

Property Update

March 2009

Income tax: Can a property buyer deduct his agent's fees?

A recent Australian Taxation Office (ATO) Interpretive Decision has confirmed that certain fees paid for the services of a buyer's agent will not be deductible.

Facts

A real estate agent entered into agreements with buyers for services when purchasing residential or investment properties.

The agent provided the following services:

- 1 Identification and selection of properties based on the buyer's instructions.
- 2 Negotiation of the contract to purchase a suitable property.
- 3 For investor clients, the provision of forecasts for capital growth and rental income.

- 4 For investor clients who require a property manager, the selection of an appropriate firm to manage the property.

The fee was calculated as a percentage of the purchase price of the property, rather than on time spent providing each of the services. The fee was calculated on the same basis for residential and investment property buyers. Also, for an investment property buyer, the fee was the same whether or not the agent was required to select a property manager. The agent's invoice was not itemised, however, the description of the service did include 'selection of a property manager'.

Argument

It was accepted that to the extent the fee related to the acquisition of

a property, it was not deductible. However, it was argued that the part of the fee referable to the selection of an appropriate property manager was a deductible expense for investment property buyers.

ATO's decision

The ATO recognised that one of the services provided by the agent was the selection of an appropriate property manager. However, they did not allocate any amount to the provision of this service on the basis that if the selection of a property manager was not required, the same fee would be charged. The ATO considered that on the evidence, the fee was charged for the sourcing of a suitable property and the negotiation of the purchase and, in these circumstances, the agent selected a property manager

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At Lavan Legal we believe in building long lasting relationships with our clients. We continue to provide the best legal advice and service, so that we can continue to improve our understanding of our client's needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology, market insight, and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through increased innovation and process improvement.

free of charge as an optional and supplementary service to investor clients in order to make the agent's services more competitive. For that reason, the buyer did not incur any outgoing in respect of the selection of a property manager.

Lavan Legal comment

The ATO's decision was based on specific circumstances and evidence. The fees, although not deductible, may form part of the capital gains tax cost base of the property.

In addition, the argument for deductibility would have been enhanced if:

- the fee for selection of a property manager was based on time spent by the agent; and
- itemisation of this amount of the total service fee on the invoice.

Reference

ATO Interpretative Decision ID 2009/9 issued 3 February 2009.

For more information about structuring the engagement contracts between a property buyer and a buyer's agent, please contact Tim Morgan on 9288 6838.

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