

CR 2005/42 - Income tax: Eligible Termination Payments - Industry Restructure Payment and Industry Restructure (Voluntary Departure) Payment under the Victorian Forestry Worker Assistance Program

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! This document has changed over time. This is a consolidated version of the ruling which was published on *1 November 2002*



Class Ruling

Income tax: Eligible Termination Payments – Industry Restructure Payment and Industry Restructure (Voluntary Departure) Payment under the Victorian Forestry Worker Assistance Program

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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 sections 26AD, 27B and 27C and subsection 27A(1) of *the Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

3. The class of persons to which this Ruling applies is all eligible employees who are displaced from the Victorian native forest timber industry as a direct result of the Voluntary Licence Reduction Program (VLRP) and Contractor business exits or reductions and who receive a payment under the arrangement described in paragraphs 11 to 26.

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 11 to 26.

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.

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8. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Date of effect

9. This Ruling applies from 1 November 2002 until it is withdrawn (see paragraph 10). 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

10. This Ruling is withdrawn and ceases to have effect after 31 December 2005. 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

11. 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 this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from representatives for the Department of Victorian Communities (DVC); and
- Workers Assistance Program Guidelines published by DVC 31 October 2002.

12. In order to assist those sectors of Victoria's native forest timber industry which are negatively affected by timber resource withdrawals flowing from 'Our Forests, Our Future' policy statement, the Victorian Government has announced an Industry Transition Program. The business component of the Program is administered by the Rural Finance Corporation and the Worker Assistance Program is administered by the DVC.

13. Worker Assistance Program Guidelines provided by the DVC explain the component of the Program designed to help employees who are displaced from the Victorian native forest timber industry as a direct result of the Voluntary Licence Reduction Program (VLRP) and Contractor business exits or reductions.

14. Employees eligible for assistance include:

- sawmill workers;
- employees of log supply and/or transport contractors; and
- workers retrenched from businesses receiving exit assistance under VLRP or Contractor business exits.

They do not include employees whose work only concerns timber from private forests.

15. To be eligible, a person must satisfy the following criteria:

- the person has worked continuously in the Victorian native forest industry for at least 19 hours a week for 9 of the 18 months preceding the date, as notified by the Rural Finance Corporation, of exit assistance under VLRP or Contractor business exit application (the Industry Restructure Payment will be paid on a pro-rata basis related to the hours worked per week);

- the person has been employed for that period either by:
 - (i) a licence holder under the *Forests Act 1958* (Vic);
 - (ii) a contractor providing a direct supply of goods and services to the Industry directly related to harvesting, haulage, and processing of hardwood timber including the transport of woodchips for stockpiling and dispatch to meet the obligations of such a licence; or
 - (iii) any other entity affected by the VLRP or Contractor business exits and where a claim for exit assistance has been accepted by the Rural Finance Corporation;
- the person must also show that:
 - (i) they have been notified that they are to be retrenched, or have already been retrenched by their employer; and
 - (ii) they have been put out of work or their employer has been forced to retrench them, because of the direct effect on the business of VLRP or Contractor exits; and
- the person needs to complete and lodge their application on the appropriate form, before the latter of:
 - (i) 12 months after the date of their retrenchment; or
 - (ii) 30 October 2003.

16. The Worker Assistance Program provides a number of types of assistance, however, this Ruling applies only to the following payments received by an eligible employee:

- A. an Industry Restructure Payment made in addition to any benefits paid by a former employer; and
- B. an Industry Restructure (Voluntary Departure) Payment which is paid to an employee in the Victorian native forest timber industry who wishes to leave the industry and by so doing, creates a vacancy which should be filled by an identified eligible redeployed employee.

17. This Ruling does not apply to the following payments made under the Workers Assistance Program:

- Training and Job Search Assistance;
- Relocation Assistance;
- Employment Incentive Scheme; and
- Travel Assistance.

18. This Ruling does not apply to anyone who receives a payment other than as an employee or a former employee.

19. An employee's entitlement to long service leave in Victoria arises after 15 years' continuous employment under section 56 of the Victorian *Long Service Leave Act 1992* (LSLA 1992).

20. An employee's pro-rata entitlement to long service leave arises only after 10 years' continuous employment under section 58 of the LSLA 1992.

21. No entitlement to long service leave arises prior to 10 years' continuous employment.

Industry Restructure Payment

22. An Industry Restructure Payment consists of:

- the difference between any redundancy payment required to be made by the employer under existing awards and workplace agreements, up to a total of three weeks' pay for each year of continuous service in the Victorian native forest timber industry prior to the employee becoming redundant;
- for any employee 45 years or older, an additional 3 weeks' pay for each year of service from age 45. This component for over 45-year-olds is capped at \$25,000;
- any entitlement towards long service leave which the employee has accumulated between years 0 and 10 of employment which the employer is not already obliged to pay; and
- any unpaid sick leave which the employee has accumulated capped at 152 hours.

23. The total of these payments is capped at \$80,000.

Industry Restructure (Voluntary Departure) Payment

24. An eligible employee in the Victorian native forest industry who wishes to leave the industry can apply for an Industry Restructure (Voluntary Departure) Payment if:

- they have worked in the industry for at least 20 years and are at least 45 years old;
- their departure will provide a vacancy for an employee who is eligible for Workers Assistance; and
- they execute a deed, in a form acceptable to the Victorian Government, which requires them not to work in the Victorian native timber forest industry for at least the next three years.

25. An Industry Restructure (Voluntary Departure) Payment consists of:

- up to a total of three weeks' pay for each year of continuous service in the Victorian native forest timber industry; and
- an additional three weeks' pay for each year of service from age 45, capped at \$25,000.

26. The total of these payments is capped at \$80,000.

Ruling

27. The Industry Restructure Payments and Industry Restructure (Voluntary Departure) Payments made to eligible employees under the Victorian Forestry Worker Assistance Program administered by the DVC are assessable as eligible termination payments (ETP) under subsection 27A(1) of the ITAA 1936.

28. Accordingly, the ETP received by an employee is included as assessable income under sections 27B and 27C of the ITAA 1936 to the extent that the ETP is not rolled-over.

Explanation

Eligible termination payments

29. An ETP is exhaustively defined in subsection 27A(1) of the ITAA 1936. There are a number of different payments that qualify as an ETP. Paragraph (a) of the definition of an ETP in subsection 27A(1) of the ITAA 1936 states, in part, that an ETP, in relation to a taxpayer, means:

any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer; other than a payment;

...

(iv) of an amount to which section 26AC or 26AD applies; or

...

30. The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. The Commissioner has also issued Taxation Ruling TR 2003/13 which discusses the meaning of the phrase.

31. The Full High Court considered the expression 'in consequence of the termination of any employment' in *Reseck v. Federal Commissioner of Taxation* (1975) 133 CLR 45; 6 ALR 642; 49 ALJR 370; 5 ATR 538; 75 ATC 4213 (Reseck). Gibbs J stated:

Within the ordinary meaning of the words a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination... It is not in my opinion necessary that the termination of the services should be the dominant cause of the payment.

32. While Jacobs J stated:

It was submitted that the words 'in consequence of' import a concept that the termination of the employment was the dominant cause of the payment. This cannot be so. A consequence in this context is not the same as a result. It does not import causation but rather a 'following on'.

33. In looking at the phrase 'in consequence of' the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation* (1979) 25 ALR 557; 10 ATR 13; 45 FLR 279; 79 ATC 4325 (McIntosh) considered the decision in *Reseck*. Brennan J stated:

Though Jacobs J. speaks in different terms, his meaning may not be significantly different from the meaning of Gibbs J... His Honour denies the necessity to show that retirement is the dominant cause, but he does not allow a temporal sequence alone to suffice as the nexus. Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement.

34. In the same case, Lockhart J stated:

In my opinion, although the phrase is sufficiently wide to include a payment caused by the retirement of the taxpayer, it is not confined to such a payment. The phrase requires that there be a connection between the payment and the retirement of the taxpayer, the act of retirement being either a cause or an antecedent of the payment. The phrase used in section 26(d) is not 'caused by' but 'in consequence of'. It has a wider connotation than causation and assumes a connection between the circumstance of retirement and the act of payment such that the payment can be said to be a 'following on' of the retirement.

35. The Commissioner in TR 2003/13 considered the phrase 'in consequence of' as interpreted by the courts. Paragraph 5 of TR 2003/13 states:

...the Commissioner considers that a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer.

36. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

37. The Industry Restructure Payments and Industry Restructure (Voluntary Departure) Payments follow as a result of employees being displaced from the Victorian native forest timber industry as a direct result of the VLRP and Contractor business exits or reductions. Therefore the Industry Restructure Payments and Industry Restructure (Voluntary Departure) Payments are made in consequence of the termination of the employee's employment and satisfy the definition of an ETP as defined in subsection 27A(1) of the ITAA 1936.

38. The ETP received by an employee can only be split up into the pre-July 83 and post-June 83 (untaxed element) components. These amounts can be rolled-over. It should be noted that the amount of an ETP may be subject to the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

39. Neither the Industry Restructure Payment nor the Industry Restructure (Voluntary Departure) Payment include an amount for unused annual leave/ leave loading.

Unused long service leave

40. Payments in lieu of long service leave entitlements are specifically excluded from the definition of an ETP and taxed in accordance with section 26AD of the ITAA 1936.

41. Section 26AD of the ITAA 1936 includes in assessable income any lump sum termination payment made to a taxpayer in lieu of long service leave to which the taxpayer has an entitlement by virtue of a law of the Commonwealth or of a State or Territory, an award, determination or industrial agreement.

42. Notably, by virtue of the operation of subsection 26AD(6), the scope of section 26AD is extended to encompass a pro-rata payment to which a taxpayer has a similar entitlement.

43. The Commissioner has issued Taxation Ruling IT 2255, which provides guidance on the assessability of certain payments where no entitlement to long service leave exists. Paragraph 5 of IT 2255 states:

By subsection 26AD(6), the scope of the section extends to a pro-rata payment to which a taxpayer has a similar entitlement. That subsection, however, envisages that there is some formal agreement for the making of the payment and a gratuitous payment to a terminating employee, calculated on a basis similar to that for ordinary long service leave entitlements, is not a payment to which section 26AD applies. That is the case whether the payment is a payment to an employee who has not qualified for any long service leave entitlement or is an additional payment calculated by reference to the employee's ordinary long service leave entitlements.

44. Paragraph 6 of IT 2255 states:

Such a gratuitous termination payment, not being a payment to which section 26AD applies, is an eligible termination payment which falls for assessment in terms of Subdivision AA.

45. An employee's entitlement to long service leave in Victoria arises after 15 years' continuous employment under section 56 of the LSLA 1992. Furthermore, an employee's pro-rata entitlement to long service leave arises only after 10 years' continuous employment under section 58 of the LSLA 1992. There is no entitlement to long service leave prior to 10 years' continuous employment.

46. Accordingly, there is no requirement for any employer to make a payment that represents an entitlement in respect of long service leave which an eligible employee has accumulated between 0 and 10 years of employment. Therefore, the payment in lieu of long service leave made to an eligible employee under an Industry Restructure Payment is an ETP.

Detailed contents list

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Commissioner of Taxation

1 June 2005

CR 2005/42

Previous draft:

Not previously issued as a draft

- ITAA 1936 26AC
- ITAA 1936 26AD
- ITAA 1936 26AD(6)

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 92/20;
TR 97/16; TR 2003/13; IT 2255

- ITAA 1936 27A(1)
- ITAA 1936 27B
- ITAA 1936 27C
- TAA 1953 Pt IVAAA

Subject references:

- accrued & unused leave
- eligible termination payments
- employment termination
- ETP components
- ETP post June 1983 component
- ETP pre July 1983 component
- ETP untaxed element
- forestry
- superannuation, retirement & employment termination
- timber industry

- Copyright Act 1968
- Forests Act 1958 (Vic)
- LSLA 1992 58
- LSLA 1992 59

Case references:

- McIntosh v. Federal Commissioner of Taxation (1979) 25 ALR 557; 10 ATR 13; (1979) 45 FLR 279; 79 ATC 4325
- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; (1975) 6 ALR 642; (1975) 49 ALJR 370; 5 ATR 538; 75 ATC 4213

Legislative references:

- ITAA 1936 Pt III Div 2 Subdiv AA
-

ATO references

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