



Class Ruling

Income tax: payments made under the BHP Billiton Boodarie Iron Plant – Worker Support Program

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 82 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- Division 110 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-40 of the ITAA 1997;
- section 110-45 of the ITAA 1997;

- section 110-55 of the ITAA 1997;
- Division 112 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 115-25 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-37 of the ITAA 1997; and
- Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

All subsequent references in this Ruling are to the ITAA 1997, unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is those workers who received assistance from the Western Australian Government under the BHP Billiton Boodarie Iron Plant Worker Support Program (the program) as described in paragraphs 9 to 37 of this Ruling.

4. In this Ruling, a person belonging to this class of entities is referred to as an eligible worker.

Qualifications

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is in accordance with the scheme described in paragraphs 9 to 37 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2004 to 30 June 2008. The Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following document, or relevant parts of it form part of and are to be read with the description:

- Guidelines of the BHP Billiton Boodarie Iron Plant Worker Support Program (the Guidelines)

10. In November 2004, BHP Billiton (the company) announced its intention to place the Boodarie Iron Plant (the Plant) on a care and maintenance basis, which affected the continued employment of the majority of the plant's employees.

11. In response to a taskforce report, the Western Australian Government established the program to provide support to maximise the retention of former employees and contractors in the Town of Port Hedland area.

12. A worker is eligible for assistance if they can demonstrate that:

- (a) they were either
 - (i) an employee of the plant on 11 November 2004 and had their services terminated as a direct result of the decision to place the Plant on a care and maintenance basis; or
 - (ii) a contractor to the plant, or an employee of such a contractor and had their contract or employment contract terminated as a direct result of the decision to place the plant on a care and maintenance basis; and
- (b) they have:
 - (i) not found alternate employment or contracts; or
 - (ii) found alternative employment or contracts at a lower rate than was payable under their previous employment or contract rate with the plant; or

- (iii) been required to find alternative accommodation as a result of their employment or contract being terminated at the Plant in circumstances where:
 - the cost of that alternative accommodation is higher than they were required to pay while employed at or contracted to the Plant (taking into account housing allowances); and
 - they are not in receipt of, or eligible for housing assistance from either Homeswest or the company; and
- (c) the assistance sought is in accordance with an agreed Location, Training and Employment Plan (the plan); and
- (d) the employee intends to remain domiciled in the Town of Port Hedland and seek work within the Town of Port Hedland area, or the Pilbara Region.

13. To be eligible each worker must be registered on the program by 30 September 2005. A worker whose employment has not been terminated by that date will be placed on an Eligibility Quarantine list to ensure access to the program. Access to this option will be determined at the discretion of the Worker Support Program Advisory Committee (the committee) established by the Department of Education and Training (the Department).

14. Each worker will be able to access the program and receive services for a period of 12 months from the date of their registration on the program. However, if training and reskilling programs had commenced but were incomplete at the end of 12 months, their costs will still be met.

15. Each eligible worker whose employment is affected is invited to meet with a case manager to develop an agreed plan. The plan may contain any combination of assistance measures, but only those specified in the guidelines.

16. If an application for assistance is rejected, workers will be entitled to have the decision reviewed by the committee.

17. Under the Program, the payments are made by the Department. The company is not required to make any payments to the Department to offset the cost of the program.

18. Each eligible worker may be provided with assistance up to the maximum amount of \$10,000 composed of any combination of assistance payments.

19. The Guidelines explain the types of assistance available under the program. These are:

- post redundancy training assistance;
- vocational training support; and
- mortgage and rent support.

20. The cost of articles of protective clothing, work clothing, training equipment or work equipment (the provision of which is not an industrial or statutory requirement for a training provider or a new employer) may also be covered by the program subject to negotiation with the case manager.

21. The types of assistance available under the program are described below.

Post redundancy training assistance

22. A plan may include assistance of \$100 per day for a short training course designed to provide eligible workers with skills or knowledge that may enable them to obtain other employment in Port Hedland or the Pilbara region. The maximum amount that may be claimed under this assistance is \$500.

23. The assistance payments are made directly to the eligible worker. The training service provider maintains an attendance register and sends a tax invoice to the Department listing the extent of each eligible worker's attendance. The Department pays the eligible worker \$100 for each day of attendance at the course.

24. The assistance payment is in the nature of a participation allowance and is provided as an incentive to attend the course.

Vocational training support

25. A plan may include support for an eligible worker to undertake vocational training which will assist in securing future employment in the Town of Port Hedland or the Pilbara region.

26. Training can be undertaken for vocational purposes such as:

- to improve literacy and numeracy skills;
- to gain a skill or qualification to meet a demand by another employer in the immediate locality; and
- to gain an offer of employment (in writing) by an employer on the condition that training is successfully completed.

27. Training can be undertaken via accredited courses or customised training. The eligible worker and the case manager decide on a training program and the case manager may call for quotes from the training service providers.

28. The training service provider would provide the training and then invoice the Department in the name of the eligible worker. The payments are made direct to the training service provider. However, in some cases, the eligible worker may pay the training provider directly and claim reimbursement from the case manager on production of a receipt.

29. Vocational training support will be available for the costs of:

- a training needs assessment;
- training courses, including fees, books equipment and other requirements;
- return travel between an eligible worker's home address and the training site. An eligible worker whose private vehicle is used is required to keep a log book and is paid on a cents per kilometre basis at the rates published by the Tax Office. The costs incurred for other modes of transport may be covered with the prior approval of the case manager on a reimbursement basis on presentation of receipts; and
- accommodation expenses, where training is undertaken outside the Town of Port Hedland area (up to a maximum of \$150 per night). These costs are reimbursed on presentation of receipts to the case manager.

30. Some expenses (for example, travel and accommodation) may be paid in advance to the relevant training provider. Other approved expenses will be reimbursed to the eligible worker on presentation of receipts. In special circumstances, the case manager may approve some payments to eligible workers in advance.

31. Prior to 1 July 2005, four payments were made to workers as a reimbursement of expenditure they incurred for training.

Mortgage and rent support

32. Payments under the program may be made to an eligible worker to provide for mortgage and rent support. Eligibility for this support will be dependent on the eligible worker and/or their spouse not being in receipt of, or eligible for, other housing assistance. In addition, they will only be eligible for mortgage or rent support where their alternative employment or contracts are at a lower rate than was the case with the Plant.

33. Up to three months of mortgage or rent support may be provided per person comprising:

- up to \$250 per week for the first month;
- up to \$200 per week for the second month; and
- up to \$150 per week for the third and final month.

34. Payments will be made directly to the landlord or real estate agency on provision of rental invoices, or to the lending institution in the case of mortgage payments, on proof of existing mortgage payments. In some cases, the eligible worker may pay the rent or mortgage directly and claim reimbursement from the case manager on presentation of a receipt.

Payments to third parties

35. Payments may be made under the program to third party providers of benefits to eligible workers for vocational training support.

36. Payments may also be made under the program to third parties on behalf of eligible workers in satisfaction of an eligible worker's obligation to make mortgage or rent payments.

37. This Ruling deals with the taxation treatment for eligible workers who may be deemed to have received such third party payments under the program. This Ruling does not consider the taxation treatment for direct recipients (third parties) of such payments under the program.

Ruling**Post redundancy training assistance*****Eligible termination payment and employment termination payment***

38. A payment received by an eligible worker as post redundancy training assistance is not an eligible termination payment (ETP) under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

39. A payment received by an eligible worker as post redundancy training assistance is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

40. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for post redundancy training assistance.

41. The capital proceeds from the event is the amount of the assistance received (subsection 116-20(1)). The eligible worker will make a capital gain if the capital proceeds are more than the cost base of the entitlement to receive the assistance, and a capital loss if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

42. The cost base of the entitlement is calculated under Divisions 110 and 112. Although the eligible worker did not incur expenditure to acquire the entitlement to assistance, there is no market value substitution for the first element of the cost base under subsection 112-20(1).

43. The capital gain is not a discount capital gain where the eligible worker received the assistance within 12 months of their plan for assistance being approved (subsection 115-25(1)).

Vocational training support paid directly to the eligible worker

Eligible termination payment and employment termination payment

44. A payment received by an eligible worker as vocational training support is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

45. A payment received by an eligible worker as vocational training support is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

46. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for vocational training support.

47. However, where the payment is received on or after 1 July 2005, any capital gain or loss made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

48. This exemption does not apply where vocational training support was paid prior to 1 July 2005. The eligible worker will make a capital gain from the CGT event C2 if the capital proceeds exceed the cost base of the entitlement and a capital loss if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

49. The capital proceeds from the CGT event C2 is the amount of vocational training support received by the eligible worker (subsection 116-20(1)).

50. The expenditure for vocational training support is included in the first element of the cost base of the entitlement to receive the support under subsection 110-25(2).

Mortgage and Rent Support paid directly to the eligible worker

Eligible termination payment and employment termination payment

51. A payment received by an eligible worker as mortgage or rent support is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

52. The amounts paid under the program for mortgage and rent support are income according to ordinary concepts. The receipt is assessable income under section 6-5.

Capital gains tax

53. CGT event C2 under section 104-25 happens when the entitlement to receive mortgage or rent support is satisfied. However, as an amount paid for mortgage or rent support is included in the eligible worker's assessable income under section 6-5:

- any capital gain made as a result of receiving the payment is reduced to nil under section 118-20; and
- there are no CGT consequences for the cost base or reduced cost base of the house to which the reimbursement of a mortgage payment relates (subsection 110-40(3), 110-45(3) or 110-55(6)).

Payments to third parties***Eligible termination payment and employment termination payment***

54. A payment made to a third party under the program (which includes vocational training support and mortgage and rent payments) is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Fringe benefits tax

55. Payments made to third parties under the program (which includes vocational training support and mortgage and rent payments) and the provision of benefits by third party providers will not result in an eligible worker having a reportable fringe benefit amount for the purposes of Part XIB of the FBTA.

Ordinary income***Vocational training support***

56. When a payment is made to a third party supplier on behalf of an eligible worker for the provision of vocational training support, the payment is not income of the eligible worker according to ordinary concepts and is not included in the eligible worker's assessable income under section 6-5.

Mortgage and rent support

57. A payment made to a third party on behalf of an eligible worker for mortgage or rent payments is income of the eligible worker according to ordinary concepts, and is included in the eligible worker's assessable income under section 6-5.

Capital gains tax

58. The CGT consequences for the eligible worker are the same, regardless of whether the assistance under the program is provided to the eligible worker directly or to a third party for their benefit.

Commissioner of Taxation

2 December 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Background

59. In arriving at the decisions in this Ruling the Commissioner has considered whether the payments made to eligible workers under the program are:

- ETP or employment termination payment;
- assessable as ordinary income;
- subject to the capital gains tax provisions (CGT);
- reportable fringe benefit amounts.

Eligible termination payment and employment termination payment

60. Prior to 1 July 2007, payments made in consequence of termination were a particular kind of ETP unless there was a specific taxing provision, such as for unused leave, applied to the payment.

61. At paragraph 5 of Taxation Ruling TR 2003/13 the Commissioner took the following view in relation to whether a payment was made in consequence of termination and was therefore an ETP:

The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. Whilst there are divergent views as to the correct interpretation of the phrase, the Commissioner considers that a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer.

62. This is the initial test to be applied to any particular facts. Would the payment have been made but for the termination of employment?

63. However, there remains a question as to the degree of connection between the termination and the payment in determining whether a payment is made 'in consequence' of termination, as stated at paragraph 6 of TR 2003/13:

The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

64. While the connection need not be dominant it can still be too weak for the payment to qualify as an ETP. As stated at paragraph 6 of TR 2003/13, a determination as to the degree of connection between a payment and a termination is a question of fact in each case.

65. The Commissioner goes on to state at paragraph 7 of TR 2003/13 that a payment made a long time after a termination may be 'too remote' to be considered to be made in consequence of termination. Another circumstance where a payment would not be in consequence of termination is where there is an 'intervening event', such as the obtaining of a right to commute a pension after the termination of employment.

66. While TR 2003/13 applies to ETPs it is substantially about the concept of 'in consequence of termination'. This terminology has carried over into Division 82 which deals with employment termination payments.

67. The payments made to the eligible workers would not have been made but for the termination. However, each payment is primarily contingent on satisfying certain conditions. Training assistance and training support for example, is essentially dependent on the eligible worker seeking to be retrained. This is the substantial reason for the payment and the termination is too weak a cause for the payment to be considered to be made in consequence of termination.

68. All of the payments require undertaking something, such as finding alternative accommodation or engaging in a new employment, for the payment to be triggered. It is not until after the termination that this occurs and the various decisions involved, to relocate, to be retrained, or to find suitable alternative accommodation, are effectively intervening events between the termination and the relevant payments, that makes the termination too remote from the payment for the payment to be in consequence of the termination.

69. In addition to these requirements, each type of payment has additional requirements to be met.

70. For example, before becoming eligible for the post redundancy training assistance and vocational training support payments, the eligible worker is required to undertake retraining to acquire skills or knowledge in a new way of earning their livelihood and to enable them to obtain employment in the town of Port Hedland or the Pilbara region.

71. Similarly, the mortgage and rent support payments are provided where the eligible worker has had to find alternative accommodation and is undergoing financial hardship in meeting mortgage or rent payments. Eligibility is dependent on the eligible worker and or their spouse not being in receipt of, or eligible for, other housing assistance.

72. Though the assistance payments have been made after the termination of a contract or employment from the Plant, the payments are made in respect of circumstances which result from the eligible worker exercising their eligibility rights under the program.

73. It is not until after the termination that this occurs and the various decisions involved, to acquire skills and be retrained, are effectively intervening events between the termination and the relevant payments that make the termination too remote from the payment for the payment to be in consequence of the termination.

74. Therefore the payments are not ETPs as defined in paragraph (a) of the definition of an ETP under subsection 27A(1) of the ITAA 1936, nor are they employment termination payments under Division 82 of the ITAA 1997.

Post redundancy training assistance

Ordinary income

75. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). The legislation does not provide specific guidance on the meaning of ordinary income. However, a substantial body of case law exists which identifies likely characteristics.

76. Whether or not a particular receipt is ordinary income, depends on its character in the hands of the recipient (refer *Scott v. Federal Commissioner of Taxation*;¹ *Hayes v. Federal Commissioner of Taxation*;² *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation*)³.

77. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,⁴ the Full High Court stated:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

78. Whilst it is accepted that in each instance the recipients are former workers of a particular entity, the payments received under the program are not considered to be a product of employment, services or business. Although the eligible workers receive the allowance as a consequence of attending the training course they owe no other obligation to the provider (the Western Australian Government), nor are they required to perform any service in order to receive the payments.

¹ (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293.

² (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73.

³ (1977) 7 ATR 519 at 539; 34 FLR 375 at 402.0

⁴ (1990) 64 ALJR 392; (1990) 93 ALR 193; 90 ATC 4413; (1990) 21 ATR 1; (1990) 170 CLR 124.

79. Therefore, it is also appropriate to consider the following points made in various High Court cases in relation to the types of payment that can be characterised as voluntary payments.

*Federal Commissioner of Taxation v. Dixon*⁵

80. In this case the court considered the form of the receipt, that is, whether it is received as a lump sum or periodically, to be a relevant factor for consideration. The court found that the fact that the patriotic top-up payments were regular and periodic was important, though not decisive, in concluding that those payments were assessable income. An important factor in determining that the receipts were ordinary income was that the taxpayer relied to some extent on the amount he received from his previous employer and that he had confidence that the payments would continue on a periodic basis to supplement his income as a soldier. The court also held that the payments were made in substitution for the salary and wages the taxpayer would have earned had he not enlisted. The payment accordingly acquired the characteristics of the payment for which it was substituted.

*Scott v. Federal Commissioner of Taxation*⁶

81. In this case, the court said that while the motives of the donor do not determine the answer, they are a relevant circumstance for consideration. The court held that the payment was given to the taxpayer by the donor as a gift and was not assessable income of the taxpayer.

*Hayes v. Federal Commissioner of Taxation*⁷

82. In this case, the court held that shares given to an accountant by a former employer were not assessable as income because 'it was impossible to point to any employment or personal exertion of which the receipt of the shares was in any real sense an incident, or which can fairly be said to have produced the receipt'.

83. Where post-redundancy training assistance is received by an eligible worker under the Program, the concepts of ordinary income developed by the courts over time can be applied:

- post-redundancy training assistance is paid as an incentive to the eligible worker to attend the training course and no other obligation is owed by the eligible worker to the Western Australian Government;
- the payments are not made as any form of substitution for what would be income of the eligible worker;

⁵ (1952) 86 CLR 540; (1952) 10 ATD 82.

⁶ (1966) 117 CLR 514; (1966) 14 ATD 286.

⁷ (1956) 96 CLR 47; (1956) 11 ATD 68.

- payments are made to encourage the eligible worker to develop skills and knowledge which will assist them in gaining new employment or contracts and are not paid on a periodic or recurring basis; and
- the assistance received is not paid in relation to any employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

84. Therefore, the Commissioner considers that any post redundancy training assistance payment received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

85. An eligible worker's entitlement to receive post redundancy training assistance is a CGT asset under subsection 108-5(1). This entitlement is acquired when the plan for assistance under the program is approved.

86. When the assistance is paid to the eligible worker, CGT event C2 under section 104-25 happens. At that time, the eligible worker's entitlement to receive the assistance is satisfied.

87. A capital gain is made if the capital proceeds from the ending of the entitlement exceed the cost base of the entitlement, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

88. The capital proceeds from the CGT event C2 is the amount of post redundancy training assistance received by the eligible worker.

89. There is no market value substitution for the first element of the cost base under subsection 112-20(1) because the entitlement was created in the eligible worker by the Western Australian Government. Therefore, the eligible worker acquired the entitlement as a result of CGT event D1 happening, and the exclusion in subparagraph 112-20(1)(a)(i) applies. The second element of the cost base includes any costs of applying for the assistance (subsection 110-25(3)).

90. A capital gain cannot be reduced by the general CGT discount where the eligible worker did not acquire the entitlement at least 12 months before the CGT event C2 happened (section 115-25).

91. The exemption in paragraph 118-37(2)(a) does not apply because the assistance is paid as an incentive to attend the course, and not as a reimbursement or payment of the eligible worker's expenses.

Vocational training support paid directly to the eligible worker

Ordinary income

92. Applying the characteristics of ordinary income, discussed in paragraphs 75 to 84 of this Ruling to vocational training support received by an eligible worker:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- payments are made to reimburse or compensate the eligible worker for approved (capital) training expenses they incur and are not normally made on a periodic or recurring basis; and
- the assistance received is not paid in relation to any employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

93. Therefore, the Commissioner considers that any vocational training support received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

94. An eligible worker's entitlement to receive vocational training support is a CGT asset under subsection 108-5(1). The entitlement is acquired when the plan for assistance under the program is approved.

95. When the vocational training support is paid to the eligible worker as a reimbursement or advance payment of expenses, CGT event C2 under section 104-25 happens. At that time, the eligible worker's entitlement to receive the support is satisfied.

96. Where vocational training support is paid on or after 1 July 2005, any capital gain or loss resulting from the CGT event is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. This program is such a scheme.

97. As the exemption under paragraph 118-37(2)(a) applies to assessments for the 2005-06 and later income years, it does not apply where vocational training support was paid prior to 1 July 2005.

Mortgage and rent support paid directly to the eligible worker***Ordinary income***

98. Applying the characteristics of ordinary income, discussed in paragraphs 75 to 84 of this Ruling, to payments received by an eligible worker for mortgage or rent assistance.

- the payments are designed to provide financial support in the form of periodical, regular and recurrent payments. The payments provide financial support for regular living expenses and may be paid to an eligible worker on a monthly basis for up to 3 months or longer in certain circumstances;
- the payments supplement the income of the eligible worker in that they ensure that mortgage or rent expenses are met whilst the eligible worker meets the qualifying conditions and the eligible worker is liable for those payments. In addition, they will only be eligible for mortgage or rent support where their alternative employment or contracts are at a lower rate than was the case with the Plant.
- it is considered that an eligible worker would rely on these payments in meeting their regular household expenditure for as long as they are eligible to receive them.

99. Therefore, the Commissioner considers that the payments received by an eligible worker for mortgage or rent assistance possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

100. The eligible worker's entitlement to receive mortgage or rent support is a CGT asset under subsection 108-5(1). This entitlement is acquired when the plan for assistance under the program is approved.

101. When that entitlement is satisfied by receipt of the support, CGT event C2 happens under section 104-25.

102. However, any gain that arises from the CGT event is reduced to nil under section 118-20 because the amount is included in the eligible worker's assessable income under section 6-5.

Mortgage payments – cost base and reduced cost base of the house

103. As a payment for mortgage support is included in the eligible worker's assessable income, the payment has no consequences for the CGT cost base or reduced cost base of the house to which the mortgage relates.

104. Although expenditure that is recouped is excluded from the cost base of a CGT asset under subsection 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), an exception applies where the recoupment is included in assessable income.

Payments to third parties

Fringe benefits tax

105. The definition of 'benefit' in subsection 136(1) of the FBTA includes any right, privilege, service or facility. Therefore, payments made to third party providers of benefits to eligible workers under the program (which includes vocational training support), payments made to third parties on behalf of eligible workers (mortgage and rent payments) and the provision of such benefits by the third party providers comes within the definition of a benefit for the purpose of the FBTA.

106. The definition of a fringe benefit is also contained in subsection 136(1) of the FBTA and requires, amongst other things, that in order for a benefit to be a fringe benefit, the benefit is provided in respect of the employment of the employee (the employment connection test).

107. For payments made to third parties under the program and the provision of benefits by third party providers, to come within the definition of a fringe benefit, the primary criterion that must be satisfied is the employment connection test.

108. The term 'in respect of employment' has been considered by the courts on numerous occasions. In *J and G Knowles and Associates Pty Ltd v. Federal Commissioner of Taxation*⁸ (Knowles) the full Federal Court examined the definition of fringe benefit and noted that:

...Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment...

109. The following are considered to be material reasons that explain the benefits provided to eligible workers under the program, namely:

- they are a result of personal (that is, non-employment) contractual relationships between the Western Australian Government and the eligible workers;
- they do not have a connection with any previous employment, but rather are provided in respect of their circumstances following the loss of employment; and
- they are made to assist eligible workers obtain other employment and remain in the town of Port Hedland area or the Pilbara region.

⁸ [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22.

110. Therefore, the Commissioner considers that the benefits provided to an eligible worker under the program do not have a sufficient or material connection with any employment of the eligible worker to fall within the definition of a fringe benefit for the purposes of the FBTA.

111. Consequently, an eligible worker will not have a reportable fringe benefit amount in relation to such benefits provided under the program for the purposes of Part XIB of the FBTA.

Ordinary income

Vocational training support

112. Applying the characteristics of ordinary income, discussed in paragraphs 75 to 84 of this Ruling, to payments to a third party supplier for the provision of vocational training support to an eligible worker under the Program:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- the payments are not made on a periodic or recurring basis; and
- the payments made to a third party supplier by the Western Australian Government are not connected with any employment relationship or the provision of services by the eligible worker.

113. Therefore, the Commissioner considers that any payments to a third party supplier for the provision of vocational training support to an eligible worker under the Program do not possess the characteristics of ordinary income and are not assessable to the eligible worker under section 6-5.

Mortgage and rent support

114. Where a payment is made to a third party on behalf of an eligible worker, the income tax provisions may apply as if the eligible worker received the amount of the payment.

115. Subsection 6-5(4) provides that in working out whether a taxpayer has derived an amount of ordinary income and when they derived it, the taxpayer is taken to have received the amount as soon as it is dealt with on their behalf or as directed by them.

116. Applying the characteristics of ordinary income discussed in paragraphs 75 to 84 of this Ruling to payments made on behalf of an eligible worker to a third party in satisfaction of an eligible worker's obligation to make mortgage or rent payments to the third party:

- the payments are designed to provide financial support in the form of periodical, regular and recurrent payments. The payments provide financial support for regular living expenses and may be paid on behalf of the eligible worker on a monthly basis for 3 months or longer in certain circumstances;
- the payments supplement the income of the eligible worker in that they ensure that mortgage or rent expenses are met whilst the eligible worker meets the qualifying conditions and the eligible worker is liable for those payments. In addition, they will only be eligible for mortgage or rent support where their alternative employment or contracts are at a lower rate than was the case with the Plant; and
- it is considered that an eligible worker would rely on these payments in meeting their regular household expenditure for as long as they are eligible to have them paid.

117. Therefore, the Commissioner considers that payments made to a third party on behalf of an eligible worker for mortgage or rent assistance possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

118. When a payment is made to a third party for the benefit of the eligible worker, the CGT provisions apply as if the eligible worker has received the amount (subsection 103-10(1)). Therefore, regardless of whether the assistance under the program is provided to the eligible worker directly or to a third party, the CGT consequences for the eligible worker are the same. The CGT consequences with respect to vocational training support and mortgage and rent support are explained in paragraphs 94 to 97 and 100 to 104 of this Ruling respectively.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/13; TR 2006/10

Subject references:

- bona fide redundancy payments
- capital gains tax
- eligible termination payments
- employment relationship
- employment termination payment
- fringe benefits tax
- genuine redundancy payment
- ordinary income

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- ITAA 1997
- ITAA 1997 6-5
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- Federal Commissioner of Taxation v. Dixon (1952) 86 CLR 540; (1952) 10 ATD 82
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 64 ALJR 392; (1990) 93 ALR 193; 90 ATC 4413; (1990) 21 ATR 1; (1990) 170 CLR 124
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- Workers Support Program Guidelines

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