



CR 2002/11 - Income tax: Approved Early Retirement Scheme - Port Waratah Coal Services Limited

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Class Ruling

Income tax: Approved Early Retirement Scheme – Port Waratah Coal Services Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.
2. Broadly, this Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for persons receiving payments under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met.

Tax law(s)

3. The tax law dealt with in this Ruling is section 27E of the *Income Tax Assessment Act 1936* (‘ITAA 1936’).

Class of persons

4. The class of persons to whom this Ruling applies is all maintenance employees at the Carrington Coal Terminal who are aged 55 years and over who receive a payment under the arrangement described below in paragraphs 12 to 25.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 12 to 25 is carried out in accordance with the details of the arrangement provided in this Ruling.
7. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
- a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - b) this Ruling may be withdrawn or modified.
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9. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Date of effect

10. This Ruling applies from 26 February 2002.

Withdrawal

11. This Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

The Scheme

12. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from Port Waratah Coal Services Limited of 8 February 2001;
- record of telephone conversation with a representative of Port Waratah Coal Services Limited on 18 February 2002;
- record of telephone conversation with a representative of Port Waratah Coal Services Limited on 21 February 2002;
- record of telephone conversation with a representative of Port Waratah Coal Services Limited on 26 February 2002.

13. Port Waratah Coal Services Limited is seeking approval for an early retirement scheme.

14. The purpose of the scheme is to replace three employees over age 55 with younger employees.

15. The early retirement scheme payment will comprise the following:

- 5 weeks in lieu of notice;
- 6 weeks ex-gratia payment;
- 2 weeks per year of service, pro-rated for incomplete years.

16. The rate of pay for the above will be based on the greater of:

- gross average wages earnings of the employee over the previous 12 months excluding non-rostered overtime;
- or
- gross average earnings of the employee over the previous 36 months excluding non-rostered overtime.

17. The employees will also receive the following payments but they do not form part of the approved early retirement scheme payment:

- unused annual leave;

- unused long service leave. For employees with less than 5 years service, long service leave will be paid on a pro-rata basis;
- accrued sick leave.

18. The scheme will operate from 26 February 2002 to 30 June 2002.

Payments made under the Scheme

19. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the following conditions must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

20. The payment must be an eligible termination payment (ETP) made in relation to the employee in consequence of his or her employment being terminated under the approved early retirement scheme.

21. The payment must not be made from an eligible superannuation fund.

22. The payment must not be made in lieu of superannuation benefits.

23. The employee terminated his or her employment before the earlier of:

- age 65; or
- the date on which his or her employment would have necessarily terminated under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service.

24. Where the employee and the employer are not dealing with each other 'at arm's length' (for example, because they are related in some way), the payment does not exceed what would have been paid to the employee had they been dealing at arm's length.

25. At the termination time, there is no agreement in force between the employee and the employer or the employer and another person, to re-employ the employee after the date of termination.

Ruling

26. The early retirement scheme offered by Port Waratah Coal Services Limited is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

27. Accordingly, so much of the eligible termination payment (ETP) as exceeds the amount of an ETP that could reasonably be expected to have been made in relation to the taxpayer if the termination of employment had occurred at the termination time otherwise than in accordance with the approved early retirement scheme, is an approved early retirement scheme payment in relation to the taxpayer.

Explanations

28. Where a scheme satisfies the requirements of section 27E of the ITAA 1936 that scheme will be an 'approved early retirement scheme.'

29. The Commissioner of Taxation (the Commissioner) has issued Taxation Ruling TR 94/12 titled: *'Income tax: approved early retirement scheme and bona fide redundancy payments'* which sets out guidelines on the application of section 27E.

30. Paragraph 14 of TR 94/12 states that:

'Three conditions need to be satisfied for a scheme to qualify as an approved early retirement scheme. Those conditions are:

- (i) the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
- (ii) the scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind (paragraph 27E(1)(b)); and
- (iii) the scheme must be approved by the Commissioner prior to its implementation (paragraph 27E(1)(c)).'

1. The scheme must be offered to all employees within a class identified by the employer

31. In order to satisfy the first condition, the scheme must be offered to all employees within one of the categories specified in subparagraphs 27E(1)(a)(i) to (v).

32. The class of employees to whom the scheme is proposed to be offered is:

- all maintenance employees at the Carrington Coal Terminal who are aged 55 years and over.

33. This class of employees does not come within any subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraph 27E(1)(a)(v), namely, all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph. In approving this class of employees the Commissioner has considered the nature of the rationalisation or re-organisation of the operations of the employer. It is therefore considered that these employees meet the requirements of an approved class of employees for the purposes of subparagraph 27E(1)(a)(v).

34. It is noted, however, that the Port Waratah Coal Services Limited retains a limited right of veto to be applied to applications by key personnel who cannot be readily be replaced and whose loss would impair the efficiency of the Port Waratah Coal Services Limited business operations. The limitation of the scheme in this way is acceptable to the Commissioner.

2. *The scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind*

35. The proposed scheme must be implemented with a view to rationalise or re-organise the operations of the employer by means of one or more of the objectives set out in subparagraphs 27E(1)(b)(i) to (vi).

36. The purposes of the scheme is described at paragraph 14 of this Ruling. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(ii); accordingly the second condition for approval has been met.

3. *The scheme must be approved by the Commissioner prior to its implementation*

37. The scheme is proposed to operate for a period from 26 February 2002 to 30 June 2002. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

38. However, subsection 27E(2) allows the Commissioner to overlook the failure to comply with any of the three conditions if special circumstances exist in relation to the scheme. Paragraph 30 of TR 94/12 states:

‘Special circumstances include circumstances where: a scheme is implemented before approval has been obtained because, for example, there has been a delay in processing an application made for its approval....’

39. Based on the full circumstances of the application it is considered that this case falls within special circumstances as set out in subsection 27E(2), and the Commissioner will waive compliance with the third requirement of subsection 27E(1).

40. The scheme will be in operation for approximately 4 months which is within the period recommended in TR 94/12.

Other relevant information

41. Under section 27E, so much of the payment received by a taxpayer under the approved early retirement scheme, that exceeds the amount that would ordinarily have been received on voluntary resignation or retirement is an approved early retirement scheme payment.

42. It should be noted that, in order for a payment to qualify as an approved early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 27E(4) and (5) of the Act):

- the payment must be an eligible termination payment (ETP) made in relation to the taxpayer in consequence of the taxpayer’s employment being terminated under an approved early retirement scheme;
- the payment must not be from an eligible superannuation fund;
- the payment must not be made in lieu of superannuation benefits;
- if the taxpayer and the employer are not dealing with each other at arm’s length (for example, because they are related in some way) the payment does not exceed what would have been paid to the taxpayer had they been dealing at arm’s length;
- the date of termination was before age 65 or such earlier date on which the taxpayer’s employment would necessarily have had to terminate under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service, whichever occurs first; and
- there was no agreement at the date of termination between the taxpayer and the employer, or the

employer and another person to re-employ the taxpayer after the date of termination.

43. The term ‘agreement’ is defined in subsection 27A(1) as meaning ‘any agreement, arrangement or understanding whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings.’

44. An approved early retirement scheme payment made on or after 1 July 1994 that falls within the specified limit will be exempt from income tax and called the ‘tax-free amount.’

45. For the year ending 30 June 2002, the tax-free amount is limited to \$5,295 plus \$2,648 for each whole year of completed employment service to which the approved early retirement scheme payment relates. Please note that 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation.

46. The total of the amount received on termination calculated in accordance with paragraph 15 qualifies as an approved early retirement scheme payment.

47. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 45 to determine the ‘tax-free amount’.

48. The tax-free amount will:

- not be an ETP;
- not be able to be rolled-over;
- not include any amount from a superannuation fund or paid in lieu of a superannuation benefit; and
- not count towards the recipient’s Reasonable Benefit Limit.

49. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

50. It should be noted that the amount of an approved early retirement scheme payment that is over the tax-free amount may be subject to the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

Detailed contents list

51. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

6 March 2002

<i>Previous draft:</i>	– ITAA 1936 27E(1)(a)
Not previously released in draft form.	– ITAA 1936 27E(1)(b)
	– ITAA 1936 27E(1)(c)
<i>Related Rulings/Determinations:</i>	– ITAA 1936 27E(1)(a)(i)
CR 2001/1; TR 92/1; TR 97/16;	– ITAA 1936 27E(1)(a)(ii)
TR 94/12; TR 94/12E.	– ITAA 1936 27E(1)(a)(iii)
	– ITAA 1936 27E(1)(a)(iv)
<i>Subject references:</i>	– ITAA 1936 27E(1)(a)(v)
– approved early retirement scheme payments;	– ITAA 1936 27E(1)(b)(i)
– eligible termination payments	– ITAA 1936 27E(1)(b)(ii)
– eligible termination payments components	– ITAA 1936 27E(1)(b)(iii)
	– ITAA 1936 27E(1)(b)(iv)
	– ITAA 1936 27E(1)(b)(v)
	– ITAA 1936 27E(1)(b)(vi)
<i>Legislative references:</i>	– ITAA 1936 27E(2)
– TAA 1953 Part IVAAA	– ITAA 1936 27E(4)
– ITAA 1936 27A(1)	– ITAA 1936 27E(5)
– ITAA 1936 27E	
– ITAA 1936 27E(1)	

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ATO References

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