

CR 2006/50 - Income tax: deductibility of employer contributions to the Mechanical and Electrical Redundancy Trust

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⚠ 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 Mechanical and Electrical Redundancy Trust

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ⓘ 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 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 within 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 to make contributions on behalf of employees to the Mechanical and Electrical Redundancy Trust (MERT).

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 12 to 25 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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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 August 2004;
- MERT trust deed including 2004 FBT amendments;
- MERT Building Industry Redundancy Pay Agreement (Annexure A of the MERT trust deed referred to in the class Ruling application as the Deed of Adherence);
- Electrical, Electronic and Communications Contracting Industry (State) Award (at July 2004);
- Metal, Engineering and Associated Industries Award 1998; and
- Electrics Enterprise Agreement 2004 (Draft 27 January 2004).

13. MERT 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. The trustee of MERT is MERT Pty Ltd (trustee), an Australian resident company.

15. MERT is an approved worker entitlement fund for fringe benefits tax (FBT) purposes.

16. An employer may be required to make regular redundancy contributions to MERT because:

- Under the Metal, Engineering and Associated Industries Award 1998, an employer is required to adhere to the Building Industry Redundancy Pay Agreement made with MERT. In terms of clause 1.1 of this agreement the employer is required to fund award obligations to pay redundancy pay with MERT. As such an employer must, as required by subclause 9.1(a) of the MERT trust deed make a monthly redundancy contribution at the rate of \$25 each week or as otherwise set by the Trustee.
- Under the Electrical, Electronic and Communications Contracting Industry (State) Award, an employer is required to adhere to the Building Industry Redundancy Pay Agreement made with MERT. Under clause 1.1 of this agreement the employer is required to fund award obligations to pay redundancy pay with MERT. As such an employer must, as required by subclause 9.1(a) of the MERT trust deed make a monthly redundancy contribution at the rate of \$25 each week or as otherwise set by the Trustee.

17. MERT will accept contributions from employers, to fund each member's redundancy benefit. As provided in clause 9.1(a) of the MERT trust deed:

Each employer shall on a monthly basis promptly pay to the Trustee, or as directed by the Trustee, contributions in respect of each Member employed or whose services are used by that Employer (other than a Member who is an apprentice) at the rate of \$25 per week per Member, or such other rate as may from time to time be set by the Trustee having regard to the Objectives, for each week or (in the Trustee's discretion) part of a week in which the relevant Member is engage[d] in Relevant Service for that Employer.

18. While the minimum contribution rate in respect of each member employed or whose services are used by that employer is \$25 per week per member, higher rates will usually be agreed by the industrial parties.

19. In accordance with clause 10 of the trust deed, all contributions made to MERT by employers are credited to separate member (employee) accounts identifying contributions for that member.

20. On becoming redundant (as defined in the trust deed) a member is entitled to be paid a redundancy benefit directly from MERT under clause 27.1 of the trust deed. Where there is a balance in the member's account, payments may also be made for other reasons as per clause 27.2 or in respect of retirement, death, disablement and leaving the industry in accordance with clause 28.

21. Where the employer pays the member redundancy benefits directly, MERT will, as allowed under clause 26.1(b) of the trust deed, reimburse the employer for the amount paid to the particular member accordingly.

22. Fund income is not distributed each year. Under clause 26.3 of the trust deed any amounts not distributed (clause 27, 28 and 29 of the trust deed), transferred (clause 30 of the trust deed) or applied by the trustee (under clause 26.1 and 26.2 of the trust deed) are capitalised.

23. The trustee has a discretion under clause 26.1(i) of the trust deed to distribute income of the fund to the individual members.

24. Members can transfer the benefits they have accumulated with another redundancy fund into MERT where permitted by the other fund.

25. Under clause 30 of the trust deed members can transfer benefits to another redundancy fund that is an 'approved worker entitlement fund'.

Ruling

26. An employer who has a legal obligation to make redundancy contributions to MERT under the MERT trust deed, as an employer who is governed by an Award listed in Schedule A of the MERT Building Industry Redundancy Pay Agreement, can claim a deduction under section 8-1 of the ITAA 1997 for the amount of the contribution which is required to be made.

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

28. A reimbursement received by an employer from MERT 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.

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

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

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31. 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

7 June 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 of the ITAA 1997

32. 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 ITAA 1997.

Positive limbs

Nexus to gaining and producing assessable income

33. 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.

34. 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 MERT. The administrative provisions require the employer to make monthly contributions to MERT in respect to worker entitlements.

35. 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

36. At the point at which an employer makes the contribution to the trustee of MERT 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 Pty Ltd v. Federal Commissioner of Taxation* (2003) 138 FCR 1; [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423 where there were no members of the trust and the contributions were not incurred as they remained funds of the employer.

37. 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.

38. Notwithstanding the ability to be reimbursed in the future, the contributions to MERT 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

39. The employer's monthly contribution/s to MERT 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?

40. Whether the payment of worker entitlements to MERT is revenue or capital in nature depends on the character of the payment when made by the employer, as provided for in *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; (1990) 90 ATC 4413; (1990) 21 ATR 1. Here the Court noted at CLR 137; ATC 4419; ATR 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.

41. In making the monthly contribution/s to MERT, the employer meets their immediate legal obligation under the MERT trust deed (as required by their governing Award listed in Schedule A of the MERT Building Industry Redundancy Pay Agreement).

42. The employer discharges their obligation in respect to their employees each month when the monthly payment is made to MERT as required by clause 9.1(a) of the MERT trust deed.

43. 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 are revenue in nature.

Payments by employer to employee

44. 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.

45. 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

46. Where an employer has paid a worker their redundancy entitlement they may apply to MERT for a reimbursement of this amount. MERT may reimburse the employer for this amount under clauses 29 or 26.1 of the MERT trust deed.

47. 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***

48. 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. One such payment is that made on termination of employment. Paragraph (a) of the definition of an ETP in subsection 27A(1) 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...

49. 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.

50. 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) 133 CLR 45; (1975) 5 ATR 538; (1975) 75 ATC 4213 (*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 at CLR 51; ATC 4216-17; ATR 541-42:

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.

51. 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 at CLR 56; ATC 4220; ATR 545:

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'.

52. 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) 79 ATC 4325; (1979) 10 ATR 13. 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.

53. 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 at ATC 4328; ATR 15-16:

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.

54. In the same case, Lockhart J stated at ATC 4336; ATR25:
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.
55. 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.
56. 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.
57. Clause 27.1 of the trust deed of the MERT provides for the payment of an amount to the Member not exceeding the amount standing to the credit of the Member Account upon the Member being made redundant. The term 'redundant' is defined under clause 1.2 of the Trust Deed as:
'Redundancy' means, in relation to a Member, a situation where that Member's Employer has made a definite decision that the Employer no longer wishes the job the Member has been doing, done by anyone, and that decision leads to the termination of employment of that Member and 'Redundant' has a corresponding meaning.
58. Clause 27.2 of the trust deed of MERT provides for the payment of amounts to the Member other than where the Member has been made redundant.
59. Clause 28 of the trust deed of MERT provides for payments to be made to Members on retirement, death, disablement and leaving the industry.
60. Clause 12.3 deals with the situation where a retiring employer is replaced and another company, person or firm agrees to undertake the obligations of the participating employer in respect of the MERT.
61. It is considered that there is sufficient nexus between the making of the payments under clause 27.1 and the termination of the relevant employee's employment to constitute the payments as being ETPs as defined under paragraph (a) of the definition of an ETP in subsection 27A(1) of the ITAA 1936.

Bona fide redundancy payment

62. Section 27F of the ITAA 1936 provides for certain termination payments to be concessionally 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 arm's 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)).

63. 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.

64. 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.

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

66. 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.

67. 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 at ATC 508; ATR 3446:

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).

68. 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.

69. As noted above, clause 27.1 of the MERT trust deed provides for the payment of an amount to the member not exceeding the amount standing to the credit of the member in their benefit account upon their being made redundant. The term redundant is defined in the trust deed and would correspond with the meaning ascribed in paragraphs 41 and 42 of TR 94/12.

70. However clause 27.2 and clause 28 provide for payments to members not exceeding the amount standing to their credit in their benefit accounts in other circumstances that would simply be termination of employment and would not correspond to the meaning of redundancy ascribed in paragraphs 41 and 42 of TR 94/12.

71. 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.

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

73. 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.

74. 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'.

75. As already noted clauses 27.1, 27.2 and 28 of the trust deed provide 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 being made redundant or terminating employment.

76. However, as also already noted, the payment may be made on the termination or cessation of employment of the employee for many reasons. 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, and so on.

77. 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.

78. Consequently, no part of the amount payable under clauses 27.1, 27.2 or 28 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.

79. Amounts payable under clauses 27.1, 27.2 and 28 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

80. 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:

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)(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
- FBTA 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) 170 CLR 124; (1990) 90 ATC 4413; (1990) 21 ATR 1

- McIntosh v. Commissioner of Taxation (1979) 25 ALR 557; (1979) 10 ATR 13; 45 FLR 279; (1979) 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. FW 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) 138 FCR 1; [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

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ATOLaw topic: Income Tax ~~ Assessable income ~~ eligible termination payments
Income Tax ~~ Assessable income ~~ recoupments
Income Tax ~~ Deductions ~~ other employment related expenses