


CR 2010/28 - Income tax: employment termination payment: WA Construction Industry Redundancy Fund

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Class Ruling

Income tax: employment termination payment: WA Construction Industry Redundancy Fund

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	7
Scheme	8
Ruling	23
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	25
Appendix 2:	
<i>Detailed contents list</i>	49

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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.

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 identified below applies to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision

2. The relevant provision dealt with in this Ruling is:

- section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997).¹

Class of entities

3. The class of entities to which this Ruling applies is all common law employees who receive a payment under the scheme described in paragraphs 9 to 22 of this Ruling.

¹ All legislative references are to the ITAA 1997 unless otherwise indicated.

Qualifications

4. 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 22 of this Ruling.

5. 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

7. This Ruling applies from 1 July 2009 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

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

9. The WA Construction Industry Redundancy Fund (WACIRF No 1) was established by a trust deed (Trust Deed) and fund regulations (Fund Regulations) dated 30 June 1989.

10. The Trustee of WACIRF No 1 is the WA Construction Industry Redundancy Fund Limited.

11. For the purposes of the Trust Deed a reference to MBA is a reference to the Master Builders' Association of Western Australia and a reference to BTA is a reference to the Building Trades Association of Unions of Western Australia.

12. Participating Employers are obligated by various industrial awards and enterprise agreements (industrial instruments) to provide termination benefits for their workers. Participating Employers could fund worker termination benefits that they are required to make by the payment of contributions to WACIRF No 1.

13. Contributions were accepted into WACIRF No 1 until 31 March 2004. Accrued contributions paid between 30 June 1989 and 31 March 2004 remain in WACIRF No 1.

14. The expression 'Participating Employee' is defined in clause 1.17 of the Trust Deed as 'any natural person who, pursuant to a contract, agreement or arrangement, provides his or her labour to a Participating Employer'. Some Participating Employee Members may not be employees of a Participating Employer Member.

15. In order to become a Participating Employer Member of WACIRF No 1 an employer must lodge a signed Contribution Agreement with the Trustee and provide to the Trustee all the information requested, including that referred to in the Contribution Agreement.

16. As outlined in clause 4.2 of the Trust Deed, all contributions made to WACIRF No 1 by employers are placed into separate member (employee) accounts identifying contributions for that member.

17. Participating Employee Members can receive the contributions they have in the fund if they meet one of a number of conditions outlined in the Fund Regulations.

18. Under subregulation 4.1 of the Fund Regulations when the Trustee is satisfied a Participating Employee Member is no longer working for a Participating Employer, and has not been offered re-employment or other rights to provide his or her labour, that Participating Employee Member will be considered to be 'redundant' and the Trustee will pay them the balance in their account in the fund.

19. Under clause 4.1A of the Trust Deed a Participating Employee Member may request the trustee of WACIRF No 1 to transfer the balance of their account to another fund established for a similar purpose to that of WACIRF No 1.

20. Clause 5.1 of the Trust Deed of WACIRF No 1 states:

The Distributable Amount of the Fund for each Financial Year shall not be applied in payment of any Redundancy Payment but shall be held by the Trustee upon trust:

- (a) as to one-half MBA; and
- (b) as to one-half BTA;
absolutely.

21. The applicant has indicated that a payment may be paid out of that Distributable Amount on death of the Participating Employee, equal to the balance in a deceased Participating Employee's account that is forfeited into the Distributable Amount, as an ex-gratia payment on behalf of the MBA and BTA to a dependant of the deceased nominated prior to death.

22. Under clause 5.3 of the Trust Deed of WACIRF No 1 in the event that the income of the fund is insufficient to meet relevant outgoings, expenses, losses and damages incurred or suffered the MBA and the BTA shall equally contribute from their respective shares held in trust by the fund such sum as is necessary to make up any deficiency.

Ruling

23. A payment made or to be made to a Participating Employee in accordance with the scheme described in paragraphs 9 to 22 of this Ruling is in consequence of termination of employment and is an employment termination payment under section 82-130.

24. A payment made or to be made on the death of a Participating Employee to a nominated dependant or the legal personal representative of the deceased, where the Participating Employee was engaged in employment at the time of that person's death, will be in consequence of termination of employment and is a death benefit termination payment under section 82-130.

Commissioner of Taxation

21 July 2010

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. This Ruling only applies to common law employees who receive a payment under the scheme. Participating Employees who are not common law employees are not covered by this Ruling.

Employment termination payment

26. From 1 July 2007, payments made in consequence of the termination of a taxpayer's employment are known as employment termination payments. Where the payment is received during the life of the taxpayer it is known as a 'life benefit termination payment'. Where the payment is received after the death of the taxpayer, it is known as a 'death benefit termination payment'.

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

28. 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 person's death, in consequence of the termination of the other person's employment; and
- (b) it is received no later than 12 months after the termination (but see subsection (4)); and
- (c) it is *not* a payment mentioned in section 82-135.

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

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

30. All of the conditions under subsection 82-130(1) are required to be satisfied in order for the payment to be treated as an employment termination payment.

In consequence of employment termination

31. The first condition to be met is that the payment is received by the person in consequence of the termination of their employment. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the words have been interpreted by the courts in several cases.

32. 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*² (*Reseck*) 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.

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

34. The decision in *Reseck* was considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation*³ (*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.

35. The phrase 'in consequence of' and the decisions in *Reseck* and *McIntosh* were also considered more recently by the Federal Court in *Le Grand v. Commissioner of Taxation*⁴ (*Le Grand*).

36. *Le Grand* involved a payment to 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.

² (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538.

³ (1979) 25 ALR 557; (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13.

⁴ [2002] FCA 1258; (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139.

37. The Commissioner of Taxation has 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'.

38. In paragraphs 5 and 6 of TR 2003/13, the Commissioner, after considering the judgments in paragraphs 32 to 36 of this Ruling, 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.

39. In the present case, the Participating Employees are entitled, under the Trust Deed of WACIRF No 1, to a payment in the event their employment is terminated.

40. The termination of employment and the payment of the amount under the Trust Deed of WACIRF No 1 are entwined and connected. Without the termination of employment the payments would not have been made.

41. Therefore, these payments will be made in consequence of the termination of the taxpayer's employment, and will be employment termination payments if they meet the other requirements of section 82-130.

Received no later than 12 months after the termination

42. Paragraph 82-130(1)(b) requires that the payment be received no later than 12 months after the termination of the employment. However, subsection 82-130(5) allows the Commissioner to determine, in writing, that paragraph 82-130(1)(b) does not apply. Under subsection 82-130(7) the Commissioner may by legislative instrument, determine that paragraph 82-130(1)(b) does not apply.

43. On 23 February 2009 legislative instrument SPR 2009/1 entitled *Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009* was issued. In that legislative instrument it was determined that paragraph 82-130(1)(b) does not apply to a payment received from a redundancy trust if:

- an application for the payment is lodged with the trustee of the redundancy trust within 12 months of the worker becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and

- the payment is made by the trustee of the redundancy trust:
 - as soon as practicable after receipt of the application for payment; or
 - no later than two years after the termination of the person's employment that led to the entitlement;
- whichever occurs earlier.

44. Consequently, provided the relevant application for the payment is lodged with WACIRF No 1 within 12 months of the Participating Employee becoming entitled to the payment under the terms of the Trust Deed and the payment is made no later than the period allowed in the legislative instrument, subject to any determination that the Commissioner may make, the payment will (dependent on the other conditions of subsection 82-130(1) being met) be an employment termination payment.

Not a payment mentioned in section 82-135

45. Section 82-135 provides that certain payments are not employment termination payments. These include:

- superannuation benefits;⁵
- payments for unused annual leave or unused long service leave;⁶
- the tax-free part of a genuine redundancy payment or an early retirement scheme payment;⁷ and
- reasonable capital payments for personal injury.⁸

46. In the present case, the payment made or to be made to a Participating Employee of the Trust Deed does not include any of the payments listed in section 82-135.

Payment after death

47. Where the Participating Employee was engaged in employment at the time of that person's death the payment received from WACIRF No 1 will be considered to be in consequence of the termination of employment.

48. If the Participating Employee was not engaged in employment at the time of that person's death the payment received from WACIRF No 1 will not be in consequence of the termination of employment. Accordingly, where the Participating Employee was not engaged in employment at the time of death any payment received on the death of the Participating Employee will not be an employment termination payment.

⁵ Paragraph 82-135(a).

⁶ Paragraphs 82-135(c) and 82-135(d).

⁷ Paragraph 82-135(e).

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Ruling	23
Appendix 1 – Explanation	25
Employment termination payment	26
<i>In consequence of employment termination</i>	31
<i>Received no later than 12 months after the termination</i>	42
<i>Not a payment mentioned in section 82-135</i>	45
Payment after death	47
Appendix 2 – Detailed contents list	49

⁸ Paragraph 82-135(i).

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/13; TR 2006/10

Subject references:

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

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(b)
- ITAA 1997 82-130(5)
- ITAA 1997 82-130(7)
- ITAA 1997 82-135
- ITAA 1997 82-135(a)
- ITAA 1997 82-135(c)
- ITAA 1997 82-135(d)
- ITAA 1997 82-135(e)
- ITAA 1997 82-135(i)

- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968

Case references:

- Le Grand v. Commissioner of Taxation [2002] FCA 1258; (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139
- McIntosh v. Federal Commissioner of Taxation (1979) 25 ALR 557; (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13
- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538

Other references:

- Legislative Instrument SPR 2009/1 Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009

ATO references

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