


CR 2009/72 - Income tax: payments made under the EG Green & Sons, Harvey - Worker Support Program

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Class Ruling

Income tax: payments made under the EG Green & Sons, Harvey – Worker Support Program

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	57
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	89
Appendix 2:	
<i>Detailed contents list</i>	171

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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.

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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 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27F of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- Division 110 of the ITAA 1997;
- Division 112 of the ITAA 1997;
- section 115-25 of the ITAA 1997;
- section 116-20 of the ITAA 1997;

- section 118-20 of the ITAA 1997;
- section 118-37 of the ITAA 1997;
- Subdivision 118-B of the ITAA 1997; and
- Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

All subsequent references in this Ruling are to the ITAA 1997, unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is those workers who received assistance made by the Western Australian Government under the EG Green & Sons, Harvey – Worker Support Program (the program) described in paragraphs 9 to 56 of this Ruling.
4. In this Ruling, a person belonging to this class of entities is referred to as an eligible worker.

Qualifications

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 56 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 2005 to 30 June 2007. The Ruling continues to apply after 30 June 2007 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. The following document, or relevant parts of it form part of and are to be read with the description:

- Guidelines of the EG Green & Sons, Harvey – Worker Support Program (the Guidelines)

10. On 12 August 2005, the management of EG Green & Sons Pty Ltd (the company) stood down the majority of its workforce due to the company experiencing financial difficulties.

11. The Western Australian Government established the program to provide support to those workers retrenched by any significant workforce downsizing of the company, with the emphasis upon assisting them to remain in the meat industry. Where this is not possible, the support will assist eligible workers to obtain other employment.

12. A worker is eligible for assistance if they can demonstrate that they were either:

- (i) an employee of the company on 12 August 2005 and had their employment terminated as a direct result of the company's decision to reduce the workforce due to the company's financial difficulties and any consequent downsizing of the workforce up to 31 December 2005; or
- (ii) a contractor to the company on 12 August 2005
 - whose contract to the company provided over 50% of the contractor's total income during the 2004-05 income year, as confirmed by the contractor's accountant, or an employee of such a contractor, and
 - had their contract or employment contract terminated as a result of the company's financial difficulties, and any consequent downsizing of the workforce and service contracts, up to 31 December 2005.

13. To be entitled to access the benefits available under the program each eligible worker must be registered on the program no later than 28 February 2006 (subject to review).

14. Each eligible worker will be able to access the program and receive services for a period of six months from the date of their registration on the program. However, if agreed training and re-skilling programs that are commenced during the period of service are not completed within these six months, their costs will be met by the program, as agreed by the case manager and the Australasian Meat Industry Employees' Union (the Union).

15. A case manager is appointed or funded by the Western Australian Department of Education and Training (the Department) to deliver and administer assistance to the eligible worker under the program. Each eligible worker whose employment is affected is invited to meet with the case manager in order to develop an agreed plan. The plan may only contain those assistance measures specified in the Guidelines.

16. If the eligible worker and the case manager are unable to agree on a plan, the matter will be reviewed by the Department and the Union. The review decision will be final.

17. The payments are made by the Department. The company is not required to make any payments to the Department to offset the cost of the program.

18. Each eligible worker may be provided with assistance up to the maximum amount of \$4,500 composed of any combination of assistance payments, as negotiated and approved by the case manager and the Department, to reflect the individual needs and circumstances of each eligible worker.

19. The Guidelines explain the types of assistance available under the program. These are:

- post redundancy training assistance;
- vocational training support;
- travel and relocation assistance;
- mortgage and rent support; and
- assistance under a flexible package for self employment or business purposes.

20. The cost of articles of protective clothing, work clothing, training equipment; or work equipment, the provision of which is not an industrial or statutory requirement for a training provider or a new employer, may also be covered by the program subject to negotiation with the case manager.

21. The types of assistance available under the program are described below.

Post redundancy training assistance

22. A plan may include assistance of \$100 per day for a one week training course designed to enable eligible workers to acquire skills or knowledge that may enable them to understand and navigate the new world of work and to obtain other employment or contracts. The maximum amount that may be claimed under this assistance is \$500.

23. The training service provider maintains an attendance register and sends a tax invoice to the Department listing the extent of each eligible worker's attendance. The Department pays \$100 for each day of attendance at the course directly to the eligible worker.

24. The payment is in the nature of a participation allowance and is provided as an incentive to attend the course.

Vocational training support

25. A plan may include support for an eligible worker to undertake vocational training which will assist in securing future employment.

26. Training can be undertaken for vocational purposes such as:

- to improve literacy and numeracy skills;
- to gain a skill or qualification to meet a demand by another employer; and
- to gain an offer of employment (in writing) by an employer on the condition that training is successfully completed.

27. Training can be undertaken via accredited courses or customised training. The eligible worker and the case manager will decide on a training program and the case manager may call for quotes from training service providers.

28. The training service provider will provide the training and then invoice the Department in the name of the eligible worker. The payments are made to the training service provider. However, in isolated cases, the eligible worker may pay the training provider directly and claim reimbursement from the case manager on production of a receipt.

29. The program will cover the cost of:

- a training needs assessment;
- training courses, including fees, books, equipment and other requirements;

- return travel between an eligible worker's home address and the training site where his or her private vehicle is used. The eligible worker is required to keep a log book and is paid on a cents per kilometre basis at the rates published by the Tax Office. Other modes of transport may be covered through reimbursement of costs on presentation of receipts, with prior approval by the case manager; and
- accommodation expenses where training is undertaken outside a 100 kilometre area from the eligible worker's home, (up to a maximum of \$80 per night). These costs are reimbursed on presentation of receipts to the case manager.

30. Some expenses (for example, travel and accommodation) may be paid in advance to the relevant training provider. Other approved expenses will be reimbursed to the eligible worker on presentation of receipts. In special circumstances, the case manager may approve some payments to eligible workers in advance.

Travel and relocation assistance

31. The costs for approved expenses incurred in travelling for job interviews or job search, and relocating to another locality are payable by the program.

Travel assistance

32. Travel assistance is available to help meet the cost of attending out of area job interviews and undertaking general job search for up to two weeks in another location which offers eligible workers better prospects of employment.

33. Assistance may include the cost of fares or allowance for petrol costs if eligible workers need to use their personal vehicle. The amount paid for use of a personal vehicle is calculated in the same way as for vocational training support in paragraph 29 of this Ruling. Travel costs for other forms of transport are reimbursed on presentation of receipts to the case manager.

34. An accommodation allowance of up to \$80 per night is also available for each night spent away from home, as agreed by the case manager. Accommodation costs are reimbursed on presentation of receipts to the case manager.

Relocation assistance

35. Relocation assistance will be available where an eligible worker who lives in one locality, and has poor alternative job prospects, is required to accept employment in another location. Relocation expenses will be paid in circumstances where the eligible worker had obtained new employment requiring relocation within Australia and application for costs is made within two months of displacement.

36. Eligible workers claiming relocation assistance must provide proof of new employment such as a letter from the new employer. Where the new employer provides financial assistance to help eligible workers to relocate, this amount will be deducted from the overall relocation payment.

37. The costs for approved expenses incurred in relocating are within the \$4,500 available. Approved expenses include the cost of relocating furniture and other chattels (including insurance and travel costs) to take up employment in the new location in the eligible worker's own vehicle, or by rail or bus.

38. If a removalist is used, the amount is paid directly to the removalist upon presentation of an invoice. In isolated cases, the worker may pay the removalist and claim reimbursement from the case manager on production of a receipt. Other expenses are paid on production of a receipt to the case manager.

Mortgage and rent support

39. Eligible workers who change their place of residence to take up new employment may receive support under the program up to a maximum of \$4,500 for:

- the costs of changing residence; and
- costs incurred where the former residence remains vacant.

40. A worker will only be eligible for mortgage or rent support while their level of income is less than the level the worker was being paid by the company prior to 12 August 2005.

Costs of changing residence

41. Assistance is available for the reimbursement of costs associated with the sale of an existing home and the purchase of a new home, or for leaving a rented house and moving into new rental accommodation. These costs are reimbursed by the case manager on production of receipts.

42. Selling costs, bank charges, advertising costs, letting fees, lease fees and utilities connection fees incurred in the process of changing residence are examples of the types of costs that will be reimbursed.

Costs incurred where the former residence remains vacant

43. Assistance is also available where an eligible worker's residence remains vacant, or a new tenant has not been found to rent the property or take over the lease. The eligible worker could opt to access up to \$4,500 to cover mortgage or rent payments due.

44. In addition, certain ongoing expenses associated with maintaining the property while the property remains vacant may be claimed.

45. In most cases, for mortgage or rent payments, the eligible worker requests the landlord, real estate agent or finance provider to invoice the Department on their behalf. The case manager would require proof of liability.

46. In isolated cases, the eligible worker may pay the mortgage or rent directly and claim reimbursement from the case manager on production of a receipt.

Flexible package for self employment or business purposes

47. Eligible workers may apply to the case manager to access any portion of their support under the program (maximum \$4,500) for use towards business purposes.

48. Those eligible workers who have recently successfully managed a business or been self employed need to provide:

- a letter of application making a case to the case manager for use of up to \$4,500 of their support under the program for allocation for business purposes; and
- a letter of evidence from an independent source, being either the eligible worker's accountant or a Business Enterprise Centre (BEC), of recently successfully running a business or being self employed successfully, and endorsing the proposed business activity to be carried out as likely to be commercially viable in the view of the accountant or BEC.

49. Approval is at the discretion of the case manager for eligible workers who have recently successfully managed a business or been self employed.

50. Those eligible workers who have not recently successfully managed a business or been self employed successfully will be required to undergo business preparation to the satisfaction of the case manager and the Department as follows:

- seek business advice from either a BEC or an accountant of their choice;
- undertake business planning and market research under the guidance of a BEC or an accountant of their choice;

- provide a letter of endorsement from a BEC or an accountant of their choice that the business activity for which funds are requested is likely to be commercially viable; and
- provide a letter of application making a case to the case manager for use of up to \$4,500 of their program funds for business purposes, specifying the business activity to be undertaken and the items for which the funds are being requested;
- provide evidence of having registered as a business and have an Australian Business Number.

51. The decision to approve or reject the application from eligible workers who have not recently successfully managed a business or been self employed will be made by the Department.

52. The eligible worker generally identifies requirements and requests a purchase order from the case manager. The provider then invoices the Department in the name of the eligible worker.

53. In isolated cases, the eligible worker may pay for the requirements directly and claim reimbursement from the case manager on production of a receipt.

Payments to third parties

54. Payments may be made by the Western Australian Government under the program to third parties of benefits to eligible workers for:

- vocational training support;
- relocation assistance; and
- self employment or business purposes.

55. Payments may also be made by the Western Australian Government to third parties on behalf of eligible workers in satisfaction of their obligation to make rent or mortgage payments.

56. This Ruling deals with the taxation treatment for eligible workers who may be deemed to have received such third party payments under the program. This Ruling does not consider the taxation treatment for direct recipients (third parties) of such payments under the program.

Ruling

Post redundancy training assistance

Eligible termination payment

57. A payment received by an eligible worker as post redundancy training assistance is not an eligible termination payment (ETP) under subsection 27A(1) of the ITAA 1936.

Ordinary Income

58. A payment received by an eligible worker as post redundancy training assistance is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

59. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for post redundancy training assistance.

60. The capital proceeds from the event is the amount of the assistance received (subsection 116-20(1)). The eligible worker will make a capital gain if the capital proceeds are more than the cost base of the entitlement to receive the assistance, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

61. The cost base of the entitlement is calculated under Divisions 110 and 112. Although the eligible worker did not incur expenditure to acquire the entitlement to assistance, there is no market value substitution for the first element of the cost base under subsection 112-20(1).

62. The capital gain is not a discount capital gain where the eligible worker received the assistance within 12 months of acquiring the entitlement when their plan was approved (subsection 115-25(1)).

Vocational training support paid directly to the eligible worker

Eligible termination payment

63. A payment received by an eligible worker as vocational training support is not an ETP under subsection 27A(1) of the ITAA 1936.

Ordinary Income

64. A payment received by an eligible worker as vocational training support is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

65. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for vocational training support. However, any capital gain or loss made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

Travel and relocation assistance paid directly to the eligible worker***Eligible termination payment***

66. A payment received by an eligible worker as travel and relocation assistance is not an ETP under subsection 27A(1) of the ITAA 1936.

Ordinary Income

67. A payment received by an eligible worker as travel or relocation assistance is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

68. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for travel and relocation assistance. However, any capital gain or capital loss made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

Mortgage and rent support paid directly to the eligible worker***Costs of changing residence******Eligible termination payment***

69. A payment received by an eligible worker for the costs of changing residence is not an ETP under subsection 27A(1) of the ITAA 1936.

Ordinary Income

70. A payment received by an eligible worker as a reimbursement of the costs associated with the sale or purchase of a home, or for moving from one rented house to another is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

71. CGT event C2 under section 104-25 happens when the eligible worker receives a reimbursement of the costs associated with the sale or purchase of a home, or for moving from one rented house to another. However, any capital gain or capital loss made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

72. Costs that are reimbursed are not included in the cost base or reduced cost base of the house that was sold or the house that is purchased (subsection 110-40(3), 110-45(3) or 110-55(6)).

73. Any capital gain or loss made on disposal of the house may be disregarded if the main residence exemption under Subdivision 118-B applies.

Costs incurred where the former residence remains vacant

Eligible termination payment

74. A payment received by an eligible worker for costs incurred while the former residence remains vacant is not an ETP under subsection 27A(1) of the ITAA 1936.

Ordinary Income

75. A payment received by an eligible worker for mortgage or rent assistance and other costs incurred while the former residence remains vacant is income according to ordinary concepts and is included in assessable income under section 6-5 in the income year in which it is received by the eligible worker.

Capital gains tax

76. CGT event C2 under section 104-25 happens when an eligible worker receives a reimbursement for mortgage or rent paid, or for the costs of maintaining the vacant residence.

77. However, as the amount is included in the eligible worker's assessable income, any capital gain made from the CGT event is reduced to nil under section 118-20.

78. There are no CGT consequences for the cost base or reduced cost base of the house, as the payment is included in assessable income (subsection 110-40(3), 110-45(3) or 110-55(6)).

Flexible package for self employment or business purposes paid directly to the eligible worker***Eligible termination payment***

79. A payment received by an eligible worker for self employment or business purposes is not an ETP under subsection 27A(1) of the ITAA 1936.

Ordinary Income

80. A payment received by an eligible worker for self employment or business purposes is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

81. CGT event C2 under section 104-25 happens when the eligible worker receives a payment for self employment or business purposes under this package. However, any capital gain or loss made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

82. To the extent that a payment for self employment or business purposes relates to the acquisition of a CGT asset, it is a recoupment of the cost of acquiring that asset. The amount that is recouped will not form part of the cost base of the asset.

Payments to third parties***Eligible termination payment***

83. Payments made to third parties under the program (which includes vocational training support, relocation assistance, payments for self employment or business purposes and mortgage and rent payments) are prima facie capable of being considered to be bona fide redundancy payments under section 27F of the ITAA 1936 in respect of an eligible worker.

84. However, the causal connection between the termination of an eligible worker's former employment and the payment to a third party under the program is considered too remote from the payment for the payment to be characterised as a payment made in consequence of termination of employment of an eligible worker. Therefore a payment to a third party on behalf of an eligible worker is not an ETP under subsection 27A(1) of the ITAA 1936.

Fringe benefits tax

85. Payments made to third parties under the program (which includes vocational training support, relocation assistance, payments for self employment or business purposes and mortgage and rent payments) and the provision of benefits by third parties will not result in an eligible worker having a reportable fringe benefit amount for the purposes of Part XIB of the FBTAA.

Ordinary income

Vocational training support, relocation assistance and assistance for self employment or business purposes

86. When a payment is made to a third party on behalf of an eligible worker for the provision of vocational training support, relocation assistance or assistance for self employment or business purposes, the payment is not income of the eligible worker according to ordinary concepts and is not included in the eligible worker's assessable income under section 6-5.

Mortgage and rent support

87. A payment made to a third party on behalf of an eligible worker for mortgage or rent payments while the former residence remains vacant is income of the eligible worker according to ordinary concepts, and is included in the eligible worker's assessable income under section 6-5.

Capital gains tax

88. The CGT consequences for the eligible worker are the same, regardless of whether the assistance under the program is provided to the eligible worker directly or to a third party.

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.*

Background

89. In arriving at the decisions in this Ruling the Commissioner has considered whether the payments made to eligible workers under the program are:

- eligible termination payments;
- assessable as ordinary income;
- subject to the capital gains tax provisions (CGT);
- reportable fringe benefit amounts.

Eligible termination payment

90. Prior to 1 July 2007, payments made in consequence of termination were a particular kind of ETP unless there was a specific taxing provision, such as for unused leave.

91. At paragraph 5 of Taxation Ruling TR 2003/13 the Commissioner took the following view in relation to whether a payment was made in consequence of termination and was therefore an eligible termination payment:

The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. Whilst there are divergent views as to the correct interpretation of the phrase, 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.

92. This is the initial test to be applied to any particular facts. Would the payment have been made but for the termination of employment?

93. However, there remains a question as to the degree of connection between the termination and the payment in determining whether a payment is made 'in consequence' of termination, as stated at paragraph 6 of TR 2003/13:

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.

94. While the connection need not be dominant it can still be too weak for the payment to qualify as an eligible termination payment. As stated at paragraph 6 of TR 2003/13, a determination as to the degree of connection between a payment and a termination is a question of fact in each case.

95. The Commissioner goes on to state at paragraph 7 of TR 2003/13 that a payment made a long time after a termination may be 'too remote' to be considered to be made in consequence of termination. Another circumstance where a payment would not be in consequence of termination is where there is an 'intervening event', such as the obtaining of a right to commute a pension after the termination of employment.

96. While TR 2003/13 applies to eligible termination payments it is substantially about the concept of 'in consequence of termination'.

97. All the payments would not have been made but for the termination. However, each payment is primarily contingent on satisfying certain conditions. The satisfying of these conditions constitutes the substantial reason for the payment and the termination is too remote from the payment for the payment to be considered to be made in consequence of termination.

98. All of the payments require the doing of something, such as purchasing a house or engaging in new employment, for the relevant payment to be triggered. It is not until after the termination that this occurs and the various decisions involved, to relocate, to be retrained, to sell or purchase a house, are effectively intervening events between the termination and the relevant payments that make the termination too remote from the payment for the payment to be in consequence of the termination.

99. In the case of post redundancy training assistance and vocational training support payments, the eligible worker is required to undertake retraining to acquire skills or knowledge to enable them to remain in the meat industry or to assist them in securing future employment or contracts.

100. Travel and relocation assistance is available to help meet the cost of attending out of area job interviews and undertaking a general job search in another location which offers eligible workers better prospects of employment.

101. In the case of the flexible package for self employment or business purposes, to be eligible for assistance those eligible workers who have successfully managed a business or been self employed successfully must:

- provide a letter of application making a case to the Case Manager for use of up to \$4,500 of their worker support program for allocation for business purposes; and

- provide a letter of evidence from an independent source, of recently successfully running a business or being self employed successfully, and endorsing the proposed business activity to be carried out with the support of the program funds as likely to be commercially viable in the view of that source.

102. The mortgage and rent support payments are being provided for reimbursement of costs associated with the sale of an existing home and the purchase of a new home, or for leaving a rented house and moving into a new rented house where the eligible worker needs to change his or her place of residence to take up new employment.

103. Though the assistance payments have been made after the termination of a contract or employment from the company, the payments are made in respect of circumstances which result from the eligible worker exercising their eligibility rights under the program.

104. The payments are not made in consequence of the termination, therefore the payments are not ETPs as defined in paragraph (a) of the definition of ETP under subsection 27A(1) of the ITAA 1936.

Post redundancy training assistance

Ordinary income

105. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). The legislation does not provide specific guidance on the meaning of ordinary income. However, a substantial body of case law exists which identifies likely characteristics.

106. Whether or not a particular receipt is ordinary income, depends on its character in the hands of the recipient (refer *Scott v. Federal Commissioner of Taxation*;¹ *Hayes v. Federal Commissioner of Taxation*;² *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation*).³

107. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,⁴ the Full High Court stated:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

¹ (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293.

² (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73.

³ (1977) 34 FLR 375 at 402; (1977) 7 ATR 519 at 539.

⁴ (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1.

108. Whilst it is accepted that in each instance the recipients are former workers of a particular entity, the payments received under the program are not considered to be a product of employment, services or business. Although the eligible workers receive the allowance as a consequence of attending the training course they owe no other obligation to the provider (the Western Australian Government), nor are they required to perform any service in order to receive the payments.

109. Therefore, it is also appropriate to consider the following points made in various High Court cases in relation to the types of payment that can generally be characterised as voluntary payments.

*Federal Commissioner of Taxation v. Dixon*⁵

110. In this case the court considered the form of the receipt, that is, whether it is received as a lump sum or periodically, to be a relevant factor for consideration. The court found that the fact that the patriotic top-up payments were regular and periodic was important, though not decisive, in concluding that those payments were assessable income. An important factor in determining that the receipts were ordinary income was that the taxpayer relied to some extent on the amount he received from his previous employer and that he had confidence that the payments would continue on a periodic basis to supplement his income as a soldier. The court also held that the payments were made in substitution for the salary and wages the taxpayer would have earned had he not enlisted. The payment accordingly acquired the characteristics of the payment for which it was substituted.

*Scott v. Federal Commissioner of Taxation*⁶

111. In this case, the court said that while the motives of the donor do not determine the answer, they are a relevant circumstance for consideration. The court held that the payment was given to the taxpayer by the donor as a gift and was not assessable income of the taxpayer.

*Hayes v. Federal Commissioner of Taxation*⁷

112. In this case, the court held that shares given to an accountant by a former employer was not assessable as income because 'it was impossible to point to any employment or personal exertion of which the receipt of the shares was in any real sense an incident, or which can fairly be said to have produced the receipt'.

⁵ (1952) 86 CLR 540; (1952) 10 ATD 82.

⁶ (1966) 117 CLR 514; (1966) 14 ATD 286.

⁷ (1956) 96 CLR 47; (1956) 11 ATD 68.

113. Where post-redundancy training assistance is received by an eligible worker under the program, the concepts of ordinary income developed by the courts over time can be applied:

- post-redundancy training assistance is paid as an incentive to the eligible worker to attend the training course and no other obligation is owed by the eligible worker to the Western Australian Government;
- the payments are not made as any form of substitution for what would be income of the eligible worker;
- payments are made to encourage the eligible worker to develop skills and knowledge which will assist them in gaining new employment or contracts and are not paid on a periodic or recurring basis; and
- the assistance received is not paid in relation to any employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

114. Therefore, the Commissioner considers that any post redundancy training assistance payment received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

115. An eligible worker's entitlement to receive post redundancy training assistance is a CGT asset under subsection 108-5(1). This entitlement is acquired when the case manager approves the plan for assistance under the program.

116. When the assistance is paid to the eligible worker, CGT event C2 under section 104-25 happens. At that time, the eligible worker's entitlement to receive the assistance is satisfied.

117. A capital gain is made if the capital proceeds from the ending of the entitlement exceed the cost base of the entitlement, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

118. The capital proceeds from the CGT event C2 is the amount of post redundancy training assistance received by the eligible worker.

119. There is no market value substitution for the first element of the cost base under subsection 112-20(1) because the entitlement to assistance was created in the eligible worker by the Western Australian Government. Therefore, the eligible worker acquired the entitlement as a result of CGT event D1 happening, and the exclusion in subparagraph 112-20(1)(a)(i) applies. The second element of the cost base includes any costs of applying for the assistance (subsection 110-25(3)).

120. A capital gain cannot be reduced by the general CGT discount where the eligible worker did not acquire the entitlement at least 12 months before the CGT event C2 happened (section 115-25).

121. The exemption in paragraph 118-37(2)(a) does not apply because the assistance is paid as an incentive to attend the course, and not as a reimbursement or payment of the eligible worker's expenses.

Vocational training support paid directly to the eligible worker

Ordinary income

122. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling to vocational training support received by an eligible worker:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- payments are made to reimburse or compensate the eligible worker for approved (capital) training expenses they incur and are not normally made on a periodic or recurring basis; and
- the assistance received is not paid in relation to any employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

123. Therefore, the Commissioner considers that any vocational training support received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

124. An eligible worker's entitlement to receive vocational training support is a CGT asset under subsection 108-5(1). The entitlement is acquired when the case manager approves the plan for assistance under the program.

125. When the vocational training support is paid to the eligible worker as a reimbursement or advance payment of expenses, CGT event C2 under section 104-25 happens. At that time, the eligible worker's entitlement to receive the support is satisfied.

126. Any capital gain or loss resulting from the CGT event is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The EG Green & Sons, Harvey – Worker Support Program is such a scheme.

Travel and relocation assistance paid directly to the eligible worker***Ordinary income***

127. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling to travel and relocation assistance received by an eligible worker:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- the payments are made to reimburse the eligible worker for approved (capital) travel and relocation expenses they incur and are not normally made on a periodic or recurring basis; and
- the assistance received is not paid in relation to any employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

128. Therefore, the Commissioner considers that any travel and relocation assistance received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

129. An eligible worker's entitlement to receive travel and relocation assistance is a CGT asset under subsection 108-5(1). The entitlement is acquired when the case manager approves the plan for assistance under the program.

130. CGT event C2 happens under section 104-25 when an eligible worker's entitlement to receive travel and relocation assistance is satisfied.

131. However, any capital gain or capital loss resulting from the CGT event is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The EG Green & Sons, Harvey – Worker Support Program is such a scheme.

Mortgage and rent support paid directly to the eligible worker

Costs of changing residence

Ordinary income

132. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling, to reimbursement of costs to sell or purchase a home or move from one rented house to another received by an eligible worker under the program:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- the payments are made as a reimbursement for approved house sale and purchase transaction costs (capital expenditure) and are not made on a periodic or recurring basis; and
- the payments are made to the eligible worker by the Western Australian Government and are not connected with any employment relationship or the provision of services by the eligible worker.

133. Therefore, the Commissioner considers that any reimbursement of costs to sell or purchase a home or move from one rented house to another received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

134. The eligible worker's entitlement to receive a reimbursement of the costs of selling one home and buying another, or moving from one rental house to another is a CGT asset under subsection 108-5(1). This entitlement is acquired when the case manager approves the plan for assistance under the program.

135. When that entitlement is satisfied by receipt of the reimbursement, CGT event C2 happens under section 104-25.

136. Any capital gain or loss resulting from the CGT event is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or capital loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The EG Green & Sons, Harvey – Worker Support Program is such a scheme.

137. Costs incurred in selling a house may be included in the second element of the cost base of the house under subsection 110-25(3) of the ITAA 1997. Similarly, costs incurred in purchasing a new house may be included in the second element of the cost base of the house under that provision. The types of incidental costs that may be included are set out in section 110-35.

138. However, to the extent that an eligible worker receives a payment as a reimbursement of those costs, the amount received is a recoupment of the expenditure incurred.

139. Expenditure that is recouped is excluded from the cost base of a CGT asset under subsection 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), except where the recoupment is included in assessable income.

140. In this case, the amounts reimbursed are not included in assessable income, and the expenditure incurred is excluded from the cost base of the house.

141. Depending on the circumstances of each eligible worker, the CGT exemption for main residence in Subdivision 118-B may apply to disregard any capital gain or loss made on disposal of the house.

Costs incurred where the former residence remains vacant

Ordinary income

142. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling, to payments received by an eligible worker for mortgage or rent assistance and other costs incurred while their former residence remains vacant:

- the payments are designed to provide financial support in the form of periodical, regular and recurrent payments. The payments provide financial support for regular living expenses and may be paid to an eligible worker on a monthly or fortnightly basis for up to a maximum of 6 months;
- the payments supplement the income of the eligible worker in that they ensure that mortgage, rent and other expenses incurred in relation to the eligible worker's former residence are reimbursed whilst the residence remains vacant and the eligible worker is liable for those payments. In addition, they will only be eligible for this support whilst their income is less than it was when the worker was being paid by the company, prior to 12 August 2005; and
- it is considered that an eligible worker would rely on these payments in meeting their regular household expenditure for as long as they are eligible to receive them.

143. Therefore, the Commissioner considers that the payments received by an eligible worker for mortgage or rent assistance and other costs incurred while the former residence remains vacant possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

144. The eligible worker's entitlement to receive payments for mortgage or rent assistance, and other costs incurred while their former residence remains vacant is a CGT asset under subsection 108-5(1). This entitlement is acquired when the case manager approves the plan for assistance under the program.

145. When that entitlement is satisfied by receipt of the assistance, CGT event C2 happens under section 104-25.

146. However, any gain that arises from the CGT event is reduced to nil under section 118-20 because the payment is included in the assessable income of the eligible worker.

147. As an amount received by an eligible worker as payment or reimbursement of a mortgage is included in assessable income, the payment has no consequences for the CGT cost base of the house.

148. Although expenditure that is recouped is excluded from the cost base of a CGT asset under subsection 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), an exception applies where the recoupment is included in assessable income.

Flexible package for self employment or business purposes paid directly to the eligible worker

Ordinary income

149. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling to payments for self employment or business purposes received by an eligible worker under the program:

- the payments are made to help establish the eligible worker in self employment or business. They generally have the character of commencement or start-up costs and are therefore capital in nature;
- payments are made to reimburse or compensate the eligible worker for approved (capital) business expenses they incur and are not normally made on a periodic or recurring basis; and;
- the assistance received is not paid in relation to any specific employment and is not related to the provision of services by the eligible worker to the Western Australian Government.

150. Therefore, the Commissioner considers that any assistance for self employment or business purposes received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

151. An eligible worker's entitlement to receive a payment for self employment or business purposes is a CGT asset under subsection 108-5(1). The entitlement is acquired when the case manager approves the plan for assistance under the program.

152. When an amount is paid under this package, CGT event C2 under section 104-25 happens. At this time, the eligible worker's entitlement to receive the payment is satisfied.

153. Any capital gain or loss resulting from the CGT event C2 is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or capital loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The EG Green & Sons, Harvey – Worker Support Program is such a scheme.

Assistance relates to the acquisition of a CGT asset

154. To the extent that a payment under this component is used to acquire a CGT asset, it is a recoupment of the expenditure incurred.

155. Expenditure that is recouped is excluded from the cost base of a CGT asset under subsection 110-45(3) or the reduced cost base under subsection 110-55(6), except where the recoupment is included in assessable income.

156. In this case, the amount of the recoupment is not included in assessable income, and therefore the expenditure is excluded from the cost base of the CGT asset.

Payments to third parties***Fringe benefits tax***

157. The definition of 'benefit' in subsection 136(1) of the FBTA includes any right, privilege, service or facility. Therefore, payments made to third parties of benefits to eligible workers under the program, payments made to third parties on behalf of eligible workers and the provision of benefits by third parties comes within the definition of a benefit for the purpose of the FBTA.

158. The definition of a fringe benefit is also contained in subsection 136(1) of the FBTA and requires, amongst other things, that in order for a benefit to be a fringe benefit, the benefit is provided in respect of the employment of the employee (the employment connection test).

Payments to third parties

159. For payments made to third parties under the program and the provision of benefits by third parties, to come within the definition of a fringe benefit, the primary criterion that must be satisfied is the employment connection test.

160. The term 'in respect of employment' has been considered by the courts on numerous occasions. In *J and G Knowles and Associates Pty Ltd v. Commissioner of Taxation*⁸ (*Knowles*) the full Federal Court examined the definition of fringe benefit and noted that:

...Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment...

161. The following are considered to be material reasons that explain the benefits provided to eligible workers under the program, namely:

- they are a result of personal (that is, non-employment) contractual relationships between the Western Australian Government and the eligible workers;
- they do not have a connection with any previous employment, but rather are provided in respect of their circumstances following the loss of employment; and
- they are made to assist eligible workers obtain other employment and to remain in the meat industry.

162. Therefore, the Commissioner considers that the benefits provided to an eligible worker under the program do not have a sufficient or material connection with any employment of the eligible worker to fall within the definition of a fringe benefit for the purposes of the FBTA.

163. Consequently, an eligible worker will not have a reportable fringe benefit amount in relation to such benefits provided under the program for the purposes of Part XIB of the FBTA.

Ordinary income

Vocational training support, relocation assistance and assistance for self employment or business purposes

164. Applying the characteristics of ordinary income, discussed in paragraphs 106 to 112 of this Ruling, to payments to a third party supplier for the provision of vocational training support, relocation assistance or assistance for self employment or business purposes, to an eligible worker under the program:

- the payments are not made as any form of substitution for what would be income of the eligible worker;

⁸ [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22.

- the payments are not made on a periodic or recurring basis; and
- the payments made to a third party by the Western Australian Government are not connected with any employment relationship or the provision of services by the eligible worker.

165. Therefore, the Commissioner considers that any payments to a third party for the provision of vocational training support, relocation assistance or assistance for self employment or business purposes to an eligible worker under the program do not possess the characteristics of ordinary income and are not assessable to the eligible worker under section 6-5.

Mortgage and rent support

166. Where a payment is made to a third party on behalf of an eligible worker, the income tax provisions may apply as if the eligible worker received the amount of the payment.

167. Subsection 6-5(4) provides that in working out whether a taxpayer has derived an amount of ordinary income and when they derived it, the taxpayer is taken to have received the amount as soon as it is dealt with on their behalf or as directed by them.

168. Applying the characteristics of ordinary income discussed in paragraphs 106 to 112 of this Ruling to payments made on behalf of an eligible worker to a third party in satisfaction of an eligible worker's obligation to make rent or mortgage payments to the third party:

- the payments are designed to provide financial support in the form of periodical, regular and recurrent payments. The payments provide financial support for regular living expenses and may be paid on behalf of the eligible worker on a monthly or fortnightly basis for up to a maximum of 6 months;
- the payments supplement the income of the eligible worker in that they ensure that mortgage or rent expenses incurred in relation to the eligible worker's former residence are paid whilst the residence remains vacant and the eligible worker is liable for those payments. In addition, they will only be eligible for this support whilst their income is less than it was when the worker was being paid by the company, prior to 12 August 2005; and
- it is considered that an eligible worker would rely on these payments being made on their behalf in meeting their regular household expenditure for as long as they are eligible to have them paid.

169. Therefore, the Commissioner considers that payments made to a third party on behalf of an eligible worker for mortgage or rent assistance and other costs incurred while the former residence remains vacant, possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

170. When a payment is made to a third party on behalf of the eligible worker, the CGT provisions apply as if the eligible worker had received the amount (subsection 103-10(1)). Therefore, regardless of whether the assistance under the program is provided to the eligible worker directly or to a third party for their benefit, the CGT consequences for the eligible worker are the same. The CGT consequences with respect to the various types of assistance under the program are set out as follows:

- vocational training support in paragraphs 124 to 126 of this Ruling;
- travel and relocation assistance in paragraphs 129 to 131 of this Ruling;
- mortgage and rent support in paragraphs 134 to 141 and 144 to 148 of this Ruling; and
- assistance for self employment or business purposes in paragraphs 151 to 156 of this Ruling.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	5
Date of effect	8
Scheme	9
Post redundancy training assistance	22
Vocational training support	25
Travel and relocation assistance	31
<i>Travel assistance</i>	32
<i>Relocation assistance</i>	35
Mortgage and rent support	39
<i>Costs of changing residence</i>	41
<i>Costs incurred where the former residence remains vacant</i>	43
Flexible package for self employment or business purposes	47
Payments to third parties	54
Ruling	57
Post redundancy training assistance	57
<i>Eligible termination payment</i>	57
<i>Ordinary Income</i>	58
<i>Capital gains tax</i>	59
Vocational training support paid directly to the eligible worker	63
<i>Eligible termination payment</i>	63
<i>Ordinary Income</i>	64
<i>Capital gains tax</i>	65
Travel and relocation assistance paid directly to the eligible worker	66
<i>Eligible termination payment</i>	66
<i>Ordinary Income</i>	67
<i>Capital gains tax</i>	68
Mortgage and rent support paid directly to the eligible worker	69
<i>Costs of changing residence</i>	69

<i>Eligible termination payment</i>	69
<i>Ordinary Income</i>	70
<i>Capital gains tax</i>	71
<i>Costs incurred where the former residence remains vacant</i>	74
<i>Eligible termination payment</i>	74
<i>Ordinary Income</i>	75
<i>Capital gains tax</i>	76
Flexible package for self employment or business purposes paid directly to the eligible worker	79
<i>Eligible termination payment</i>	79
<i>Ordinary Income</i>	80
<i>Capital gains tax</i>	81
Payments to third parties	83
<i>Eligible termination payment</i>	83
<i>Fringe benefits tax</i>	85
<i>Ordinary income</i>	86
<i>Vocational training support, relocation assistance and assistance for self employment or business purposes</i>	86
<i>Mortgage and rent support</i>	87
<i>Capital gains tax</i>	88
Appendix 1 – Explanation	89
Background	89
Eligible termination payment	90
Post redundancy training assistance	105
<i>Ordinary income</i>	105
<i>Federal Commissioner of Taxation v. Dixon</i>	110
<i>Scott v. Federal Commissioner of Taxation</i>	111
<i>Hayes v. Federal Commissioner of Taxation</i>	112
<i>Capital gains tax</i>	115
Vocational training support paid directly to the eligible worker	122
<i>Ordinary income</i>	122
<i>Capital gains tax</i>	124
Travel and relocation assistance paid directly to the eligible worker	127
<i>Ordinary income</i>	127
<i>Capital gains tax</i>	129

Mortgage and rent support paid directly to the eligible worker	132
<i>Costs of changing residence</i>	132
<i>Ordinary income</i>	132
<i>Capital gains tax</i>	134
<i>Costs incurred where the former residence remains vacant</i>	142
<i>Ordinary income</i>	142
<i>Capital gains tax</i>	144
Flexible package for self employment or business purposes paid directly to the eligible worker	149
<i>Ordinary income</i>	149
<i>Capital gains tax</i>	151
<i>Assistance relates to the acquisition of a CGT asset</i>	154
Payments to third parties	157
<i>Fringe benefits tax</i>	157
<i>Payments to third parties</i>	159
<i>Ordinary income</i>	164
<i>Vocational training support, relocation assistance and assistance for self employment or business purposes</i>	164
<i>Mortgage and rent support</i>	166
<i>Capital gains tax</i>	170
Appendix 2 – Detailed contents list	171

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/13; TR 2006/10

Subject references:

- bona fide redundancy payments
- capital receipts
- CGT cost base
- CGT events C1-C3 – end of a CGT asset
- CGT exemptions
- derived
- eligible termination payments
- employment relationship
- fringe benefits
- government grants income
- income
- in respect of employment
- recouped expenses
- reportable fringe benefits amount

Legislative references:

- ITAA 1936
- ITAA 1936 27A
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- J and G Knowles and Associates Pty Ltd v. Commissioner of Taxation [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 14 ATD 286

Other references:

- Guidelines of the EG Green & Sons, Harvey – Worker Support Program
-

ATO references

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