


CR 2008/2 - Fringe benefits tax and income tax: employer contributions to the Electrical Industry Training Foundation

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Class Ruling

Fringe benefits tax and income tax: employer contributions to the Electrical Industry Training Foundation

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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:

- subsection 136(1) (definition of 'fringe benefit') of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA); and
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of entities

3. The class of entities to which this Ruling applies is all employers who are bound by the terms of the Enterprise Bargaining Agreement (EBA) to make, and do in fact make, contributions to the Electrical Industry Training Foundation Pty Limited in its capacity as trustee (the Trustee) for the Electrical Industry Training Foundation (the Foundation).

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 13 to 23 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 16 January 2008.

9. 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 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 Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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).

Scheme

13. The following description of the scheme is based on information provided by the applicant. 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 dated 21 August 2007;
- supplementary information dated 26 September 2007;
- a copy of the draft constitution of Constitution of Electrical Industry Training Foundation Pty Limited;
- a copy of the draft Electrical Industry Training Foundation Trust Deed (Trust Deed); and
- a copy of the ETU Enterprise Agreement 2007-2010.

14. The Southern States Branch of the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU) and the National Electrical Contractors Association (NECA) have established a company called the Electrical Industry Training Foundation Pty Limited which acts as trustee for the Foundation.

15. The Objects of the Foundation are provided for in clause 3 of the Trust Deed:

The overriding object of the Foundation is to increase the safety, efficiency, productivity and competitiveness of Employers and to enhance the employment and career opportunities of Workers by facilitating training and training related initiatives, including but not limited to:

- (a) the development and/or the delivery of training courses;
- (b) the development and/or production of course materials and resource materials;
- (c) the development and/or implementation of new teaching and learning initiatives; and
- (d) research into training needs and issues.

16. Employers covered by the EBA have an obligation to provide a payment of \$5.00 per week per employee in respect of training initiatives.

17. The employers make contributions to the Foundation that are calculated on the number of employees they employ. There is no link or relationship between an employee on account of whom a contribution is made and the provision of a benefit by the Foundation for a particular employee. Rather, the employer makes a global contribution to the Foundation that is measured by the number of employees.

18. The ETU and NECA agreed, as allowed for by clause 9.4 of the EBA, to establish the Foundation (in the manner described in paragraph 14 of this Ruling) to receive the monies required to be paid under the EBA.

19. The objective of the ETU and NECA in establishing the trust was to facilitate on-going training to improve occupational health and safety in the industry and to improve employees' work skills so as to advance progression to higher industry skill levels.

20. Under clause 4 of the Trust Deed the Trustee has the power to accept contributions of property to the Foundation and on acceptance of these contributions they become part of the Trust Fund.

21. Contributions made to the Foundation by employers become part of the capital of the Trust Fund.

22. Income of the Trust Fund not paid out to satisfy the objects of the Foundation can be added by the Trustee to the capital of the Trust Fund.

23. The employer's obligation to make contributions to the Foundation arises from the terms of the EBA. Neither the EBA nor the terms of the Trust Deed of the Foundation provide or require that the obligation of employers to make contributions to the Foundation be tied to the Foundation returning particular amounts to the NECA or employers. The contribution the employers are required to make to the Foundation pursuant to the terms of the EBA is not tied to the Foundation returning income to the ETU, NECA or any other party.

Ruling

24. Contributions made to the Foundation by employers to fulfil their EBA obligations will not be 'fringe benefits' as defined at subsection 136(1) of the FBTAA.

25. An employer who makes a contribution to the Foundation to fulfil their EBA obligations can claim a deduction under section 8-1 of the ITAA 1997 for the amount of the contribution.

Commissioner of Taxation

16 January 2008

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.***

Fringe benefits tax

26. The term ‘benefit’ is defined in subsection 136(1) of the FBTAA and includes any right, privilege, service or facility under an arrangement in relation to the performance of work. The contribution of an amount to help fund training provided to employees will be the provision of a benefit.

27. The definition of a ‘fringe benefit’ as also contained within subsection 136(1) of the FBTAA requires amongst other things, that in order for a benefit to be a fringe benefit:

- the benefit must be provided to the employee or an associate of the employee; and
- that this benefit be provided in respect of the employment of the employee.

28. For the purposes of the FBTAA, the definition of ‘associate’ at subsection 136(1) defers to the definition at section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). As provided for at paragraph 318(1)(d) of the ITAA 1936, a trustee of a trust estate can be an associate of the individual where the individual benefits under the trust.

29. In determining whether a ‘fringe benefit’ has been provided in these circumstances the Full Federal Court decision in *Commissioner of Taxation v. Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; 2007 ATC 4236; 65 ATR 369 (the *Indooroopilly Case*) is authority for the requirement that a particular employee must be identified.

30. Edmonds J provided reasons for the decision, with which Stone and Allsop JJ agreed in separate judgements. His Honour said in the *Indooroopilly Case* [2007] FCAFC 16 at paragraph 35 that it was necessary, as Kiefel J had held in *Essenbourne Pty Ltd v. Federal Commissioner of Taxation* [2002] FCA 1577; 2002 ATC 5201; 51 ATR 629, to identify a particular employee in respect of whose employment a benefit is provided.

31. His Honour, at paragraph 36 drew an analogy that in terms of an associate of a natural person, it would not be possible to conclude that a person is a relative without knowing the identity of the relevant employee. On that basis, this was strongly suggestive of the reference to ‘the employee’ being a reference to a particular employee.

32. His Honour at paragraph 37, found that whilst a benefit provided to a trustee of a trust estate can be a fringe benefit, for this to occur:

... the identity of each employee who will take a share of the benefit is known with sufficient particularity, at the time the benefit is provided to enable it to be said that the benefit is provided in respect of the employment of each of those employees.

33. His Honour at paragraph 38 further found that the shares provided to the trustee were not provided in respect of the employment of any particular employee, nor all of the employees capable of benefiting who would in fact receive a benefit – only some employees may later benefit and their identity was not known.

34. His Honour at paragraph 39 said that his conclusion was consistent with his view that there was no discernible legislative policy:

to accelerate and bring to charge..... a benefit which the employee may never get as against a policy of deferring taxes on the benefit unless and until it comes home to the employee....

35. In the circumstances covered by this Ruling, the employers will make regular contributions to the Trustee of the Foundation to enable it to carry on its training activities. At the time of providing the contribution there is no certainty as to which of the employer's employees, if any, will benefit from the training or training related activity the Foundation is to undertake.

36. The contributions made by the employer are not made in respect of any particular employee. They are made on the basis of the number of employees for whom the employer is covered by an EBA.

37. Therefore, the contributions by employers to the Foundation do not constitute a fringe benefit within the meaning of subsection 136(1) of the FBTAA.

Income tax

38. 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, or is necessarily incurred in carrying on a business for the purposes of gaining or producing assessable income and is not:

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

39. For expenditure to be deductible under section 8-1 of the ITAA 1997 there must be a sufficient nexus or relationship between

the outgoing and the production of assessable income so that the outgoing is incidental and relevant to the gaining or producing of assessable income (*Ronpibon Tin & Tongkah Compound NL v. FC of T* (1949) 78 CLR 47; (1949) 8 ATD 431).

40. 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, as in this case, in an enterprise bargaining agreement (EBA) negotiated between the employer or employer association and the relevant union on the employee's behalf.

41. 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 a contribution to the Foundation under the EBA, such that those payments are incidental and relevant to the production of the assessable income of the business.

42. When an employer makes a contribution to the Foundation the amount is no longer available to the employer. This differs from the situation in *Walstern Pty Ltd v. Federal Commissioner of Taxation* [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423 where there were no employee members of the trust fund in the year each contribution was made and the employer remained the sole owner in equity of the moneys it had contributed in that year.

43. The Trust Deed of the Foundation allows amounts of income to be distributed to the NECA and the ETU, and for the assets of the Foundation to be disposed of at the discretion of the Trustee. However, the contributions by the employer to the Foundation are definite amounts paid as required by the EBA to fulfil the employer's legal obligations and as such are incurred by the employer.

44. The employer's contribution to the Foundation, as required by the EBA, is an outgoing incurred in carrying on a business for the purposes of section 8-1 of the ITAA 1997.

45. The payment by the employer of the contribution amount to the Foundation is clearly not of a private or domestic nature as it is only paid in relation to employees engaged in the business of their employer. Likewise such a payment is not a capital expense or of a capital nature. The payment has the character of a business expense similar to other costs associated with employing workers. Unlike a payment of a capital nature the payment does not secure any enduring benefit for the employer. Rather it discharges an ongoing obligation imposed upon the employer. In making repetitive monthly contributions to discharge an immediate obligation, the obligation is directly connected to the income earning capacity of the business. Accordingly, the payment of the contributions is revenue and not capital in nature.

46. Whether or not an expense relates to the earning of exempt income or non-assessable non-exempt income will depend on the circumstances applying to each participating employer, the nature of their business activities and the income they derive.

47. Therefore, where the payment of a contribution by an employer is made to the Foundation, in order to satisfy an obligation imposed by the EBA, it will be an allowable deduction under section 8-1 of the ITAA 1997. This is subject to the proviso that it does not relate to the earning of exempt income or non-assessable non-exempt income by the employer.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- deductions and expenses
- definition
- fringe benefit
- fringe benefits tax
- income

Legislative references:

- ITAA 1936 318
- ITAA 1936 318(1)(d)
- ITAA 1997 8-1
- FBTAA 1986 136(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

Case references:

- Commissioner of Taxation v. Indooroopilly Children Services (Qld) Pty Ltd [2007] FCAFC 16; 2007 ATC 4326; 65 ATR 369
- Essenbourne Pty Ltd v. Federal Commissioner of Taxation [2002] FCA 1577; 2002 ATC 5201; 51 ATR 629
- Ronpibon Tin & Tongkah Compound NL v. FC of T (1949) 78 CLR 47, (1949) 8 ATD 431
- Walstern Pty Ltd v. Federal Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423

ATO references

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