Friday, 2 February 2024

Ms Danijela Jablanovic,
Australian Tax Office.

By email: IAITLA@ato.gov.au

Dear Ms Jablanovic,

Submission: Draft Determination TD 2023/D4 Income tax: deductions for financial advice fees paid by individuals who are not carrying on a business

The FSC welcomes the opportunity to submit on Tax Determination 92/124 (**TD**) and the previous engagements we have had with the Australian Tax Office on this issue.

The FSC supports the tax deductibility of financial advice fees. While we believe the law should more fully facilitate this, the FSC welcomes the ATO moving to clarify the circumstances and parameters in which advice fees are permissible under the provisions of the Income Tax Assessment Act 1997.

This letter brings to the attention of the ATO several potential points for clarification in the TD.

- **The TD should accommodate the full spectrum of consumer interactions:** The TD should fully contemplate the experience of different advice models within the market providing different forms of financial advice to consumers. The TD should expand further on what the adviser needs to document in the invoice and/or how the cost of advice can be apportioned (e.g., time-based apportionment) to make it clearer for the client and their tax agent in claiming the deduction.
- **Ongoing investment advice arrangements should be deductible**: An ongoing arrangement to provide advice on suitability and performance of investments should be deductible regardless of whether investments are purchased or disposed when the portfolio is rebalanced. Further, the investments are not just for capital gains but for assessable dividends and distribution income. We would also query the practical application of paragraph 22 in the context of ongoing advice.

  > *22. Fees for financial advice on a proposed investment are also not deductible under section 8-1 because the amount is considered to be capital or of a capital nature. This is because the expenditure is incidental to the cost of acquiring the income-producing investment.*

  Where the adviser provides ongoing advice on the suitability and performance of investments

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and the taxpayer also makes regular contributions/ investments to earn assessable income as well as capital growth, we are of the view there is sufficient connection with producing assessable income rather than capital in nature. It is unfair and unreasonable to require deductibility apportionment of the ongoing advice on suitability and performance where the taxpayer also happen to make regular contributions vs a taxpayer who doesn't make regular contributions.

- **Example 2 on continuing arrangements needs to be amended to reflect the consumer experience:** The ongoing advice has a scenario (noted below) where Min-Ji changes her mix of investments in the managed fund without acquiring or disposing of her interest in the managed fund. This example is not realistic because for investment in unitised funds changing the mix of investments or modifying the risk profile requires acquiring/disposing of units in managed funds to rebalance a portfolio. Clarity over whether ongoing financial advice on suitability and performance of an investment is deductible where it requires acquisition or disposal of units to change the mix of investment would also be appreciated.

Example 2 – continuing arrangement

49. After Min-Ji acquires the investment in the managed fund, she agrees to enter into an ongoing arrangement where Claudio will continue to provide her with advice on the suitability and performance of her investment for a fee. Claudio also agrees to provide Min-Ji with budgeting advice to enable her to increase her savings.

50. From time to time, Claudio suggests that Min-Ji change her mix of investments in the managed fund in order to achieve her original goals and objectives. When Min-Ji agrees with these changes, Claudio actions Min-Ji's request to modify the risk profile of her investment in the managed investment scheme. This does not result in Min-Ji acquiring or disposing of her interest in the managed fund.

51. In this case, the component of Claudio's fee that relates to the ongoing advice on the suitability of Min-Ji's investments is deductible under section 8-1. This is because the expenditure is incurred in the course of gaining or producing assessable income from the managed investment scheme. In this case there is a sufficient connection between the fee for the ongoing advice and the investment in the scheme which produces Min-Ji's assessable income.

52. The fee for the advice provided on the budgeting matters is not deductible under section 8-1 as it is not incurred in gaining or producing Min-Ji's assessable income. It is considered to be a private or domestic expense. The fee is also not deductible under section 25-5 as it is not a fee incurred in managing Min-Ji's tax affairs. As the advice is provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.

- **Upfront fees:** We acknowledge the limits of the ATO's powers to permit tax deductible outside provisions of the law. However, there is an argument upfront fees should be deductible under 8-1 as per the existing law on the basis the ATO has used the previous rationale from TD 95/60 that an upfront fee is a capital event which is too distant from a client drawing income to say that an upfront fee is not deductible under 8-1. In reality, very few clients have a pot of money that invests at some future date they are rolling over super, consolidating funds, moving to pension phase etc (I.e. funds are already invested).An upfront deduction for 25-5 is already provided for and the draft TD can be relied on so advisers will be able to claim a deduction on upfront fees proportional to the amount of that advice which is tax related now. This is likely to be a high proportion, especially for holistic and investment advice when considering the number of strategies consumer might have with nexus to taxation (less so for insurance advice).

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We welcome the ATO’s TD overall and further consideration of our proposed refinements as part of this consultation. Should you or your team have any questions please do not hesitate to contact me.

Yours sincerely,

Zach Castles
Policy Director, Advice and Platforms

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