


CR 2009/17 - Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Funding Model

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Class Ruling

Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Funding Model

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 159P of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 15-2 of the ITAA 1997;
- Subdivision 20-A of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1997 unless indicated otherwise.

Class of entities

3. The class of entities to which this Ruling applies comprises:
- persons in the 'target group' (as defined in section 5 of the *Disability Services Act 1993* (NSW)); and
 - carers of such persons,

who enter into agreements to receive payments to purchase attendant care services under the Attendant Care Program Direct Funding Model (direct funding model). In this Ruling these persons are referred to as 'recipients'.

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 10 to 32 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 2008. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Rulings

9. This Ruling replaces Class Ruling CR 2006/83 Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Payment Pilot project. The pilot project ran from November 2006 to 30 June 2008. CR 2006/83 is withdrawn with effect from 25 March 2009.

Scheme

10. The scheme that is the subject of the Ruling is described below. This description is based on the following documents and telephone records which are attached to the file record maintained by the Tax Office for this Ruling. 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 part of documents incorporated into this description of the scheme are:

- ACP Guidelines, draft ACP Pilot Project Guidelines included with Application for Class Ruling received by letter dated 21 September 2005;
- Class Ruling CR 2006/83 Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Payment Pilot project;
- Application for Class Ruling received by letter dated 31 March 2008;
- ACP Direct Funding Model Guidelines July 2008;
- Funding Agreement between the Department and recipients;
- Various email and telephone discussions relating to the funding arrangement; and
- *Disability Services Act 1993* (NSW) (DSA) and regulations.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

11. The DSA provides the legislative basis for the funding of attendant care services to recipients as well as the funding of the research and development of these services.

12. The objects of the DSA are set out at section 3. They include ensuring the provision of services to persons with disabilities so as to enable them to 'achieve their maximum potential as members of the community', and 'to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community'.

13. The DSA sets out 'principles' and 'applications of principles' in Schedule 1. These have the purpose of ensuring that persons with disabilities are treated with due dignity and have their rights respected. They also expand upon the objects set out in section 3.

14. Under section 6 of the DSA the Minister for Disability Services (the Minister) has a duty to ensure that disability services to recipients are provided and funded in conformity with the objects, principles and applications of principles set out in Schedule 1.

15. Under section 8 of the DSA the Minister has the function of 'facilitating the provision' of disability services to a person in the target group. This may be done by providing the services directly, by providing financial assistance directly to such persons (or their carers) or to eligible organisations (service providers), or by encouraging the provision of the services by other persons or organisations.

16. The Department of Ageing, Disability and Home Care (NSW) (the Department) administers the Attendant Care Program (ACP) according to the Attendant Care Program Guidelines and Procedures. The ACP provides funding for the provision of high level in-home personal care and support services (attendant care) to assist people with a physical disability with the tasks of daily living. Between 15 and 35 hours per week are approved for the provision of attendant care such as assistance with getting out of bed, showering, dressing and meal preparation.

17. The ACP is funded on a fixed hourly rate. This rate is adjusted each financial year. The hourly rate is set having considered award rates for care workers, salary on-costs, training costs, necessary insurance and associated administrative costs (including co-ordinator salaries or part salaries). The rate is intended to cover those costs and expenses and does not include a profit component.

18. The Attendant Care Program Direct Funding Pilot Project ran from November 2006 to 30 June 2008. The Department approved the continuation of this direct funding model within the ACP on an ongoing basis. Direct funding is one of three funding options.

19. The direct funding model provides funding directly to the recipients to enable direct purchase of personal care services previously provided through an eligible service provider.

20. The direct funding model is not available in relation to all persons in the target group. Criteria apply to ensure that a recipient has the capacity to manage the funds and the attendant care.

21. A person must apply and be assessed and approved as a recipient by the Department.

22. The Department enters into a funding agreement with each recipient of direct funding outlining the funding being provided by the Department and what the funds can be used for.

23. The funds are paid electronically monthly in advance into an interest bearing bank account, in the name of the recipient, established specifically for that purpose. The level of payments is determined when the person is approved to receive direct funding and is included in the Funding Agreement.

24. Grants are made on the basis of the approved hours of attendant care and must be used solely for the purpose of receiving services as described in the Funding Agreement. The recipient may incur costs in excess of the grant however these are at the recipient's own expense.

25. Where grant money is:

- spent for a purpose other than an approved purpose; or
- unspent, either because it is in excess of the permitted carryover limit at the end of the year or because the direct funding agreement is terminated,

that part of the grant must be repaid to the Department.

26. Recipients of direct funding are required to maintain appropriate financial records and reports in respect of the grants. These records are to be maintained and made available for inspection by the Department as required. They will also provide the basis of acquittal of any unused funds to be paid back to the Department at the end of each financial year.

27. Interest earned on the grant must be used by the recipient in accordance with the Funding Agreement and is accounted for in the acquittal process of any unused funds.

28. The direct funding model allows the recipients the option of obtaining care by either:

- engaging an eligible service organisation to provide the necessary attendant care; or
- assuming employer responsibilities by engaging their own attendant carer to provide the necessary care. These responsibilities include the recruitment and training of staff and meeting legislative requirements including in respect of tax and superannuation.

29. The recipient is required to have workers compensation insurance where the recipient employs their own attendant carer directly. The recipient is advised to obtain adequate public liability insurance.

30. The recipient may not employ himself or herself or a close relative to provide the attendant care services.

31. Clause 4.4 of the agreement states:

Bank account: To process and record all Grant receipts and expenditure. You must, throughout the Term, maintain a separate account at a financial institution (bank, building society or credit union) operating in Australia.

32. The agreement is a voluntary one. The ACP Direct Funding Model Guidelines provide that if a recipient chooses to no longer participate in the direct funding model, the person's receipt of ACP will not be jeopardised.

Ruling

33. The grants received from the Department do not form part of the recipient's assessable income under section 6-5.

34. The grants received from the Department are:

- not given or granted to the recipient in relation to employment or services rendered under section 15-2; and
- not assessable recoupments of the recipient under Subdivision 20-A.

35. The interest earned on funds deposited into an account specially maintained for the purposes of receiving the grant does not form part of the recipient's assessable income.

36. Any losses or outgoings incurred in managing or obtaining the attendant care under the Funding Agreement are not deductible under section 8-1 or any other provision of the ITAA 1997.

37. None of the amounts paid by the recipient on attendant care and in respect of which a grant has been received, are treated as rebatable amounts for the purposes of the medical expenses tax offset under section 159P of the ITAA 1936.

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.*

38. A payment or other benefit received by a taxpayer is assessable income if it is:

- income in the ordinary sense of the word (ordinary income); or
- an amount or benefit that through the operation of the provisions of the tax law is included in assessable income (statutory income).

Ordinary income

39. Under subsection 6-5(1) an amount is assessable income if it is income according to ordinary concepts (ordinary income).

40. In determining whether an amount is ordinary income, the courts have established the following principles:

- what receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as a statute dictates otherwise;
- whether the payment received is income depends upon a close examination of all relevant circumstances; and
- whether the payment received is income is an objective test.

41. Relevant factors in determining whether an amount is ordinary income include:

- whether the payment is the product of any employment, services rendered, or any business;
- the quality or character of the payment in the hands of the recipient;
- the form of the receipt, that is, whether it is received as a lump sum or periodically; and
- the motive of the person making the payment. Motive however, is rarely decisive as in many cases a mixture of motives may exist.

42. When considering the first and last factors of paragraph 41 of this Ruling it is appropriate to look at the nature of the relationship between the recipients and the Department.

The nature of the relationship between the Department and the recipient

43. The Department is responsible for the administration of the ACP which provides high level in-home personal care and support services to assist people with a physical disability with the tasks of daily living.

44. The recipients in receipt of payments under the direct funding model are required to utilise the funds to directly purchase services previously provided through an eligible service provider.

45. Certain features of the arrangement point to the existence of a fiduciary relationship between the recipient and the Department. In *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 Mason J made the following observations about fiduciary relationships (at 97):

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

46. By entering into the agreement the recipient agrees to apply the funds to obtain attendant care, which is otherwise provided by the Department. Therefore, the recipient can be said to be acting on behalf of the Department in discharging its duty to provide attendant care services.

47. The arrangement clearly guards against abuse by the recipient. The terms of the Funding Agreement confine the use of the direct funding payments to approved purposes, protecting the Department and ensuring that public funds are used only in a way that discharges the Minister's statutory duty. The fact that this protection is expressed in a contract is not inconsistent with the existence of a fiduciary relationship: *Quistclose Investments Ltd v. Rolls Razor Ltd* [1970] AC 567.

48. A second critical feature is that the fiduciary may not profit from the position in which he or she is placed: see *Boardman v. Phipps* [1967] 2 AC 46 and cases referred to there by Lord Guest at 115-116; also *Pavan v. Ratnam* (1996) 23 ACSR 214 per Mahoney ACJ at 217. The fiduciary must treat his or her own interests as subservient to the interests of the principal, in this case the Department. The fiduciary must account for any profit made without the knowledge and consent of the principal. These elements are clearly present.

49. The recipient can only use the funds for approved purposes, and cannot employ himself or herself or family members. In addition, any interest accruing becomes part of the funds and can only be used for approved purposes.

50. Further, to say that the recipient holds the funds for his or her own benefit fails to give proper significance to the totality of the arrangement. The recipient holds the funds for the approved purposes and applies them on behalf of the Department.

51. Therefore, the fact that the funds may be used to obtain attendant care for a recipient personally does not mean that that person profits from the arrangement in the sense referred to in the authorities. The person would receive the same level of attendant care if he or she were not participating in the direct funding model.

52. In addition, an express obligation to keep funds separate from the recipient's own money points to the existence of a trust – that is, a fiduciary obligation: *Cohen v. Cohen* (1929) 42 CLR 91, referred to by the majority of the High Court in *Associated Alloys Pty Limited v. ACN 001 452 106 Pty Limited (in liquidation) (Formerly Metropolitan Engineering and Fabrications Pty Limited)* [2000] HCA 25 at [34].

53. This obligation is clearly present. Clause 4.4 of the funding agreement states:

To process and record all Grant receipts and expenditure you must, throughout the Term, maintain a separate account at a financial institution...

54. These characteristics of the arrangement strongly point to the recipient being in a fiduciary relationship with the Department.

The scope of the fiduciary relationship

55. The subject matter of the direct funding model is the provision of funds to the recipient to obtain attendant care. Apart from holding and applying the funds for the approved purposes, the recipient has no other obligations to the Department under the arrangement. It is clear, then, that the scope of the recipient's fiduciary obligations to the Department under the direct funding model relates to the recipient's holding and application of the funds.

56. The discretionary powers the recipient has as to the use of the funds are authorised under the funding agreement and fall within the purposes for which direct funding may be provided under the DSA. These powers do not conflict with the fiduciary obligations that the recipient owes to the Department. On the contrary, they are designed to further the objects and principles of the DSA.

57. The fiduciary duties owed by the recipient to the Department indicate that the direct payments are not beneficially held and used by the recipient for private purposes but are held and used on behalf of the Department in discharging the Minister's statutory obligation to provide attendant care.

58. The recipient under the funding agreement is neither an employee of the Department nor in receipt of the payments in relation to the carrying on of a business.

59. However whether the payments have been received for services rendered must be examined, as payments to a taxpayer for services rendered are assessable income, even though the taxpayer does not provide those services as an employee or in carrying on a business.

60. Under the terms of the Funding Agreement, while the recipient obtains and manages the attendant care services, the recipient does not receive any amount as a reward for taking on this role. The recipient is precluded from gaining any financial benefit, may not employ himself or herself or a close relative, and must use the funds only for approved purposes. Approved purposes are limited to paying for the attendant care services and the direct costs of managing these services. The recipient must account for the use of the grant and must repay any money not spent for an approved purpose.

61. In these circumstances, the grant is not a payment for services rendered.

62. In the present case, it is clear that a recipient cannot deal with the grant money as his or her own. The recipient's obligations in dealing with the grant money have the nature of fiduciary obligations. The ACP Direct Funding Guidelines support this at paragraph 7:

Funds used for the DFM are public funds, and as such, are subject to certain conditions. People receiving direct funding will be required to meet the conditions in the Funding Agreement and provide the Department with data regarding service outputs and expenditure.

63. The exclusion of agency by Clause 25.5 of the funding agreement may be effective in preventing the recipient from binding the Department under the recipient's own contracts with attendant care service providers. However, this does not prevent the relationship between the recipient and the Department from being a fiduciary one.

64. A primary motive of the Department in providing direct financial assistance in place of the attendant care services is to give the person with a disability non-material benefits such as increased dignity, self-determination and capacity to integrate into the life of the community. This motive is apparent in the objects and principles of the DSA and the Minister's duty in section 6 of that Act to ensure that services are provided and funded in accordance with those objects and principles. It is also apparent in the decision of the Department to continue with and expand the direct funding model following the success of the pilot project.

65. For the reasons given above, it is concluded that the grant is not ordinary income in the hands of a recipient under the Funding Agreement for the purposes of section 6-5.

Statutory income

66. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts are called statutory income. A list of the statutory income provisions can be found in section 10-5. That list includes a reference to section 15-2 and Subdivision 20-A.

Employment or services rendered

67. Section 15-2, provides that assessable income shall include:

... the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you ...

68. As discussed in paragraphs 58 and 60 of this Ruling, the recipients do not receive the grants for any employment or services rendered. Therefore the payments to the recipients are not statutory income under section 15-2.

Assessable recoupment

69. Subdivision 20-A operates to include in assessable income amounts received as recoupments of specified losses or outgoings allowed or allowable as deductions. As the payments are not being made by way of insurance or indemnity, the relevant provision is subsection 20-20(3) which provides that an amount is an assessable recoupment of a loss or outgoing if a taxpayer:

- receives the amount (except by way of insurance or indemnity); and
- can deduct an amount for the loss or outgoing in the current year or has deducted or can deduct an amount for it in an earlier year under a provision listed in the tables at section 20-30.

70. As no deduction is allowable or would be allowable to the recipient in respect of the expenditure incurred for the attendant care (see paragraph 74 of this Ruling), the payments received by them from the Department are not assessable recoupments and therefore no amounts are included in their assessable income under Subdivision 20-A.

Interest earned

71. Interest earned on money held in a bank account is ordinarily income from property and assessable to the owner of the bank account.

72. In the present case, however, any interest accrued in the dedicated account into which the payments are deposited forms part of the grant money and therefore subject to the same fiduciary obligations owed by the recipient to the Department.

73. Interest accruing to the account is therefore not ordinary or statutory income of the recipient.

General deductions

74. As the payments received by the recipients are not assessable as either ordinary or statutory income, the losses and outgoings that are incurred in connection with those payments are not allowable as deductions under section 8-1 or any other provision of the ITAA 1997. Consequently, expenses incurred by the recipient in acquiring attendant care services in accordance with the funding agreement are not deductible.

Medical expenses tax offset

75. Section 159P of the ITAA 1936 provides that an amount paid by a taxpayer as medical expenses less any amount paid, or entitled to be paid, to the taxpayer or any other person in respect of those medical expenses, is a rebatable amount for the purposes of the medical expenses tax offset.

76. Medical expenses include payments:

- to a legally qualified medical practitioner, nurse or chemist, or a public or private hospital, in respect of an illness or operation;
- for therapeutic treatment administered by direction of a legally qualified medical practitioner; and
- made as remuneration of a person for services rendered by him as an attendant of a person who is blind or permanently confined to a bed or invalid chair.

77. The payments made by the recipient may qualify as medical expenses. However those expenses must be reduced by any payment received or receivable in respect of the expenses to determine the rebatable amount. As the recipient will receive a grant from the Department under the direct funding model in respect of these expenses there will be no amount which can be treated as a rebatable amount for the purposes of the medical expenses tax offset.

Employer obligations

78. Where the recipient exercises the option to employ an attendant carer directly, the recipient will be required to register as an employer, withhold tax from payments made to the attendant carer and to meet any superannuation guarantee requirements in force at the time.

Appendix 2 – Detailed contents list

79. 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 2006/10

Previous Rulings/Determinations:

CR 2006/83

Subject references:

- allowances vs. reimbursements
- assessable income
- assessable recoupments
- deductions & expenses
- disabled care expenses
- income
- medical expenses
- medical expenses rebates
- rebates and offsets

Legislative references:

- ITAA 1936 159P
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 15-2
- ITAA 1997 Subdiv 20-A
- ITAA 1997 20-20(3)

- ITAA 1997 20-30
- Disability Services Act 1993 (NSW)
- Disability Services Act 1993 (NSW) 3
- Disability Services Act 1993 (NSW) 5
- Disability Services Act 1993 (NSW) 8
- TAA 1953
- Copyright Act 1968

Case references:

- Associated Alloys Pty Limited v. ACN 000 452 106 Pty Limited (in liquidation) (Formerly Metropolitan Engineering and Fabrications Pty Limited) [2000] HCA 25
- Boardman v. Phipps [1967] 2 AC 46
- Cohen v. Cohen (1929) 42 CLR 91
- Hospital Products Ltd v. United States Surgical Corporation (1984) 156 CLR 41
- Pavan v. Ratnam (1996) 23 ACSR 214
- Quistclose Investments Ltd v. Rolls Razor Ltd [1970] AC 567

ATO references

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Income Tax ~~ Assessable income ~~ recoupments
Income Tax ~~ Assessable income ~~ government payments
Income Tax ~~ Exempt income ~~ government payments
Income Tax ~~ Tax offsets, credits and benefits ~~ medical expenses tax offset - calculation
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