specifically, subsection 295-85(2) of the ITAA 1997 states that if a CGT event happens to a CGT asset owned by a complying superannuation fund, the following provisions do not apply:

(a) section 6-5 of the ITAA 1997

(b) section 8-1 of the ITAA 1997

(c) sections 15-15 and 25-40 of the ITAA 1997, and

(d) sections 25A and 52 of the ITAA 1936.

A share is a CGT asset as defined in subsection 108-5(1) of the ITAA 1997 and the sale of a share is CGT Event A1 under section 104-5 of the ITAA 1997. Therefore, by the operation of subsection 295-85(2) of the ITAA 1997, any loss realised by the fund on the sale of the shares is determined under the CGT provisions - a loss on the sale of the shares cannot be claimed as a deduction under section 8-1 of the ITAA 1997.

Subsection 295-85(3) of the ITAA 1997 provides an exception to this rule. Under subsection 295-85(3) of the ITAA 1997 the provisions referred to in subsection 295-85(2) of the ITAA 1997 can apply to the CGT event if any capital gain or capital loss from the event is attributable to currency exchange rate fluctuations, or if the CGT asset is one listed in paragraph 295-85(3)(b) of the ITAA 1997, namely:

(i) debenture stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security

(ii) a deposit with a bank, building society or other financial institution

(iii) a loan (whether secured or not), and

(iv) some other contract under which an entity is liable to pay an amount (whether the liability is secured or not).

The Explanatory Memorandum which accompanied the Tax Laws Amendment (Simplified Superannuation) Bill 2006 introducing section 295-85 of the ITAA 1997 provides that the rule set out in subsection 295-85(2) of the ITAA 1997 does not apply to "the disposal of a security". This references the fact that section 295-85 of the ITAA 1997 is a rewrite of section 304 of the *Income Tax Assessment Act 1936* (ITAA 1936). Section 304 of the ITAA 1936 similarly operated to provide that the CGT provisions were the primary provisions for determining taxation of the gains and losses of assets disposed of by a complying superannuation fund.

As noted in paragraph 3.14 of the Explanatory Memorandum which accompanied the Tax Laws Amendment (Simplified Superannuation) Bill 2006, the rewritten provisions of Division 295 of the ITAA 1997 did not change the law as it previously operated under Part IX of the ITAA 1936.

Subsection 303(1) of the ITAA 1936 set out the meanings of terms for the purposes of section 304 of the ITAA 1936, including the definition of 'security'. The definition of 'security' contained in subsection 303(1) of the ITAA

1936 is now contained in paragraph 295-85(3)(b) of the ITAA 1997.

The Explanatory Memorandum to the Taxation Laws Amendment (Superannuation) Bill 1989 which introduced sections 303 and 304 of ITAA 1936 states:

> ... shares do not fall within the definition of security for the purposes of section 304.

Consequently, as a share does not fall within the definition of security for the purposes of section 304 of the ITAA 1936, a share does not fall within any of the exclusions in paragraph 295-85(3)(b) of the ITAA 1997.

Any loss realised by the fund on the sale of the shares is determined under the CGT provisions - a loss of the sale of the shares cannot be claimed as a deduction under section 8-1 of the ITAA 1997.

Date of decision: 14 August 2009

Year of income: Year ended 30 June 2008

Legislative References:
Income Tax Assessment Act 1936
section 303
subsection 303(1)
section 304

Income Tax Assessment Act 1997
section 8-1
section 104-5
section 108-5
subsection 108-5(1)
section 295-85
subsection 295-85(2)
subsection 295-85(3)
paragraph 295-85(3)(b)

Other References
Explanatory Memorandum to Taxation Laws Amendment (Superannuation) Bill 1989
Explanatory Memorandum to Tax Laws Amendment (Simplified Superannuation) Bill 2006

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