

CR 2006/111 - Income tax: eligible termination payment: Rail Corporation NSW, Rail Infrastructure Corporation and State Rail Authority of NSW - transfer of employment

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 November 2006*



Class Ruling

Income tax: eligible termination payment: Rail Corporation NSW, Rail Infrastructure Corporation and State Rail Authority of NSW – transfer of employment

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27B of the ITAA 1936; and
- section 27C of the ITAA 1936.

Class of entities

3. The class of entities to which this Ruling applies is all employees of Rail Corporation NSW (RailCorp), Rail Infrastructure Corporation (RIC) and State Rail Authority of NSW (SRA) who, in connection with the outsourcing of Information Communications Technology (ICT) Operations and Delivery (defined below), resign from employment with RailCorp/RIC/SRA to take up employment with Fujitsu Australia (Fujitsu) and receive payment under the scheme described in paragraphs 14 to 28 of this Ruling.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 14 to 28 of this Ruling.

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

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme 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 transfer of employment.

Date of effect

9. This Ruling applies after 15 November 2006. However, the 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 the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after 14 November 2007. This Ruling continues to apply, in respect of the relevant provisions relied upon, to all entities within the specified class who enter into the specified scheme during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for a scheme entered into prior to the withdrawal of the Ruling. This is subject to there being no changes in the scheme or in the entities' involvement in the scheme.

Scheme

14. The scheme that is subject to 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 the documents incorporated into this description of the scheme are:

- correspondence from representatives of RailCorp; and
- telephone conversations with representatives of RailCorp.

15. RailCorp is the new integrated rail entity in New South Wales, combining the SRA and the greater metropolitan functions of RIC. RailCorp owns and maintains the rail infrastructure in the greater metropolitan Sydney region and delivers the CityRail and CountryLink passenger services.

16. The RailCorp ICT Group was formed as a result of the merge of the SRA and RIC information technology groups. A restructure was undertaken following the merge with staff from the former SRA and RIC entities obtaining some of the roles within the newly formed RailCorp ICT Group.

17. The ICT Group supports RailCorp business operations through the provision of information and communications systems, strategies, policies and procedures. The ICT Operations and Delivery Division is responsible for providing and maintaining the ICT infrastructure and production environment and providing user support services. Specifically, the ICT Service Centre and ICT Support Centre provide helpdesk, desktop support, server management and data centre services.

18. A benchmarking exercise of selected ICT operational and support services was undertaken to provide an overall view of service levels and information technology requirements.

19. As a result of the benchmarking exercise, a new ICT structure has been developed to support the provision of ICT services to RailCorp. The new structure, which entails the outsourcing of the ICT Operations and Delivery Division to Fujitsu, will be more commercially and business focused with a strong commitment to technological soundness and customer service.

20. Fujitsu will provide helpdesk, desktop support, server management and data centre services to ensure RailCorp's ICT applications are available, reliable, cost-effective and secure.

21. A transfer package will be offered to permanent full and part-time RailCorp/RIC/SRA staff:

- directly affected by the ICT Operations and Delivery outsourcing arrangements; and
- who obtain direct employment with Fujitsu up to the time the outsourcing arrangements commence.

22. The transfer package provides, amongst other benefits, for the payment of an amount referred to as a 'transfer payment'. The transfer payment is payable up to three months after an eligible employee obtains a permanent position with Fujitsu.

23. The transfer payments, paid by and processed through RailCorp payroll systems at the time of an employee's transfer, will be calculated pursuant to the employee's length of service in accordance with the following table:

LENGTH OF SERVICE	TRANSFER PAYMENT WEEKS (calculated on a weekly ordinary time payment base rate)
Less than 1 year	0
1 year or more but less than 2 years	7.5
2 years or more but less than 3 years	13.125
3 years or more but less than 4 years	18.75
4 years or more but less than 5 years	22.50
5 years or more but less than 6 years	26.25
6 years or more	30

24. The transfer payment is calculated on the basis of substantive base rates of pay applying at the date the scheme commences, exclusive of aggregate wage and any other allowances.

25. The transfer payment is an amount in addition to any other benefits or statutory leave entitlements. Employees will have the option of transferring or cashing out their accrued Annual Leave, Long Service Leave and Accrued Public Holiday entitlements, upon transfer of their employment.

26. The transfer payment will be made at a higher rate for eligible employees, who as at the date of transfer, have been acting in a higher grade for a period of six months or more within the last 12 months.

27. Employees in the class not recruited by Fujitsu will have the options of redeployment into other public sector agencies or voluntary redundancy under the Special Purpose Payment Package approved for the merge of SRA/RIC and the creation of RailCorp.

28. RailCorp/RIC/SRA are seeking confirmation as to whether the transfer payments made to the class of employees described in paragraph 3 constitute 'eligible termination payments' within paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

Ruling

29. The proposed transfer payment, payable only to Rail Corporation New South Wales (RailCorp), Rail Infrastructure Corporation (RIC) and State Rail Authority (SRA) employees following termination of their employment with RailCorp/RIC/SRA and their appointment to a position with Fujitsu Australia (Fujitsu), is an 'eligible termination payment' under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936. Accordingly, the ETP received by an employee is assessed under sections 27B and 27C of the ITAA 1936 to the extent that the ETP is not rolled-over.

Commissioner of Taxation

15 November 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

30. In the context of payments made by an employer, paragraph (a) of the definition of an 'eligible termination payment' in subsection 27A(1) of the ITAA 1936 means:

- (a) any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer, other than a payment:
 - (i) made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund;
 - (ii) of an annuity, or supplement, to which section 27H applies;
 - (iii) from a fund in relation to which section 121DA, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1989*, has applied in relation to the year of income commencing on 1 July 1984 or any subsequent year of income;
 - (iiia) from a fund that is or has been a non-complying superannuation fund in relation to any year of income;
 - (iv) of an amount to which section 26AC or 26AD applies; or
 - (v) of an amount that, under any provision of this Act, is deemed to be a dividend, or a non-share dividend, paid to the taxpayer.

The proposed transfer payment does not fall within any of these exclusions, nor is it covered by the further exclusions in paragraphs (ja) to (s) of the definition.

31. In determining whether the payment constitutes an eligible termination payment it is necessary to determine whether:

- there has been a termination of employment; and
- the payment is 'in consequence of the termination of employment'.

Is there a termination of employment?

32. Those employees who accept an offer with Fujitsu will resign from their employment with RailCorp/RIC/SRA to enable them to commence employment with Fujitsu. Accordingly, there is a termination of employment with RailCorp/RIC/SRA.

Is the making of the transfer payment ‘in consequence of’ the termination of employment?

33. A payment can be considered to be in consequence of termination where it follows from the termination, or the termination is a condition precedent to the payment. In *Reseck v. FC of T* 75 ATC 4213, (1975) 133 CLR 45, (1975) 49 ALJR 370, (1975) 6 ALR 642, 5 ATR 538 (*Reseck’s Case*) Gibbs J said at ATC pp 4216-7:

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.

In the same case, Jacobs J said that ‘in consequence of’ did not import causation but rather a ‘following on’ (ATC p 4219).

34. The decision in *Reseck’s Case* was considered by the Full Federal Court in *McIntosh v Federal Commissioner of Taxation* (1979) 45 FLR 279; 79 ATC 4325; 10 ATR 13 (*McIntosh’s Case*). The case concerned a taxpayer who became entitled to a payment subsequent to his retirement. In finding that the payment was in consequence of the taxpayer’s termination, Brennan J said (at ATC p 4328):

...if the payment is made to satisfy a payee’s entitlement, the phrase ‘in consequence of retirement’ required that the retirement be the occasion of, and a condition of, entitlement to the payment. A sufficient causal nexus between the payment and the retirement is thus established.

35. The phrase ‘in consequence of’ and the decisions in the *Reseck Case* and *McIntosh’s Case* were also considered more recently by the Federal Court in *Le Grand v Federal Commissioner of Taxation* [2002] 124 FCR 53; 2002 ATC 4907; 51 ATR 139 (*Le Grand’s Case*).

36. *Le Grand’s Case* involved a payment to the taxpayer as a result of accepting an offer of compromise in respect of claims brought by him against his former employer, in relation to the termination of his employment. The taxpayer had made claims for common law damages for breach of employment agreement and for statutory damages for misleading and deceptive conduct to procure the taxpayer’s employment with the employer. The payment was found to be in consequence of the taxpayer’s termination. Goldberg J said (at ATC p 4914):

I do not consider that the issue can simply be determined by seeking to identify the ‘occasion’ for the payment. The thrust of the judgments in *Reseck* and *McIntosh* is rather to the effect that payment is made ‘in consequence’ of a particular circumstance when the payment follows on from, and is an effect or result, in a causal sense, of the circumstance. ... there need not be identified only one circumstance which gives rise to a payment before it can be said that the payment is made ‘in consequence’ of that circumstance.

... it can be said that a payment may be made in consequence of a number of circumstances and that, for present purposes, it is not necessary that the termination of the employment be the dominant cause of the payment so long as the payment follows in the causal sense referred to in those judgments, as an effect or result of the termination.

37. The Commissioner of Taxation (the Commissioner) has issued Taxation Ruling TR 2003/13 Income tax: eligible termination payments (ETP): payments in consequence of, the termination of any employment: meaning of the words 'in consequence of', in which he considers the meaning of the phrase 'in consequence of the termination of any employment' in the definition of eligible termination payment in subsection 27A(1) of the ITAA 1936.

38. In paragraphs 5 and 6 of the Taxation Ruling TR 2003/13, the Commissioner, after considering the above judgments, stated:

... 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. The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant purpose of the payment. 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.

39. In Class Ruling CR 2002/1 Income tax: Eligible Termination Payment – FreightCorp Sale and Transfer of Employment, the Commissioner considered the question of the taxation of 'transfer payments' payable to employees under a similar arrangement to that proposed between RailCorp/RIC/SRA and Fujitsu. The Commissioner concluded that the transfer payment payable to FreightCorp employees upon the sale of its business was a payment made in consequence of termination of employment under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

40. Further, in Class Ruling CR 2004/107 Income tax: eligible termination payment: State Rail Authority of NSW and Rail Infrastructure Corporation – transfer of employment, the Commissioner concluded that the transfer payment payable to State Rail Authority of NSW and Rail Infrastructure Corporation employees upon a new lease agreement with Australian Rail Track Corporation, was a payment made in consequence of termination of employment under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

41. Notwithstanding that the transfer payment is only payable to employees who take up employment with Fujitsu, the transfer payment is payable only on the condition that these employees terminate their employment with RailCorp/RIC/SRA. Therefore, the payment follows as an effect or result of the termination and the payment would not have been made to these employees but for the termination of their employment with RailCorp/RIC/SRA.

42. The following aspects of the scheme reinforce the characterisation of the 'transfer payment' as an eligible termination payment (as distinct form, for example, a transfer or sign-on fee):

- the payment is calculated by reference to each employee's years of service with RailCorp/RIC/SRA; and
- there are no obligations imposed on the employees to continue their employment with Fujitsu for any particular period after commencement of the employment with Fujitsu.

43. Further, the transfer payment will be paid by, and processed centrally through the RailCorp payroll systems shortly after termination of employment with RailCorp/RIC/SRA. The timing of any transfer payments strengthens the connection between payments and the termination of employment.

44. In view of the above, the transfer payment is in consequence of the termination of employment and is therefore an eligible termination payment under subsection 27A(1) of the ITAA 1936. The ETP will be split up into pre-July 1983 and post-June 1983 (untaxed element) components. This amount can be rolled over.

Appendix 2 – Detailed contents list

45. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2002/1; CR 2004/107;
TR 2003/13

Subject references:

- eligible termination payments
- employment termination

Legislative references:

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- ITAA 1396 26AC
- ITAA 1936 26AD
- ITAA 1936 27A
- ITAA 1936 27A(1)
- ITAA 1936 27B
- ITAA 1936 27C

- ITAA 1936 27H
- ITAA 1936 121DA
- Taxation Laws Amendment Act
(No. 2) 1989 1

Case references:

- Le Grand v. Federal
Commissioner of Taxation [2002]
124 FCR 53; 2002 ATC 4907; 51
ATR 139
- McIntosh v. Federal
Commissioner of Taxation (1979)
45 FLR 279; 79 ATC 4325; 10
ATR 13
- Reseck v. Federal
Commissioner of Taxation (1975)
133 CLR 45; 75 ATC 4213; 5 ATR
538

ATO references

NO: 2006/19897

ISSN: 1445-2014

ATOlaw topic Income Tax ~~ Assessable income ~~ eligible termination
payments