



# ***CR 2006/46 - Income tax: deductibility of employer contributions to the South Australian Building Industry Redundancy Scheme Trust***

 This cover sheet is provided for information only. It does not form part of *CR 2006/46 - Income tax: deductibility of employer contributions to the South Australian Building Industry Redundancy Scheme Trust*

 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2000*



## Class Ruling

# Income tax: deductibility of employer contributions to the South Australian Building Industry Redundancy Scheme Trust

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>12</b>
<b>Ruling</b>	<b>27</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b><i>Explanation</i></b>	<b>33</b>
<b>Appendix 2:</b>	
<b><i>Detailed contents list</i></b>	<b>76</b>

### **📌 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 (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and 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 provisions 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 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27B of the ITAA 1936;
- section 27C of the ITAA 1936; and
- section 27F of the ITAA 1936.

## Class of entities

3. The class of entities to which this Ruling applies is all employers who are required by their Deed of Adherence and Industrial Instruments to make contributions, on behalf of employees, to the South Australian Building Industry Redundancy Scheme Trust (BIRST).

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in the 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 9 to 23.

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.

7. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration  
Attorney General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

## Date of effect

---

8. This Ruling applies from 1 July 2000. 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.

9. 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)).

10. 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.

11. 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).

## **Scheme**

---

12. The scheme 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 and are part of and are to be read with the description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- Class Ruling application from Phillips Fox dated 9 November 2004;
- BIRST trust deed including amendments up until 18 February 2004;
- a copy of a typical Agreement of Adherence;
- a copy of a typical Enterprise Bargaining Agreement; and
- Clause 16.2.7 of the National Building and Construction Industry Award.

13. South Australian Building Industry Redundancy Scheme Trust (BIRST) is an Australian resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

14. A board of trustees (Trustee) manages BIRST with equal representation by union and employer representatives. All trustees that comprise the Trustee are natural persons.

15. The Trustee has appointed an administrator of BIRST and an investment manager to manager the investments of BIRST on behalf of the Trustee.

16. BIRST is an approved worker entitlement fund for fringe benefits tax (FBT) purposes.

17. BIRST was established to facilitate employers providing construction industry employees with a secure benefit at the time of retirement, death, permanent disablement or other termination of employment (Employee Entitlements).
18. Employers can fund Employee Entitlements that they are required to make under various industrial awards and enterprise agreements (Industrial Instruments) or Agreements of Adherence for the benefit of employees through the payment of contributions to BIRST.
19. BIRST accepts contributions from employers, to fund each member's employee entitlements in respect of which contributions are legally payable under a Deed of Adherence or Industrial Instrument.
20. The current contribution is \$40 per week per employee. However this may vary due to Industrial Instruments and Agreements of Adherence. Higher rates will usually be agreed by the industrial parties.
21. As outlined in clause 3.2 of the trust deed, all contributions made to BIRST by employers are placed into separate member (employee) accounts identifying contributions for that member.
22. In accordance with clause 19.2 of the trust deed, on termination (including by way of redundancy), an employee is entitled to the balance of his/her member account with BIRST (termination payment). An employee that is made redundant (as defined in the National Building and Construction Industry Award), dies, becomes disabled or retires is immediately entitled to his/her termination payment (redundancy payment). A waiting period may apply where termination is for other reasons.
23. The redundancy payment may be paid by the employer or BIRST. Where the employer pays the member redundancy payment directly, BIRST will reimburse the employer for the amount paid to the particular member accordingly.
24. The trustee has discretion to distribute income of BIRST to individual members in accordance with clause 16 of the trust deed.
25. In accordance with clause 8AA members can transfer the benefits they have accumulated in another redundancy fund into BIRST where permitted by the other fund.
26. In accordance with clause 8A members can transfer benefits to another redundancy fund that is an 'approved worker entitlement fund'.

## Ruling

---

27. An employer who has a legal obligation to make redundancy contributions to BIRST under the BIRST Trust Deed, as an employer who is a building contractor or contractor who is engaged in the Industry, and is required to make payments under an Agreement of Adherence, can claim a deduction under section 8-1 of the ITAA 1997 for the amount of the contribution which is required to be made.

28. Where an employer pays an amount of redundancy entitlement directly to an employee and then seeks reimbursement from BIRST, the amount of the payment of redundancy entitlement will be an allowable deduction under section 8-1 of the ITAA 1997.

29. A reimbursement received by an employer for an amount of redundancy entitlement paid directly to an employee will be assessable income under section 6-5 of the ITAA 1997 at the time the amount is derived by the employer.

30. Where the employer pays an amount of an entitlement directly to a worker and then seeks reimbursement from BIRST, the payment of the entitlement will be treated in the same manner as if it were paid by BIRST.

31. The redundancy payment in terms of the trust deed made to a member of BIRST is made 'in consequence of' the termination of the employment of the member and constitutes an ETP as defined under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

32. However, section 27F of the ITAA 1936 will not apply to the 'redundancy' payment as the payment will not exceed the amount of an ETP that could reasonably be expected to have been made in relation to the member had they voluntarily retired from that employment at the termination time.

---

**Commissioner of Taxation**

31 May 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.***

### **Application of section 8-1**

33. Section 8-1 of the ITAA 1997 provides that you can deduct from your assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income and is not:

- capital, private or domestic in nature;
- incurred in gaining or producing exempt income; or
- prevented from being deductible by a provision of the Act.

### **Positive limbs**

#### ***Nexus to gaining and producing assessable income***

34. In carrying on business activities an employer is required to fulfil their obligations in respect to the entitlements of their workers. These entitlements may be contained in the governing award, enterprise bargaining agreement or other industrial instrument negotiated between the employer and the relevant union on the employee’s behalf.

35. In addition to the employer’s legal obligations under their relevant industrial instrument/s the employer is also required to meet the obligations contained in the Administration provisions of BIRST. The administrative provisions require the employer to make monthly contributions to BIRST in respect to worker entitlements.

36. It is accepted that there is a nexus between the business activities being carried on by the employer and the employer’s obligation to provide for worker entitlements, such that payment of the employee entitlements is incidental and relevant to the production of the assessable income of the business.

#### ***Incurring the amount***

37. At the point at which an employer makes the contribution to the Trustee of BIRST the amount is placed into member accounts and the amount/s are no longer owned by the employer. This differs from the situation in *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428 where there were no members of the trust and the contributions were not incurred as they remained funds of the employer.

38. The ability for amounts to be reimbursed and returned to the employer under the trust deed (a factor which must be possible to satisfy paragraph 58PB(4)(c) of the *Fringe Benefits Tax Assessment Act 1986*) does not effect whether the monthly contributions are incurred by the employer.

39. Notwithstanding the ability to be reimbursed in the future, the contributions to BIRST are definite payments which the employer is required to make to meet the legal obligations of carrying on business activities. As such the contributions are incurred when made (for employers accounting on a cash basis) or when the liability to make the payment each month arises (for employers accounting on an accruals basis).

### **Conclusion**

40. The employer's monthly contribution/s to BIRST are outgoings incurred in carrying on a business for the purposes of section 8-1 of the ITAA 1997.

### **Negative limbs**

#### ***Is the contribution revenue or capital in nature?***

41. Whether the payment of worker entitlements to BIRST is revenue or capital in nature depends on the character of the payment when made by the employer. As stated in *G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) ATC 4413 at 4419; (1990) 21 ATR 1 at 7:

The character of expenditure is ordinarily determined by reference to the nature of the asset acquired or the liability discharged by the making of the expenditure, for the character of the advantage sought by the making of the expenditure is the chief, if not the critical, factor in determining the character of what is paid: *Sun Newspapers Ltd. v. F.C. of T.* (1938) 61 C.L.R. 337 at p. 363.

42. In making the monthly contribution/s to BIRST, the employer meets their immediate legal obligation under the Industrial Instrument and Agreement of Adherence.

43. The employer discharges their obligation in respect of their employees each month when the monthly payment is made to BIRST as required by clause 3.1 of the BIRST trust deed.

44. The employer is making repetitive monthly contributions to discharge an immediate obligation and the obligation is directly connected to the income earning capacity of the business. Accordingly, the payment of the contribution/s is revenue in nature.

## **Payments by employer to employee**

45. It is accepted that there is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for worker entitlements, such that payment of the employee entitlements to an employee by an employer is incidental and relevant to the production of the assessable income of the business.

46. Accordingly the payment of a redundancy entitlement to a redundant employee would be an allowable deduction under section 8-1 of the ITAA 1997 as an expense incurred in gaining or producing assessable income or carrying on a business.

## **Reimbursement of payment by employer**

47. Where an employer has paid an employee their redundancy entitlement they may apply to BIRST for a reimbursement of this amount. BIRST may reimburse the employer for this amount under clause 16A.1(b) of the BIRST trust deed.

48. Where an employer has claimed or will claim a deduction for a redundancy entitlement paid to a redundant employee under section 8-1 of the ITAA 1997, the reimbursement of this expense must be declared as income. In these cases it is considered that reimbursement is income received in the ordinary course of business and assessable under section 6-5 of the ITAA 1997 in the income year in which it is derived.

## **Nature of payment made by employer**

### ***Eligible termination payment***

49. An eligible termination payment (ETP) is exhaustively defined in subsection 27A(1) of the ITAA 1936. There are a number of different payments that qualify as an ETP. One such payment is that made on termination of employment. Paragraph (a) of the definition of an ETP in subsection 27A(1) of the ITAA 1936 states in part:

**eligible termination payment**, in relation to a taxpayer, 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...

50. 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 (Income tax: eligible termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of') which discusses the meaning of the phrase.

51. The Full High Court of Australia considered the expression 'in consequence of the termination of any employment' in *Reseck v. Federal Commissioner of Taxation* (1975) 49 ALJR 370; (1975) 6 ALR 642; (1975) 5 ATR 538; (1975) 75 ATC 4213; (1975) 133 CLR 45 (*Reseck*). The relevant issue in that case was whether amounts paid to a taxpayer by his employer at the end of two periods of employment, to which the taxpayer was entitled under an agreement between the employer and the taxpayer's union, were an allowance paid in a lump sum 'in consequence of retirement from, or the termination of, any office or employment ...'. Gibbs J concluded that the amounts were made in consequence of the termination of the taxpayer's employment. His Honour said that:

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 present case the allowance was paid in consequence of a number of circumstances, including the fact that the taxpayer's service had been satisfactory and that the industrial agreements provided for the payment, but it was none the less paid in consequence of the termination of the taxpayer's employment.

52. Jacobs J also concluded that the amounts constituted an allowance that was paid in consequence of the termination of the taxpayer's employment. His Honour said:

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'.

53. The different interpretations of 'in consequence of' adopted by Jacobs J and Gibbs J were considered by the Full Federal Court in *McIntosh v. Commissioner of Taxation* (1979) 25 ALR 557; 10 ATR 13; 45 FLR 279; 79 ATC 4325. The matter before the court concerned a taxpayer who one week after retirement commuted part of the pension, to which he became entitled upon his retirement, into a lump sum. The commuted payment was made out of a provident fund established by a bank for the payment of benefits to bank officers on their retirement. The issue being considered by the court was whether the commuted lump sum payment came within former paragraph 26(d) of the ITAA 1936.

54. Brennan J considered the judgments of Gibbs J and Jacobs J in *Reseck* and concluded that their Honours were both saying that a causal nexus between the termination and payment was required, though it was not necessary for the termination to be the dominant cause of the payment. Brennan J said that:

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.

55. 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.

56. 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.

57. 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.

58. Clause 19.2 of the trust deed of the BIRST provides for the payment of the employee's benefit to the employee as soon as practicable after presentation of a certificate from the employer by the employee to the trustees. Employee's benefit is defined under clause 2.7 of the trust deed as:

**'Employees benefit'** in respect of each employee at any time means

2.7.1 the total amount credited in that employee's contribution account; or

2.7.2 that proportion of the capital of the trust fund which bears to the total of the capital of the trust fund the same proportion as that employee's contribution account bears to the aggregate of all the employees' contribution accounts whichever is the lesser amount.

59. It is considered that there is sufficient nexus between the making of the payments under clause 19.2 and the termination of the relevant employee's employment to constitute the payments as being an ETP as defined under paragraph (a) of the definition of an ETP in subsection 27A(1) of the ITAA 1936.

### ***Bona fide redundancy payment***

60. Section 27F of the ITAA 1936 provides for certain termination payments to be concessional taxed as a bona fide redundancy payment (BFRP) provided they meet all of the following requirements:

- there must be an ETP made in relation to a taxpayer in consequence of the dismissal of the taxpayer from employment by reason of the taxpayer's bona fide redundancy (paragraph 27F(1)(a));
- if the ETP is made after 1 July 1994, it must not be made from an eligible superannuation fund (paragraph 27F(1)(aa));
- the time of termination must be before the date that the taxpayer attains 65 years of age, or such earlier date on which the taxpayer's employment would necessarily have had to terminate under the terms of employment (paragraph 27F(1)(b));
- the amount of the ETP must not be greater than the amount that could reasonably be expected to have been paid if the employer and the taxpayer had been at arms length (paragraph 27F(1)(c)); and
- there must not be, at the termination time, any agreement between the taxpayer and the employer, or between the employer and another person, to employ the taxpayer after the termination time (paragraph 27F(1)(d)).

61. Additionally, where all of the above requirements are met, section 27F of the ITAA 1936 imposes a further requirement that only 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 had he voluntarily retired from that employment at the termination time' will be treated as a BFRP in relation to the taxpayer.

62. The terms 'dismissal' and 'redundancy' are not defined in the ITAA 1936. Therefore, it is necessary to consider the common law or ordinary meaning of the terms and the meaning the judicial authorities have ascribed to each word.

63. The Explanatory Memorandum to the Income Tax Assessment Amendment Bill (No. 3) 1984 (the EM) which inserted section 27F into the ITAA 1936 states at page 91:

The terms 'dismissal' and 'redundancy' are not defined in the legislation and, therefore, should be given their ordinary meanings. 'Dismissal' carries with it the concept of the involuntary (on the taxpayer's part) termination of employment. 'Redundancy' carries the concept that the requirements of the employer for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish. Redundancy, however, would not extend to the dismissal of an employee for personal or disciplinary reasons or for reasons that the employee was inefficient.

64. Taxation Ruling TR 94/12 Income tax: approved early retirement scheme and bona fide redundancy payments, which outlines the Commissioner's view of the requirements for a payment to qualify as a bona fide redundancy payment under section 27F of the ITAA 1936, expands upon and provides additional clarification as to what constitutes a 'dismissal' and 'redundancy'.

35. *Dismissal* carries with it the concept of the involuntary (on the employee's part) termination of employment. The termination of an employee's employment will usually be instigated or initiated by the employer.

...

40. Dismissal also includes the notion of constructive dismissal. Constructive dismissal arises if an employer places an employee in a position in which the employee has little option but to tender his or her resignation. For example, the employer may be reducing the size of his or her operations and may offer a voluntary redundancy package to a selected employee. If the employee refuses the offer he or she may be forced to accept another position which may not be commensurate with his or her qualifications and experience or may involve a lower level of remuneration...The termination of employment in these circumstances would amount to a constructive dismissal.

65. The subject of 'bona fide redundancy payments' was discussed in *AAT Case 4287* (1988) 19 ATR 3443; *Case V67 88* ATC 505. In concluding that the dismissal amounted to a 'constructive dismissal', Deputy President Dr Gerber stated:

I am satisfied that a provision which, put crudely, means 'resign or else' has all the hallmarks of leaving a loaded pistol in the hands of an officer and gentleman and telling him that he is about to be court-martialled for hocking the regimental silver.

Applied to the instant case, I have 'concluded' that the option of a voluntary retirement is a Faustian bargain equivalent to a constructive dismissal; it is not the voluntary retirement referred to in sec.27F(1).

66. Paragraphs 41 to 42 of TR 94/12 provide the following in relation to the meaning of redundancy:

41. Redundancy can be described as the situation where an employer no longer requires employees to carry out work of a particular kind or to carry out work of a particular kind at the same location. Bray CJ in *R v. The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd & Ors* (1977) 44 SAIR 1202 at page 1205; (1977) 16 SASR 6 at page 8 defined redundancy as follows:

... a job becomes redundant when an employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone.

42. Redundancy refers to a job becoming redundant and not to an employee becoming redundant (*Short v. F W Hercus Pty Ltd* (1993) 40 FCR 511; (1993) 46 IR 128; (1993) 35 AILR 151). An employee's job is considered to be redundant if:

- an employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by any one;
- that decision is not due to the ordinary and customary turnover of labour;
- that decision led to the termination of the employee's employment; and
- that termination of employment is not on account of any personal act or default of the employee.

67. As noted above, clause 19.2 of the BIRST trust deed provides for the payment of an amount to the employee not exceeding the amount standing to the credit of the employee in their benefit account upon the termination of employment. However the term termination is not defined in the trust deed and would simply be the termination or cessation of employment of the employee for any reason and thus does not correspond with the meaning ascribed in paragraphs 41 and 42 of TR 94/12.

68. Consequently, it is not possible to conclude whether or not the first requirement under paragraph 27F(1)(a) of the ITAA 1936 would be satisfied. This would have to be determined by the relevant facts and circumstances of each case.

69. The BIRST is not an eligible superannuation fund so the second requirement under paragraph 27F(1)(aa) of the ITAA 1936 would be satisfied.

70. It is not possible to conclude whether or not the other three requirements under paragraphs 27F(1)(b), (c) and (d) of the ITAA 1936 would be satisfied. This would have to be determined by the relevant facts and circumstances of each case.

71. Even if the requirements of paragraphs 27F(1)(a), (b), (c) and (d) of the ITAA 1936 are satisfied, only 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 had he voluntarily retired from that employment at the termination time' will be treated as a BFRP in relation to the taxpayer'.

72. As already noted clause 19.2 of the trust deed provides for the payment of an amount to the employee not exceeding the amount standing to the credit of the employee in their employee benefit account upon the employee terminating employment.

73. However, as also already noted, termination of employment simply refers to the termination or cessation of employment of the employee for any reason. Thus payments may be made to an employee for various events including retirement from the workforce on or after age 55, leaving the industry, death, etc.

74. This means that, for example, where an employee of a participating employer resigns and leaves the Industry, that employee would receive the balance of their employee account.

75. Consequently, no part of the amount payable under clause 19.2 of the trust deed would exceed the amount of an ETP 'that could reasonably be expected to have been made in relation to the taxpayer had he voluntarily retired from that employment at the termination time'. Thus, there will not be a BFRP in relation to the employee. Amounts payable under clause 19.2 of the trust deed would be assessable income of the recipient in terms of sections 27B and 27C of the ITAA 1936.

## **Appendix 2 – Detailed contents list**

---

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>12</b>
<b>Ruling</b>	<b>27</b>
<b>Appendix 1 – Explanation</b>	<b>33</b>
Application of section 8-1	33
Positive limbs	34
<i>Nexus to gaining and producing assessable income</i>	34
<i>Incurring the amount</i>	37
<i>Conclusion</i>	40
Negative limbs	41
<i>Is the contribution revenue or capital in nature?</i>	41
Payments by the employer to employee	45
Reimbursement of payment by employer	47
Nature of payment made by employer	49
<i>Eligible termination payment</i>	49
<i>Bona fide redundancy payment</i>	60
<b>Appendix 2 – Detailed contents list</b>	<b>76</b>

## References

---

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 94/12; TR 2003/13

*Subject references:*

- assessable recoupments
- deductions and expenses
- eligible termination payments
- income

*Legislative references:*

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- ITAA 1936 26(d)
- ITAA 1936 27A
- ITAA 1936 27A(1)
- ITAA 1936 27B
- ITAA 1936 27C
- ITAA 1936 27F
- ITAA 1936 27F(1)
- ITAA 1936 27F(1)(a)
- ITAA 1936 27F(1)(aa)
- ITAA 1936 27F(1)(b)
- ITAA 1936 27F(1)(c)
- ITAA 1936 27F(1)(d)
- ITAA 1997 6-5
- ITAA 1997 8-1
- FBTAA 1986 58PB(4)(c)
- Copyright Act 1968

*Case references:*

- AAT Case 4287 (1988) 19 ATR 3443
- Case V67 88 ATC 505
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) ATC 4413; (1990) 21 ATR 1
- McIntosh v. Commissioner of Taxation (1979) 25 ALR 557; 10 ATR 13; 45 FLR 279; 79 ATC 4325
- R v. The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd & Ors (1977) 44 SAIR 1202 (1977) 16 SASR 6
- Reseck v. Federal Commissioner of Taxation (1975) 49 ALJR 370; (1975) 6 ALR 642; (1975) 5 ATR 538; (1975) 75 ATC 4213; (1975) 133 CLR 45
- Short v. F W Hercus Pty Ltd (1993) 40 FCR 511; (1993) 46 IR 128; (1993) 35 AILR 151
- Sun Newspapers Ltd v. FC of T (1938) 61 CLR 337
- Walstern Pty Ltd v. Federal Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423

*Other references:*

- Explanatory Memorandum to the Income Tax Assessment Amendment Bill (No. 3) 1984

---

ATO references

- NO: 2006/8304  
ISSN: 1445-2014  
ATOLaw topic: Income Tax ~~ Assessable income ~~ recoupments  
Income Tax ~~ Assessable income ~~ eligible termination payments  
Deductions ~~ other employment related expenses