


CR 2009/64 - Income tax: employment termination payment: New South Wales Lotteries Corporation

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Class Ruling

Income tax: employment termination payment: New South Wales Lotteries Corporation

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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 provision dealt with in this Ruling is section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997). All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are all employees with the New South Wales Lotteries Corporation (NSW Lotteries Corp) at the time of the sale of the business who:

- cease employment with NSW Lotteries Corp;

- accept an offer to take up employment with the successful purchaser of the business; and
- receive a 'transfer payment' from NSW Lotteries Corp under the scheme described in paragraphs 9 to 23 of this Ruling.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 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 18 November 2009 to 17 November 2010. The Ruling continues to apply after 17 November 2010 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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).

Scheme

9. The following description of the scheme is based on information provided by the applicant.

10. NSW Lotteries Corp is a statutory State Owned Corporation (SOC) constituted by the *New South Wales Lotteries Corporatisation Act 1996* (NSW) and the *State Owned Corporations Act 1989* (NSW).

11. The New South Wales Government (NSW Government) intends to sell, via an application process, the business undertaking conducted by NSW Lotteries Corp to a private sector entity.

12. The principals carrying out the scheme include NSW Lotteries Corp and the NSW Government.

13. The NSW Government are currently considering the method of sale of NSW Lotteries Corp. *NSW Lotteries (Authorised Transaction) Act 2009* (NSW) (the Act), passed by Parliament on 9 September 2009, authorises a number of alternative options which result in either:

- employees terminating employment with the SOC and accepting employment with a new NSW Government owned corporation which is subsequently sold to the successful applicant; or
- the direct transfer of employees to the successful applicant.

14. Public lotteries are illegal in NSW unless conducted under licence. Licences cannot be transferred to another entity without legislative instrument. NSW Lotteries Corp holds licences to conduct certain public lotteries. Since 30 June 2007, these licences have been granted annually and the current licences held by NSW Lotteries Corp expire on 30 June 2010.

15. Following the passing of the Act, an operator licence will be granted under and pursuant to the *Public Lotteries Act 1996* as amended by the Act. Transfer of the assets, rights and liabilities of NSW Lotteries Corp to the private sector and other public sector agencies as well as the transfer of employees will be effected pursuant to and under the Act..

16. Under the sale, existing licences held by NSW Lotteries Corp will be cancelled on the commencement of the new licensing arrangements. The licences provided under the amended legislation will involve the grant of a 40 year licence to conduct public lotteries in NSW. The licence will expire at the end of 40 years unless it is terminated, revoked, suspended or surrendered before that time.

17. The class of entities to which this arrangement applies are all employees with the NSW Lotteries Corp at the time of the sale of the business who:

- cease employment with NSW Lotteries Corp;
- accept an offer to take up employment with the successful purchaser of the business; and
- receive a 'transfer payment' from NSW Lotteries Corp.

18. NSW Lotteries Corp currently employs 169 permanent, casual and temporary employees, including 156 employees employed on the terms of the New South Wales Lotteries (Salaries, Allowance and Conditions of Employment) 2008 Award (2008 Award).

19. 2008 Award employees of NSW Lotteries Corp will be able to elect whether to remain in the NSW Government public sector or to commence employment with the successful applicant who purchases the NSW Lotteries Corp business on completion of the sale.

20. Upon the sale of the NSW Lotteries Corp business, all permanent (full or part-time) employees with more than one year's service with NSW Lotteries Corp, who accept an offer to take up employment with the purchaser of NSW Lotteries Corp business, will receive a 'transfer payment' from NSW Lotteries Corp.

21. The 'transfer payment' reflects compensation for certain public sector employment conditions that will be lost following cessation of employment with the NSW Lotteries Corp such as:

- No forced redundancies and voluntary redundancy provisions;
- Access to redeployment provisions, including salary maintenance (a period up to 12 months on full salary if an employee's position is made redundant) and professional career transition support with external providers;
- Paid maternity leave provision;
- Broader range of paid leave and leave without pay provisions;
- Mandatory flexible working hours arrangements;
- Access to provisions regarding the management of conduct and performance; and
- Access to provisions regarding the advertising, eligibility, selection and appointment to positions.

22. The 'transfer payment' is determined as set out in the table:

Length of Service	'Transfer payment' Week's ordinary time base rate of pay
Less than one year	0
1 year or more, but less than 2 years	7.5
2 years or more, but less than 3 years	13.125
3 years or more, but less than 4 years	18.75
4 years or more, but less than 5 years	22.5
5 years or more, but less than 6 years	26.25
6 years or more	30

23. The 'transfer payment' will be paid at the earliest possible time on or around completion of the sale of the business of NSW Lotteries Corp.

Ruling

24. The proposed 'transfer payment' made in accordance with the scheme described in paragraphs 9 to 23 of this Ruling is in consequence of the termination of employment and is an employment termination payment under section 82-130.

Commissioner of Taxation

18 November 2009

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.*

25. Section 995-1 states that an employment termination payment has the meaning given by section 82-130.

26. Subsection 82-130(1) states:

A payment is an **employment termination payment** if:

- (a) it is received by you:
 - (i) in consequence of the termination of your employment; or
 - (ii) after another persons death, in consequence of the termination of the other persons employment; and
- (b) it is received no later than 12 months after that termination (but see subsection (4)); and
- (c) it is not a payment mentioned in section 82-135.

27. Section 82-135 lists payments that are not employment termination payments. These include (among others):

- superannuation benefits;
- unused annual leave or long service leave payments; and
- the tax free part of a genuine redundancy payment or an early retirement scheme payment.

28. The proposed 'transfer payment' is not a payment mentioned in section 82-135.

29. In determining whether the 'transfer payment' constitutes an employment termination payment, all the conditions in section 82-130 need to be satisfied.

Is there a termination of employment?

30. Paragraph 9 of Taxation Ruling IT 2152 Income tax: retiring allowances paid to employees upon restructuring of a business states:

Where a company or other employer ceases carrying on a business which has been transferred to an associated entity, it will be accepted that the employees of the company have had their employment terminated. This will apply in cases similar to the *Paklan* Case where it is clear that the business in question has been transferred to another entity and it is also clear that the employee's employment has, in fact, been terminated...

31. The facts in *Paklan Pty Ltd and others v. Federal Commissioner of Taxation* (1983) 67 FLR 328; (1983) 83 ATC 4456; (1983) 14 ATR 457 (*Paklan's*) can be summarised as follows:

- The taxpayers were directors and shareholders of a company (the old company) which carried on business as consulting engineers.
- On 30 June 1977 the old company ceased to carry on business and the next day sold the business to another company (the new company) also controlled by the taxpayers.
- The new company commenced carrying on the business from the same premises and subject to the same arrangements for occupancy as the old company.
- All the old company's employees, including the taxpayers, became employees of the new company.
- Six months later, it was decided to pay a lump sum to former directors. The payments were actually made a year after the company ceased business and out of outstanding fees received after the business had ceased.

32. The taxpayers in *Paklan's* did not succeed in having the lump sums in question treated as a 'payment in consequence of termination' as they were paid under circumstances, and at a time, too remote from the termination. However, the Full Federal Court did not dispute the fact that employment had terminated when the old company had ceased business on 1 July 1977.

33. The facts in *Case Q118* (1983) 83 ATC 610 were similar to those in *Paklan's*, and again involved the sale of a company's business as a going concern to a new company. All the employees of the old business were transferred across to the new company. The Board of Review (at 618) did not dispute the fact that employees of the old company had ceased to be employees of the old company immediately before taking up employment with the new company.

34. While in *Case K76* (1978) 78 ATC 703; (1978) 23 CTBR(NS) 24, where a taxpayer ceased work with a subsidiary company due to a corporate restructure and immediately re-commenced work with the parent company on the same terms and conditions, it was held the taxpayer's employment with the subsidiary company had been terminated.

35. The relevant facts in respect of the sale of NSW Lotteries Corp indicate that the employment of all 2008 Award employees with the NSW Lotteries Corp will be terminated. Employees of NSW Lotteries Corp will be able to elect whether to remain employed in the NSW Government public sector or to transfer to the successful applicant on completion of the sale.

36. Employees who take up positions with the successful applicant will cease employment with NSW Lotteries Corp. Therefore, there is a termination of their employment with NSW Lotteries Corp.

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

37. A payment can be considered to be in consequence of termination where it follows from the termination, or the termination is a condition precedent to the payment. In *Reseck v. Federal Commissioner of Taxation* (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538 (*Reseck’s*) Justice Gibbs said:

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.

38. In the same case, Justice Jacobs said that ‘in consequence of’ did not import causation but rather a ‘following on’.

39. The decision in *Reseck’s* was considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation* (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13; (1979) 25 ALR 557 (*McIntosh*). The case concerned a taxpayer who became entitled to a payment subsequent to his retirement. In finding that the payment was in consequence of the taxpayer’s termination, Justice Brennan said:

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

40. The phrase ‘in consequence of’ and the decisions in *Reseck’s* and *McIntosh* were also considered more recently by the Federal Court in *Le Grand v. Federal Commissioner of Taxation* [2002] FCA 1258; (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139 (*Le Grand*).

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

I do not consider that the issue can simply be determined by seeking to identify the 'occasion' for the payment. The thrust of the judgments in *Reseck* and *McIntosh* is rather to the effect that payment is made 'in consequence' of a particular circumstance when the payment follows on from, and is an effect or result, in a causal sense, of the circumstance. ... there need not be identified only one circumstance which gives rise to a payment before it can be said that the payment is made 'in consequence' of that circumstance. ... it can be said that a payment may be made in consequence of a number of circumstances and that, for present purposes, it is not necessary that the termination of the employment be the dominant cause of the payment so long as the payment follows in the causal sense referred to in those judgments, as an effect or result of the termination.

42. The Commissioner of Taxation 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'.

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

... a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer. The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

44. In the present case, notwithstanding that the 'transfer payment' is payable only to 2008 Award employees who take up employment with the successful applicant, the 'transfer payment' is payable only on the condition that employees have terminated their employment with NSW Lotteries Corp. The payment follows as an effect or result of the termination and the payment would not have been made to the employees but for the termination of their employment with NSW Lotteries Corp.

45. The following aspects of the arrangement reinforce the characterisation of the 'transfer payment' as an employment termination payment (as distinct from, for example, a transfer or sign-on fee):

- the payment is made by NSW Lotteries Corp;
- the payment is calculated by reference to each employee's years of service with NSW Lotteries Corp; and
- there are no obligations imposed on the employees to continue their employment with the successful applicant for any particular period after commencement of the employment with the successful applicant.

46. Further, the 'transfer payment' will be paid at the earliest possible time after completion of the sale of NSW Lotteries Corp. The timing of the payments further strengthens the connection between the 'transfer payments' and the termination of employment.

47. The 'transfer payment' is only payable on the condition that employees have terminated their employment with NSW Lotteries Corp. No entitlement to the payment arises prior to this event. Although the 'transfer payment' is payable to those who take up employment with the successful applicant, it more directly relates to the termination of employment with NSW Lotteries Corp.

48. In view of the above, the 'transfer payment' is in consequence of the termination of employment and is therefore an employment termination payment under section 82-130.

Appendix 2 – Detailed contents list

49. 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:

IT 2152; TR 2003/13; TR 2006/10

Subject references:

- employment termination
- employment termination payments
- superannuation business line
- superannuation case reports
- superannuation, retirement & employment termination
- Sydney CBD ATO

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-135
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968
- New South Wales Lotteries Corporatisation Act 1996 (NSW)
- NSW Lotteries (Authorised Transaction) Act 2009 (NSW)
- Public Lotteries Act 1996 (NSW)
- State Owned Corporations Act 1989 (NSW)

Case references:

- Case K76 (1978) 78 ATC 703; (1978) 23 CTBR(NS) 24
- Case Q118 (1983) 83 ATC 610
- Le Grand v. Federal Commissioner of Taxation [2002] FCA 1258; (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139
- McIntosh v. Federal Commissioner of Taxation (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13; (1979) 25 ALR 557
- Paklan Pty Ltd and others v. Federal Commissioner of Taxation (1983) 67 FLR 328; (1983) 83 ATC 4456; (1983) 14 ATR 457
- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538

Other references:

- New South Wales Lotteries (Salaries, Allowance and Conditions of Employment) 2008 Award

ATO references

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