



CR 2002/82 - Income tax: Approved Early Retirement Scheme - Bendigo Regional Institute of TAFE

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Class Ruling

Income tax: Approved Early Retirement Scheme – Bendigo Regional Institute of TAFE

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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 before relying on this Ruling.

Tax law(s)

3. The tax laws dealt with in this Ruling are sections 27E and 27CB of the *Income Tax Assessment Act 1936* ('ITAA 1936').

Class of persons

4. The class of persons to which this Ruling applies is all staff of the Bendigo Regional Institute of TAFE (BRIT) who are:

- on the payroll as at 27 September 2002 and remain on the payroll thereafter;
- employed on an open-ended continuing basis (that is, not employed for a fixed term or contracted period or on probation pending permanent employment or other trial employment arrangement);

- less than 65 years of age at 27 September 2002;
- not a recipient of weekly non-medical payments under WorkCare/WorkCover as at 27 September 2002;
- not on unpaid leave of any description as at 27 September 2002;
- not on probation pending permanent appointment or other trial arrangement; and
- not an executive;

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 actually carried out is carried out in accordance with the arrangement described below at paragraphs 12 to 25 in this Ruling.
7. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
 - (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 1 October 2002 unless and until it is withdrawn (see paragraph 11 of this Ruling). However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

11. This Ruling is withdrawn and ceases to have effect after 31 December 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 a representative of the Department of Employment, Education and Training;
- an email dated 23 October 2002 from a representative of the Department of Employment, Education and Training.

13. BRIT is seeking approval for an early retirement scheme known as the Bendigo Regional Institute of TAFE (BRIT) Voluntary Departure Package program.

14. BRIT is offering a Voluntary Departure Package (VDP) to facilitate reorganisation of the Institute's operations. The purpose of the program is to replace employees having a particular occupational skill with employees having more relevant skills. This reorganisation

will allow BRIT to offer a more flexible and responsive program and curriculum in line with current student demand.

15. A Voluntary Departure Package will be offered to all staff of BRIT other than executives.

16. BRIT reserves the right to exercise reasonable discretion over which employees are provided with a Voluntary Departure Package (VDP) based on operational requirements and availability of funding. The discretion in relation to the veto will be applied where the skills of employees expressing interest in a VDP cannot be replaced by the reallocation of remaining staff.

17. The following payments are made under the Voluntary Departure Package:

- A flat payment of 4 weeks pay at the employee's substantive rate of ordinary time pay immediately before resignation; plus
- Two weeks pay per year of continuous service to a maximum of 15 years (30 weeks pay); plus
- A lump sum voluntary departure incentive of up to \$10,000.

18. The total of the payments described above must not exceed the gross ordinary time pay to which an employee would have been entitled had the employment continued to age 65 years.

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 conditions set out in paragraphs 20 to 25 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 must terminate 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 Voluntary Departure Package offered by the Bendigo Regional Institute of TAFE is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

27. Accordingly, so much of the 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.

28. In addition, so much of the approved early retirement scheme payment as falls within the threshold calculated in accordance with subsection 27A(19) of the ITAA 1936 is non-assessable and is ignored in working out whether a capital gain has been made via the operation of section 27CB of the ITAA 1936.

Explanations

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

30. 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.

31. 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

32. 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).

33. The class of persons to which this Ruling applies is all staff of the Bendigo Regional Institute of TAFE (BRIT) who are:

- on the payroll as from 27 September 2002 and remain on the payroll thereafter;
- employed on an open-ended continuing basis (that is, not employed for a fixed term or contracted period or on probation pending permanent employment or other trial employment arrangement);
- less than 65 years of age at 27 September 2002;
- not a recipient of weekly non-medical payments under WorkCare/WorkCover as at 27 September 2002;
- not on unpaid leave of any description as at 27 September 2002;
- not on probation pending permanent appointment or other trial arrangement; and
- not an executive

who receive a payment under the arrangement described below in paragraphs 12 to 25.

34. This class does not come within any of the subparagraphs of 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 paragraph 27E(1)(a). 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).

35. It is noted, however, that BRIT retains a limited right of veto to be applied to key personnel who cannot be readily replaced and whose loss would impair the efficiency of BRIT's 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

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

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

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

38. The scheme is to operate from 1 October 2002 to 31 December 2002. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

39. 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....’

40. Based on consideration of the full circumstances surrounding the application, this case falls within the special circumstances set out in subsection 27E(2). The Commissioner will waive compliance with the third requirement of subsection 27E(1).

41. The scheme will be in operation for 3 months which is within the period recommended in TR 94/12.

Other relevant information

42. 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.

43. 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 ITAA 1936):

- the payment must be an 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.

44. 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.'

45. 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'.

46. For the year ending 30 June 2003, the tax-free amount is limited to \$5,623 plus \$2,812 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.

47. The following payment qualifies as an approved early retirement scheme payment:

- the amount received on termination calculated in accordance with paragraph 17.

48. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 46 to determine the 'tax-free amount'.

49. 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.

50. 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.

51. 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

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

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Commissioner of Taxation

20 November 2002

<i>Previous draft:</i>	- ITAA 1936 27E(1)
Not previously released in draft form	- ITAA 1936 27E(1)(a)
	- ITAA 1936 27E(1)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(c)
CR 2001/1; TR 92/1; TR92/20;	- ITAA 1936 27E(1)(a)(i)
TR 97/16; TR 94/12	- ITAA 1936 27E(1)(a)(ii)
	- ITAA 1936 27E(1)(a)(iii)
<i>Subject references:</i>	- ITAA 1936 27E(1)(a)(iv)
- approved early retirement scheme payments	- ITAA 1936 27E(1)(a)(v)
- eligible termination payments	- ITAA 1936 27E(1)(b)(i)
- eligible termination payments components	- ITAA 1936 27E(1)(b)(ii)
	- ITAA 1936 27E(1)(b)(iii)
	- ITAA 1936 27E(1)(b)(iv)
	- ITAA 1936 27E(1)(b)(v)
<i>Legislative references:</i>	- ITAA 1936 27E(1)(b)(vi)
- TAA 1953 Pt IVA	- ITAA 1936 27E(2)
- ITAA 1936 27A(1)	- ITAA 1936 27E(4)
- ITAA 1936 27A(19)	- ITAA 1936 27E(5)
- ITAA 1936 27CB	- Copyright Act 1968
- ITAA 1936 27E	

ATO References

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