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## DEDUCTIBILITY OF FINANCIAL ADVICE FEES

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Late last year, the ATO released a draft taxation determination (TD 2023/D4) on the deductibility of financial advice fees paid by individuals who are not carrying on a business. This draft has been a year in the making, with the ATO first flagging its intention to broaden and update its previously issued Determination TD 95/60 in mid-December 2022. This new draft, issued in mid-December 2023, had an initial predicted release date of mid-2023, and is a modernisation of TD 95/60 without a substantial change in the ATO's view.

When the ATO first announced that TD 95/60 was being broadened and updated, the Financial Planning Association of Australia (FPA) welcomed the move, noting that the TD was issued in 1995 and much has changed in the financial planning industry since then. The FPA called for two critical areas of TD 95/60 to be reviewed, including the timing of advice and the deductibility of tax (financial) advice. It appears that the new draft TD has delivered on both counts, clarifying when fees paid would be deductible for individuals and the tax treatment of tax (financial) advice.

TD 2023/D4 states that generally, an individual may be entitled to a deduction for fees paid to a financial adviser if they satisfy the requirements in ss 8-1 or 25-5 of the ITAA 1997. According to the ATO, it takes the view that "tax (financial) advice" as defined in s 90-15 of the Tax Agent Services Act 2009 would be included within the meaning of "tax affairs".

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To help explain the practical implications of the TD 2023/D4, let's take a simple example of an individual taxpayer. Grace is an Australian resident who is currently working and earns salary and wages. She has savings in an account earning interest and is a member of a low-cost super fund. She decides to get some financial advice to help her plan for the future and on the recommendations of family and friends, goes to see Andrew.

Andrew is a financial adviser authorised to provide a comprehensive range of personal advice to retail clients and is also a recognised tax adviser for the purposes of s 25-5 of the ITAA 1997. Andrew meets with Grace and agrees to provide her the appropriate advice for a fee. He makes all the relevant enquiries and gathers facts to ascertain Grace's needs as well as considering her assets, liabilities, income, risk profile and tax profile.

Andrew then delivers comprehensive advice outlining how Grace can invest her savings in a management investment vehicle, and how she can enter a salary sacrifice arrangement to increase her retirement savings. He also recommends taking out life, total and permanent disability and trauma insurance to protect her family. In providing the advice, Andrew interprets and applies the tax laws to Grace's circumstances and provides advice about the tax consequences of acquiring, holding and disposing an investment, as well as the tax implications of salary sacrifice and making payments for the insurance policies.

Under TD 2023/D4, the component of Andrew's fee related to recommending the investment and acquiring units on Grace's behalf would not be deductible under s 8-1 as it does not have sufficient connection with earning income from the investment and is considered to be of a capital nature. However, Grace will be able to claim a deduction under s 25-5 in relation to the component of tax (financial) advice provided by Andrew in relation to the tax implications of investing.

Further, Grace will be able to claim a deduction for the portion of the fee that relates to advice on the salary sacrifice arrangement under s 8-1. The component of the fee that relates to interpreting and applying income tax laws including entering into the salary sacrifice arrangement (ie tax (financial) advice) will be deductible under s 25-5.

In relation to the insurance, the component of the fee that relates to the provision of advice on the life, total and permanent disability and trauma insurance policies will not be deductible under section 8-1 because the expenditure is considered to be of a capital nature. However, the tax (financial) advice related to the taxation implications of insurance policies may be able to be deducted under s 25-5.

As the above example illustrates, even relatively simple advice would likely require the apportionment of fees between deductible and non-deductible components. This increase in complexity is likely to lead to many financial services clients missing out on deductions which they were otherwise entitled to. However, the draft determination is currently in the consultation stage and may change when the final determination is released.

#### **CONTACT**

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Page 2 of 2

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