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Public advice and guidance compendium – Taxation Determination TD 2016/18

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2016/D1 *Income tax: is a redemption payment received by a worker under the Return to Work Act 2014 (SA) assessable income of the worker?*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised[*]	ATO Response/Action taken[†]
1. Application and date of effect		
1.1	The draft Determination deals exclusively with the <i>Return to Work Act 2014 (RWA)</i> . Is the final Determination intended to apply to payments which may still be made under section 42 of the <i>Workers Rehabilitation and Compensation Act 1986 (SA)</i> in respect of negotiations commenced in accordance with that section prior to 1 July 2015?	The Determination does not apply to payments under the former <i>Workers Rehabilitation and Compensation Act 1986 (SA)</i> ; see footnote 2.
1.2	The proposed date of effect will make the final Determination retrospective in its effect; see paragraph 4. While the ATO engaged interested parties over a lengthy period and flagged a warning about the possible operative date, the ATO cannot be satisfied that all interested parties were aware of the possible operative date. This is or could be seen as unfair.	The Determination does not apply to payments under the former <i>Workers Rehabilitation and Compensation Act 1986 (SA)</i>; see response to Issue No 1.1. Further, the Determination confirms of the ATO's preliminary view as expressed in TD 2016/D1, which was published on 10 August 2016. Accordingly, the Determination is not considered to have retrospective effect. A change in the date of effect to the issue date of TD 2016/18 would only benefit those taxpayers who were aware of the ATO's view, or had a reasonable opportunity to be aware of that view, at the time they decided to enter into an agreement to receive a redemption payment.

^{*} Paragraph references in this column of the Compendium are references to draft Taxation Determination TD 2016/D1.

[†] Paragraph and footnote references in this column of the Compendium are references to Taxation Determination TD 2016/18.

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1.3	The ATO should issue an explanation of the reasons behind the change in its position regarding the assessability of these payments in order to reassure taxpayers and their advisers that this different tax treatment is fair.	The ATO's previous position related to redemption payments under the former <i>Workers Rehabilitation and Compensation Act 1986</i> (SA). The Determination does not apply to payments under that Act; see response to Issue No 1.1. There are differences between the former Act and the RWA which support a change in position, including the inclusion of specific provisions dealing with a loss of future earning capacity; see paragraph 21. However, on balance, it was considered that there were sufficient similarities between the former Act and the RWA to make it appropriate to apply the position in TD 2016/D1 on a prospective basis only.
1.4	Paragraph 4 of the draft TD should be expanded to clarify that where the original agreement was entered into prior to 10 August 2016 and an increasing adjustment occurs as provided for by sections 45 to 48 of the RWA, the increase will be treated in the same way as the original agreed amount. Where the taxpayer had treated the original lump sum as a capital amount in calculating their tax liabilities, any upward variation should be treated the same.	The Determination concerns the income tax treatment of a redemption payment made under subsection 53(1) of the RWA. The quantum of this payment is fixed by agreement and is non reviewable. In contrast, sections 45 to 48 of the RWA concern the adjustment of weekly payments. The Determination would not apply to a redemption payment which was validly increased after the date of issue of TD 2016/D1 if the increase was pursuant to an agreement entered into before that time.
2. Characterisation as ordinary income		
2.1	It would be useful if the ATO could address the timing of assessability, for example, whether there are potential implications from <i>Arthur Murray (NSW) Pty Ltd v. Federal Commissioner of Taxation</i> (1965) 114 CLR 314 in the context of these payments.	The amount is included in the workers' assessable income in the income year in which it is received; see paragraphs 1 and 14.
2.2	Paragraph 23 implies, but does not clearly state, that compensation for future loss of earning capacity by way of lump sum will not be treated as assessable income; see paragraph 23.	A statement to this effect has been included in the Determination; see paragraph 21.
2.3	Legislative references appearing in the fourth dot point in	The dot-point has been revised; see paragraph 17.

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	paragraph 19 do not support the overall observation contained within that dot-point.	
2.4	There is no authority for the proposition in paragraph 35 that, for income tax purposes, a lump sum can be dissected into taxable and non-taxable components. While the Revenue would prefer that a section 54 redemption amount be dissected into taxable and non-taxable components: (a) the case law authorities do not support the dissection; (b) the possible amount of assessable income at issue, even if dissection was possible, is the present value amount of a maximum of 13 weeks of payments.	The Determination does not apply to payments under section 54 of the RWA. Consideration will be given to whether it is necessary to provide further guidance on the income tax treatment of payments which, in part, redeem a liability to make weekly payments under section 40 of that Act.
2.5	Is the ATO correct in asserting that apportionment will always be available for an undissected lump sum? See paragraph 35.	It is considered subsection 53(1) of the RWA requires identification of the redemption amount, since that amount must be fixed by agreement; see paragraph 32. The Determination does not apply to amounts payable under section 54 of the RWA; see response to Issue No 2.4.
2.6	Please include a practical example after paragraph 35. The example should illustrate an appropriate dissection of a capital payment into its redemption payment and non-redemption payment parts for the purposes of the Determination.	The Determination does not apply to payments under section 54 of the RWA; see response to Issue No 2.4.
3. Other issues		
3.1	Is the ATO aware of any common scenarios in which a redemption payment would constitute an employment termination payment?	The ATO is not aware of any common circumstances in which a redemption payment would be received in consequence of the termination of a worker's employment. Whether a payment meets this requirement is a question of fact for each case. However, further consideration will be given to whether additional guidance of a more general nature is required.

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3.2	Are there any pay-as-you-go withholding or superannuation guarantee charge (SGC) obligations to be met in relation to these payments?	Redemption payments covered by the Determination are subject to withholding; see section 12-120 of Schedule 1 to the <i>Taxation Administration Act 1953</i>. Redemption payments covered by the Determination are not 'salary or wages' for SGC purposes and as such are not subject to SGC.