TAXATION RULING NO. IT 249

EX GRATIA PAYMENTS RECEIVED BY FORMER EMPLOYEES

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1102046	EX GRATIA PAYMENT LUMP SUM PAYMENT RETIRED EMPLOYEE BANK EMPLOYEE FCT V HARRIS 80 ATC 4238	25(1)

FACTS Following the judgment of the Federal Court of Australia in FC of T v Harris reported at 80 ATC 4238; 10 ATR 869 the Commissioner sought the special leave of the High Court of Australia to appeal to that Court. The High Court, on 6 November 1980, refused the Commissioner's application.

2. To briefly recapitulate, the question at issue was whether an amount of $450, being an ex gratia payment made to the taxpayer, a retired bank officer, by his former employer, the Australian and New Zealand Banking Group Ltd, on 21 April 1976 was assessable income in his hands under section 25(1) of the Income Tax Assessment Act. The amount was paid by the Bank to the taxpayer and other eligible members of the Bank's (independent) superannuation scheme, in recognition of "the problems caused by continuing high rates of inflation". No promise or indication of further payment was given to such recipients though, in fact, similar payments have been made in subsequent years.

3. The Federal Court, which by majority (Bowen C.J., Fisher J. and Deane J. dissenting) dismissed the Commissioner's appeal from the Supreme Court of Victoria, considered a number of factors including the fact that the payment was unexpected and unsolicited, the relationship between the receipt and the former employment, the fact that the payment was one in a series of annual payments, and made to supplement the pension. Bowen C.J. and Fisher J. considered that the payment was not a product of the employment, that it was not periodical and was not a substitution for, or addition to, salary (cf. FC of T v Dixon (1952) 86 CLR 540).

4. The High Court, in refusing the Commissioner's application for special leave to appeal considered that the Federal Court had not misconstrued the principles emerging from Dixon's case and McCathie v FC of T (1944) 69 CLR 1 and that the critical factor was one of degree in applying the principles to

this case.

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5. In the light of the decision of the High Court it is clear that it must now be accepted that ex gratia payments received in circumstances similar to those existing in this case cannot be characterised as income under section 25(1). The payment in this case was the first of a series of similar such payments received by the taxpayer and there is dicta at least to suggest that subsequent payments possibly may be characterised as income. At the same time, the judge at first instance and the members of the Court who, on appeal, found for the taxpayer noted that the payment made in 1976 was the first of four annual payments that had been received by the taxpayer. Because of this it has been decided that the decision must be applied to both the initial and subsequent payments.

6. Accordingly, such payments should not be treated as income. It is to be noted, however, that this decision is to be applied only in circumstances clearly analogous to those in this case. Where, for example, former employers make the ex-gratia payments on a regular basis (in some cases they are made monthly together with the usual pension payment) the payment would lack the necessary similarity and should be brought to account as income. Clearly, in such cases, the payments exhibit the characteristics of income.

COMMISSIONER OF TAXATION