


***CR 2011/22 - Income tax: assessable income:
payments received by former residents in State care
in South Australia***

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Class Ruling

Income tax: assessable income: payments received by former residents in State care in South Australia

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	9
Ruling	17
Appendix 1 – Explanation	20
Appendix 2 – Detailed contents list	37
References	

① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997; and
- section 118-37 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is individuals who receive an ex gratia payment from the South Australian Government as a result of experiencing sexual abuse as children while they were residents in State care.

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 16 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 29 January 2010 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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. On 29 January 2010 the South Australian Government announced it would be providing a one-off ex gratia payment to eligible former residents in State care in South Australia who experienced sexual abuse, to acknowledge their pain and suffering and to help their recovery.

11. Applicants for the ex gratia payment are limited to individuals who satisfy the eligibility criteria, including those who

- are over 18 years of age; and
- suffered sexual abuse as a child while in State care.

12. Individuals who are assessed as meeting the eligibility criteria will be offered a payment based on the severity of the sexual abuse. A person who establishes that they have suffered serious and lasting harm from sexual abuse whilst in State care may receive up to \$30,000. In exceptional circumstances, where extreme sexual abuse has occurred, a total of up to \$50,000 may be granted.

13. The Attorney-General decides who may be offered a payment, the amount of money the person is offered and whether there are any conditions attached to receiving the money.

14. The payment will be made subject to the applicant signing a Deed of Settlement and Release, indemnifying the Minister for Families and Communities and the State of South Australia from any past, current or future claims arising from abuse of any kind whilst in State care.

15. The payments are to be made by the Attorney-General of South Australia under the *Victims of Crime Act 2001* from the Victims of Crime Fund set up under that Act.

16. There is currently no closing date for applications, however, the Attorney-General of South Australia may announce a closing date in the future.

Ruling

Section 6-5 – income according to ordinary concepts

17. A lump sum payment made by the South Australian Government to former residents in State care in South Australia who suffered sexual abuse is not assessable as ordinary income under section 6-5.

Capital gains tax

18. Capital gains tax (CGT) event C2 under section 104-25 happens to the entitlement to receive a payment when the entitlement is satisfied.

19. Any capital gain or capital loss made as a result of receiving a payment is disregarded under paragraph 118-37(1)(b).

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.*

Section 6-5 – income according to ordinary concepts

20. A payment is assessable income if:
- it is income in the ordinary sense of the word (ordinary income); or
 - it is not ordinary income but through the operation of the legislation it is included in assessable income (statutory income).

Ordinary income

21. Subsection 6-5(1) provides that the assessable income of a taxpayer includes income according to ordinary concepts (ordinary income).

22. The legislation does not provide specific guidance on the meaning of income according to ordinary concepts. However, a substantial body of case law exists which identifies likely characteristics.

23. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,¹ 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.

24. Amounts that are periodical, regular or recurrent, relied upon by the recipient for their regular expenditure and paid to them for that purpose are likely to be ordinary income, as are amounts that are the product in a real sense of any employment of, or services rendered by, the recipient.² Amounts paid in substitution for salary or wages foregone or lost may also be ordinary income.³

¹ (1990) 170 CLR 124 at 138; 90 ATC 4413 at 4420; (1990) 21 ATR 1 at 7.

² *Federal Commissioner of Taxation v. Rowe* (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392.

³ *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540 at 568; (1952) 10 ATD 82 at 92; (1952) 5 AITR 443 at 456 (per Fullagar J).

25. Ultimately, whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient.⁴ The whole of the circumstances must be considered⁵ and the motive of the payer may be relevant to this consideration.⁶

26. Payments made under the scheme are one-off lump sum payments in the nature of compensation or settlement sums. They do not possess the characteristics of ordinary income. Therefore the payments will not be assessable as ordinary income.

Statutory income

27. An amount that is not ordinary income may still be assessable income as a result of the operation of section 6-10 which includes statutory income in assessable income.

28. Payments made under the scheme are not assessable as statutory income under any of the provisions in Division 15 or Division 20.

Capital gains tax

29. Statutory income includes a net capital gain calculated under section 102-5. In broad terms a net capital gain is the difference between a person's capital gains and capital losses for an income year.

30. Generally a capital gain or capital loss is made when a CGT event happens to a CGT asset.

31. The entitlement to receive a payment under the scheme is a CGT asset under section 108-5. The entitlement arises when an applicant has done everything necessary to be entitled to the payment including:

- making an application; and
- satisfying the eligibility criteria.

32. CGT event C2 under section 104-25 happens when the entitlement to receive a payment under the scheme comes to an end which is when the entitlement is satisfied. This is the point in time when the Deed of Settlement and Release is signed.

⁴ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 375; *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73; (1956) 6 AITR 248 at 254; *Federal Coke Co Pty Ltd v. FC of T* 77 ATC 4255 at 4273; (1977) 7 ATR 519 at 539.

⁵ *Squatting Investment Company Limited v. Federal Commissioner of Taxation* (1953) 86 CLR 570 at 627-628 per Kitto J.

⁶ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 527, 528; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 376.

33. However, any capital gain or capital loss made from CGT event C2 is disregarded under paragraph 118-37(1)(b) when the CGT event relates directly to compensation or damages received for any wrong, injury or illness you suffer personally.

34. The treatment for CGT purposes of compensation receipts for personal wrong or injury is discussed in paragraphs 19 to 22 of *Taxation Ruling TR 95/35 Income tax: capital gains: treatment of compensation receipts*. In particular, paragraph 20 of TR 95/35 provides that CGT exemption is available if the taxpayer receives compensation in an undissected lump sum which relates wholly to the personal wrong or injury suffered by the taxpayer.

35. A lump sum payment made under the scheme is made to acknowledge the pain and suffering of eligible former residents of State care in South Australia who suffered sexual abuse while they were residents in State care, and to help their recovery.

36. Therefore, any capital gain or capital loss arising from the CGT event is disregarded under paragraph 118-37(1)(b) as it relates wholly to compensating individuals for personal wrong, injury or illness.

Appendix 2 – Detailed contents list

37. 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	4
Date of effect	8
Scheme	9
Ruling	17
Appendix 1 – Explanation	20
Section 6-5 – income according to ordinary concepts	20
Ordinary income	21
Statutory income	27
Capital gains tax	29
Appendix 2 – Detailed contents list	37

References

Previous draft:

Not previously issued as a draft

- Copyright Act 1968
- Victims of Crime Act 2001

Related Rulings/Determinations:

TR 95/35
IT 2424
TR 2006/10

Case references:

- *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540; (1952) 10 ATD 82; (1952) 5 AITR 443
- *Federal Coke Co Pty Ltd v. FC of T* 77 ATC 4255; (1977) 7 ATR 519
- *Federal Commissioner of Taxation v. Rowe* (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392
- *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47; (1956) 11 ATD 68; (1956) 6 AITR 248
- *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; (1966) 14 ATD 286; (1966) 10 AITR 367
- *Squatting Investment Company Limited v. Federal Commissioner of Taxation* (1953) 86 CLR 570

Subject references:

- income
- capital gains tax
- CGT events
- CGT exemptions
- CGT events C1-C3 – end of a CGT asset
- statutory compensation scheme
- compensation for injury
- compensation income

Legislative references:

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 Div 15
- ITAA 1997 Div 20
- ITAA 1997 102-5
- ITAA 1997 104-25
- ITAA 1997 108-5
- ITAA 1997 118-37
- ITAA 1997 118-37(1)(b)
- TAA 1953

ATO references

NO: 1-2GU3BI7

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ other payments
Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 – end of a CGT asset
Income Tax ~~ Capital Gains Tax ~~ exemptions other than main residence
Income Tax ~~ Exempt income ~~ compensation and ex gratia payments