CR 2004/111 - Fringe benefits tax: redundancy contributions made by a South Australian employer to the Electrical Industry Severance Scheme

Class Ruling

Fringe benefits tax: redundancy contributions made by a South Australian employer to the Electrical Industry Severance Scheme

Contents Para

Preamble

*The number, subject heading, **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.

Tax law(s)

2. The tax laws dealt with in this Ruling are section 58PA and subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986).

Class of persons

3. The class of persons to which this Ruling applies is all South Australian employers who are bound by the National Electrical, Electronic & Communications Contracting Industry Award 1998 South Australia (federal award) and also have in place a certified enterprise agreement (the relevant enterprise agreement) which contains a severance clause with the same wording as clause 25 of the Electrical Company Pty Ltd Installation and Construction Enterprise Agreement South Australia 2003-2006 (Electrical Company enterprise agreement).

Qualifications

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

5. 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 in paragraphs 10 to 16.

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

- 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
- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 April 2004 to 31 March 2006. Further, the Class Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 March 2006. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specific arrangement during the term of the Ruling, subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of this 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 the description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Class Ruling application from the National Electrical & Communications Association South Australian Chapter dated 27 May 2004;
- Federal award; and
- Electrical Company enterprise agreement.

11. The Electrical Company enterprise agreement is a standard agreement that is currently being used by six of the largest electrical contractors in South Australia. This enterprise agreement is likely to be adopted by other employers in the future. While clauses can potentially change when used by individual employers, it is the wording contained in clause 25 of the Electrical Company enterprise agreement that forms part of the arrangement upon which this Ruling is made.

12. Redundancy is defined in subclause 12.1 of the federal award.

> **12. REDUNDANCY**
>
> **12.1 Definition of redundancy**
>
> Redundancy shall apply where an employer has made a definite decision that the employer no longer wishes the job an employee has been doing done by anyone and this is not due to the normal and customary turnover of labour as recognised by the electrical contracting industry and that decision leads to the termination of employment of the said employee.

13. Subclause 12.3 of the federal award requires an employer to provide a redundant employee with an amount of redundancy pay and details how this amount is to be calculated.

> **12.3 Redundancy pay**
>
> **12.3.1** In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy, shall be entitled to the following amount of redundancy pay in respect of a continuous period of service:

Period of continuous service	Redundancy pay
At completion of one year	4 week's pay
At completion of two years	6 week's pay

At completion of three years	7 week's pay
At completion of four years	8 week's pay

12.3.2 **Week's pay** means the gross weekly ordinary all purpose rate of pay, as defined, at the date of termination.

12.3.3 Provided that an employee shall be entitled to a pro rata payment for any period of continuous service which is less than a full year at any of the year levels referred to above.

12.3.4 Provided that where an employee who is terminated receives a benefit from a severance pay scheme, he or she shall only receive the difference between the redundancy pay specified above and the amount of the severance benefit he or she receives which is attributable to employer contributions. If the severance benefit is greater than the amount under 12.3.1 hereof then he or she shall receive no payment under that subclause.

14. The severance clause of the relevant enterprise agreement also contains obligations for an employer in relation to redundancy pay, including that the redundancy contributions must be made to an approved severance scheme and must be made at the appropriate rate.

15. As mentioned above, this Ruling applies where the relevant enterprise agreement uses the wording of the severance clause in the Electrical Company enterprise agreement. This clause states:

25. Severance

It is agreed that the company will make Severance payments to the Protect fund or an agreed Industry Severance fund for all employees covered by this Agreement in accordance with the timing provisions of the fund.

On Certification	**1st May 2004**	**1st May 2005**
$40.00	$45.00	$50.00

The parties agree that the amounts contained in the above table shall be inclusive of all taxes payable pursuant to legislation and/or ATO rulings.

The parties to this agreement clearly recognise that this clause has no application to apprentices/trainees.

16. The Protect Fund is the common name used to refer to the Electrical Industry Severance Scheme. The remainder of this Ruling will use the official name of the fund, being the Electrical Industry Severance Scheme (EISS). All references to EISS should be read as including both references to the Protect Fund and the Electrical Industry Severance Scheme (as the funds are one and the same).

Ruling

17. A South Australian employer, who is bound by the National Electrical Electronic & Communications Contracting Industry Award 1998 and makes a redundancy contribution to the Electrical Industry Severance Scheme (or to an agreed Industry Severance fund that is an approved worker entitlement fund) pursuant to their obligations under the relevant enterprise agreement will not be providing a fringe benefit under subsection 136(1) of the FBTAA 1986. The payment will constitute an exempt benefit for the purposes of section 58PA of the FBTAA 1986.

18. The redundancy contribution/s made by the employer will only be an exempt benefit up to the amount which the employer is required to make under the relevant enterprise agreement.

Explanation

19. When an employer makes a contribution to an approved worker entitlement fund, that contribution will be an exempt benefit if it meets the requirements in section 58PA of the FBTAA 1986.

20. Section 58PA of the FBTAA 1986 states:

> If:
>
> (a) a person makes a contribution to an approved worker entitlement fund; and
>
> (b) the person is required to make the contribution under an industrial instrument; and
>
> (c) the contribution is either:
>
> (i) required for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or
>
> (ii) for the reasonable administrative costs of the fund;
>
> the contribution is an exempt benefit.

These elements are considered below.

The redundancy contribution must be made to an approved worker entitlement fund

Contributions to EISS

21. Paragraph 58PA(a) of the FBTAA 1986 requires the contribution to be made to an approved worker entitlement fund. Whether the employer makes the redundancy payments to an approved worker entitlement fund is a question of fact.

22. Section 58PB of the FBTAA 1986 deals with the meaning of approved worker entitlement funds. Subsection 58PB(2) of the FBTAA 1986 states:

> A fund is also an ***approved worker entitlement fund*** if:
>
> (a) the fund is prescribed for the purposes of this paragraph; and
>
> (b) a declaration under subsection (3) is not in force in relation to the fund.

23. Under the relevant enterprise agreement the employer is required to make redundancy contributions for workers to EISS or to an agreed Industry Severance fund.

24. EISS has been prescribed as an approved worker entitlement fund for the purposes of paragraph 58PB(2)(a) of the FBTAA 1986 under regulation 6(o) of the Fringe Benefits Tax Regulations 1992. There is no declaration under subsection 58PB(3) of the FBTAA 1986 in force in relation to this fund. Therefore, contributions made to EISS will satisfy paragraph 58PA(a) of the FBTAA 1986.

Contributions to another agreed industry severance fund

25. Similarly contributions to another agreed severance fund will satisfy paragraph 58PA(a) of the FBTAA 1986 if that fund is an approved worker entitlement fund.

The contribution must be required under an industrial instrument

Is the relevant enterprise agreement an industrial instrument?

26. Paragraph 58PA(b) of the FBTAA 1986 requires the contributions to be made under an 'industrial instrument'. An 'industrial instrument' is defined in subsection 136(1) of the FBTAA 1986 as 'a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law'.

27. If an enterprise agreement meets certain criteria required by the *Workplace Relations Act 1996* the Australian Industrial Relations Commission will certify the agreement. Once certified, the enterprise agreement becomes an industrial agreement in force under the Workplace Relations Act, which is a Commonwealth law. As such a certified enterprise agreement is an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

28. As outlined in paragraph 3, the relevant enterprise agreement will be the certified enterprise bargaining agreement an employer has in place which contains a severance clause with the same wording as clause 25 of the Electrical Company enterprise agreement. Therefore the relevant enterprise agreement will be an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

Is the contribution required under an industrial instrument?

29. For the period that the relevant enterprise agreement is in place an employer is required to make a redundancy contribution, equal to the weekly amount prescribed by the severance clause of the relevant enterprise agreement to EISS or other agreed fund.

30. As an employer is required to make redundancy contributions to EISS or other agreed fund under the certified enterprise agreement (industrial instrument) the requirement of paragraph 58PA(b) of the FBTAA 1986 is satisfied.

The contribution must be to ensure that an obligation under an industrial instrument to make payments when an employee ceases employment are met

31. Paragraph 58PA(c) of the FBTAA 1986 requires that the contribution is either for ensuring that an obligation under the industrial instrument for leave or termination payment is met, or for the reasonable administrative expenses of the fund.

32. The severance payments required by the relevant enterprise agreement are made to fulfil an employer's obligation imposed on them by the federal award to make redundancy payments to employees whose employment is terminated. As such the requirement of paragraph 58PA(c) of the FBTAA 1986 is satisfied.

Conclusion

33. The requirements of section 58PA of the FBTAA 1986 are met in relation to an employer's redundancy contributions made to EISS or another agreed approved worker entitlement fund. Therefore, the redundancy contribution/s which the employer is required to make under the relevant enterprise agreement will constitute an exempt benefit.

Detailed contents list

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

Commissioner of Taxation
20 October 2004

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 97/16

Subject references:
- exempt benefits
- fringe benefits tax
- worker entitlement funds

Legislative references:
- Copyright Act 1968
- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 58PB

- FBTAA 1986 58PB(2)
- FBTAA 1986 58PB(2)(a)
- FBTAA 1986 58PB(3)
- FBTAA 1986 136(1)
- Fringe Benefits Tax Regulations 1992 6(a)
- TAA Act 1953 Pt IVAAA
- Workplace Relations Act 1996

ATO references
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