CR 2004/41 - Fringe benefits tax: redundancy contributions made by a South Australian employer to the Building Industry Redundancy Scheme Trust Fund

Class Ruling

Fringe benefits tax: redundancy contributions made by a South Australian employer to the Building Industry Redundancy Scheme Trust Fund

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**, **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 South Australian employers who make redundancy contributions to the Building Industry Redundancy Scheme Trust Fund (BIRST) on behalf of their employee's under the following certified Enterprise Bargaining Agreements (EBA's):

- Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004;
- Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004; and
- Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- Section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986); and
- Subsection 136(1) of the FBTAA 1986.

Class of persons

3. The class of persons to which this Ruling applies is all South Australian employers who employ their employees under one of the following certified Enterprise Bargaining Agreements:

- Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004;
- Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004; and
- Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004.

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 9 to 14.

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:

- there is no material change in the arrangement or in the class of persons involved in the arrangement;
- 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.

Arrangement

9. 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 the description of the arrangement are:

- Class Ruling application by Master Builders Australia Inc dated 9 March 2004;
- Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004 (non-union EBA);
- Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004 (union EBA); and
- Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004. (hourly hire EBA).

10. Employers who have a certified Enterprise Bargaining Agreement (EBA) (listed above in paragraph 9) in place will have an obligation to continue participation with the BIRST fund pursuant to the following clause contained in each of the EBA's:

> The Company is currently a participating employer in the Building Industry Redundancy Scheme Trust Fund (BIRST). All eligible employees will be enrolled in the said Fund and will be entitled to redundancy benefits in accordance with the terms of the said Fund, where such benefits exceed those prescribed by the National Building and Construction Industry Award 2000. Should the BIRST Fund be replaced by a Statutory Fund, then the Company will abide by the provisions of the Statutory Fund from the date of that Fund's commencement.[1]

[1] Clause 3.10.2 of the non-union EBA and the union EBA, clause 3.11.2 of the hourly hire EBA

11. Clause 1.8 of each of the EBA's (listed above in paragraph 9) outlines that each EBA operates in conjunction with the *National Building & Construction Industry Award 2000* (the Award) and will prevail in the event of any inconsistency:

> **1.8 RELATIONSHIP TO PARENT AWARD**
>
> Except as varied by this Agreement the National Building & Construction Industry Award 2000 (hereinafter called 'the Award') will be binding upon the company.
>
> Where there is any inconsistency between this Agreement and 'the Award', then this Agreement will prevail to the extent of any such inconsistency.

12. Clause 3.10.3 of the **non-union** EBA specifies that the employer is required to make a contribution of $48.10 per week to the BIRST fund:

> 3.10.3 *Employer Contributions.*
>
> The Company contributions to the BIRST Fund on behalf of each eligible employee will be:
>
> - Date of Certification -$43.10 per week.
> - 1st July 2002. -$48.10 per week.

13. Clause 3.10.3 of the **union** EBA specifies that the employer is required to make a contribution of $55.00 per week less any premium for income maintenance to the BIRST fund:

> 3.10.3 *Employer Contributions.*
>
> The Company contributions to the BIRST Fund on behalf of each eligible employee will be an amount of $55.00 per week less the cost of the premium for the provision of income maintenance insurance.

14. Clause 3.11.3 of the **hourly hire** EBA specifies that the employer is required to make a contribution of $55.00 per week less any premium for income maintenance to the BIRST fund:

> 3.11.3 *Employer Contributions.*
>
> The Company contributions to the BIRST Fund on behalf of each eligible employee will be an amount of $55.00 per week less the cost of the premium for the employee's income maintenance insurance.

Ruling

15. An employer who makes a redundancy contribution for an employee to an approved worker entitlement fund pursuant to their obligations under:

- Clause 3.10.2 of the Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004;

- Clause 3.10.2 of the Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004; and/or
- Clause 3.11.2 of the Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004.

will be providing an exempt fringe benefit for the purposes of section 58PA of the FBTAA 1986.

16. The redundancy contribution(s) made by the employer will only be an exempt fringe benefit up to the amount which the employer is required to make under the relevant EBA. The required amount of redundancy contribution is:

- $48.10 per week under clause 3.10.3 of the Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004;
- $55.00 per week (less any premium for the provision of income maintenance insurance) under clause 3.10.3 of the Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004; and
- $55.00 per week (less any premium for the provision of income maintenance insurance) under clause 3.11.3 of the Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004.

Explanation

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

18. 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 in relation to each of the following EBA's:

1. Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004
2. Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004
3. Master Builders Association South Australia (Hourly Hire) Enterprise Bargaining Agreement 1 March 2004.

Redundancy contributions under the Master Builders Association South Australia (Non-Union) Enterprise Bargaining Agreement 1 March 2004

The contribution must be made to an approved worker entitlement fund

19. 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.

20. 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 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.

21. Under clause 3.10.2 of the non-union EBA the employer is required to participate in the BIRST fund, or such statutory fund that replaces the BIRST fund.

22. BIRST has been prescribed as an approved worker entitlement fund for paragraph 58PB(2) of the FBTAA 1986 under regulation 6(n) 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.

23. As BIRST is an approved worker entitlement fund, contributions made to this fund under clause 3.10.2 of the non-union EBA will meet the requirement of paragraph 58PA(a) of the FBTAA 1986.

The contribution must be required under an industrial instrument

Is the non-union EBA an industrial instrument?

24. 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'.

25. The non-union EBA will come into force once it meets certain criteria required by the *Workplace Relations Act 1996 (Cth)*, and is certified by the Australian Industrial Relations Commission. Once certified, the agreement becomes an industrial agreement in force under the *Workplace Relations Act 1996 (Cth)*, which is a Commonwealth law. Therefore, a certified non-union EBA will be an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

Is the contribution required under an industrial instrument?

26. The non-union EBA is binding on the employer named in clause 1.5. That is, the employer who is party to the EBA. For the period that the Certified Agreement is in place clause 3.10.2 of the non-union EBA requires an employer to make redundancy contributions to the BIRST Fund.

27. Under clause 3.10.3 of the non-union EBA the employer is required to make a redundancy payment of $48.10 per week for its employee's after 1st July 2002.

28. As an employer is required to make the contributions to BIRST under clause 3.10.2 of the certified non-union EBA (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

29. 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 purposes of the fund.

30. As the contributions under clause 3.10.2 of the non-union EBA are contributions to provide for the payment of redundancy benefits to an employee, which will be paid on termination, the requirement of paragraph 58PA(c) of the FBTAA 1986 will be satisfied.

Conclusion

31. As long as BIRST is an approved worker entitlement fund, the payment of redundancy contributions to BIRST under clause 3.10.2 of the certified non-union EBA will meet the requirements of section 58PA of the FBTAA 1986 and be an exempt fringe benefit. The amount of the exempt fringe benefit will be the amount of $48.10 per week for each eligible employee, which is the employer's required redundancy contribution(s) under clause 3.10.3 of the certified non-union EBA.

Redundancy contributions under the Master Builders Association South Australia (Union) Enterprise Bargaining Agreement 1 March 2004

The contribution must be made to an approved worker entitlement fund

32. 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.

33. 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 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.

34. Under clause 3.10.2 of the union EBA the employer is required to participate in the BIRST fund, or such statutory fund that replaces the BIRST fund.

35. BIRST has been prescribed as an approved worker entitlement fund for paragraph 58PB(2) of the FBTAA 1986 under regulation 6(n) 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.

36. As BIRST is an approved worker entitlement fund, contributions made to this fund under clause 3.10.2 of the Union EBA will meet the requirement of paragraph 58PA(a) of the FBTAA 1986.

The contribution must be required under an industrial instrument

Is the union EBA an industrial instrument?

37. 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'.

38. The union EBA will come into force once it meets certain criteria required by the *Workplace Relations Act 1996 (Cth)*, and is certified by the Australian Industrial Relations Commission. Once certified, the agreement becomes an industrial agreement in force under the *Workplace Relations Act 1996 (Cth)*, which is a Commonwealth law. Therefore, a certified union EBA will be an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

Is the contribution required under an industrial instrument?

39. The union EBA is binding on the employer named in clause 1.5 of the union EBA. That is, the employer who is party to the EBA. For the period that the Certified Agreement is in place, clause 3.10.2 of the union EBA requires an employer to make redundancy contributions to the BIRST Fund.

40. Under clause 3.10.3 of the union EBA the employer is required to make a redundancy payment of $55.00 per week less the cost of any premium for the provision of income maintenance insurance for each eligible employee.

41. As an employer is required to make the contributions to BIRST under clause 3.10.2 of the certified Union EBA (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

42. 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 purposes of the fund.

43. As the contributions under clause 3.10.2 of the union EBA are contributions to provide for the payment of redundancy benefits to an employee, which will be paid on termination, the requirement of paragraph 58PA(c) of the FBTAA 1986 will be satisfied.

Conclusion

44. As long as BIRST is an approved worker entitlement fund, the payment of redundancy contributions to BIRST under clause 3.10.2 of the certified union EBA will meet the requirements of section 58PA of the FBTAA 1986 and be an exempt fringe benefit. The amount of the exempt fringe benefit will be the amount of $55.00 per week, less any premium for the provision of income maintenance insurance for each eligible employee, which is the employer's required redundancy contribution(s) under clause 3.10.3 of the certified union EBA.

Redundancy contributions under the Master Builders Association South Australia (Hourly hire) Enterprise Bargaining Agreement 1 March 2004

The contribution must be made to an approved worker entitlement fund

45. 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.

46. 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 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.

47. Under clause 3.11.2 of the certified hourly hire EBA the employer is required to participate in the BIRST fund, or such statutory fund that replaces the BIRST fund.

48. BIRST has been prescribed as an approved worker entitlement fund for paragraph 58PB(2) of the FBTAA 1986 under regulation 6(n) 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.

49. As BIRST is an approved worker entitlement fund, contributions made to this fund under clause 3.11.2 of the certified hourly hire EBA will meet the requirement of paragraph 58PA(a) of the FBTAA 1986.

The contribution must be required under an industrial instrument

Is the hourly hire EBA an industrial instrument?

50. 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'.

51. The hourly hire EBA will come into force once it meets certain criteria required by the *Workplace Relations Act 1996 (Cth)*, and is certified by the Australian Industrial Relations Commission. Once certified, the agreement becomes an industrial agreement in force under the *Workplace Relations Act 1996 (Cth)*, which is a Commonwealth law. Therefore, a certified hourly hire EBA will be an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

Is the contribution required under an industrial instrument?

52. The hourly hire EBA is binding on the employer named in clause 1.5 of the hourly hire EBA. That is, the employer who is party to the EBA. For the period that the Certified Agreement is in place clause 3.11.2 of the hourly hire EBA requires an employer to make redundancy contributions to the BIRST Fund.

53. Under clause 3.11.3 of the hourly hire EBA, the employer is required to make a redundancy payment of $55.00 per week less the cost of any premium for the provision of income maintenance insurance for each eligible employee.

54. As an employer is required to make the contributions to BIRST under clause 3.11.2 of the hourly hire EBA (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

55. 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 purposes of the fund.

56. As the contributions under clause 3.11.2 of the certified hourly hire EBA are contributions to provide for the payment of redundancy benefits to an employee, which will be paid on termination, the requirement of paragraph 58PA(c) of the FBTAA 1986 will be satisfied.

Conclusion

57. As long as BIRST is an approved worker entitlement fund, the payment of redundancy contributions to BIRST under clause 3.11.2 of the certified hourly hire EBA will meet the requirements of section 58PA of the FBTAA 1986 and be an exempt fringe benefit. The amount of the exempt fringe benefit will be the amount of $55.00 per week less the cost of any premium for the provision of income maintenance insurance for each eligible employee under clause 3.11.3 of the certified hourly hire EBA.

Detailed contents list

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

Commissioner of Taxation
21 April 2004

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 97/16; CR 2004/22

Subject references:
- approved worker entitlement fund
- fringe benefits tax
- exempt fringe benefit
- redundancy payment

Legislative references:
- 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(3)
- FBTAA 1986 136(1)
- FBTR 1992 regulation 6(n)
- Workplace Relations Act 1996 (Cth)
- Copyright Act 1968
- TAA 1953 Pt IVAAA

ATO references
NO: 2004/4647
ISSN: 1455-2014