


CR 2011/85 - Income tax: self-purchasing of attendant care services in the NSW Lifetime Care and Support Scheme

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Class Ruling

Income tax: self-purchasing of attendant care services in the NSW Lifetime Care and Support Scheme

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

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- section 159P of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 15-2 of the ITAA 1997;
- Subdivision 20-A of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies comprises:

- persons who have been accepted as participants in the Lifetime Care and Support Scheme (scheme) established under the New South Wales Motor Accidents (Lifetime Care and Support) Act 2006 (MAA); and/or
- participants' authorised representatives,

who enter into a Participant Funding Agreement – Direct self-purchasing of attendant care services (the Agreement), with the Lifetime Care and Support Authority of New South Wales to receive payments to purchase attendant care services.

In this Ruling these persons (including their authorised representatives) are referred to as 'participants'.

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 20 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 2011. 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 documents, or relevant parts of them form part of and are to be read with the description:

- Application for Class Ruling dated 18 January 2011
- Participant Funding Agreement: Direct self-purchasing of attendant care services attached to email dated 27 May 2011;
- Various email and telephone discussions relating to the funding arrangement; and
- *Motor Accidents (Lifetime Care and Support) Act 2006* (MAA)

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

10. The MAA provides the legislative basis for the funding of attendant care services to participants as well as the funding of the research and development of these services.

11. The Lifetime Care and Support Authority of New South Wales (the Authority) is a statutory body established under the MAA. The functions of the Authority include the provision of funding for treatment, rehabilitation, care and support services for participants who have sustained severe injuries from motor vehicle accidents.

The Agreement

12. Under the scheme, the Authority enters into a funding agreement with each participant. The Agreement enables the participant to directly purchase approved attendant care services.

13. The Agreement is designed to do away with the payment-upon-receipt system and give participants a greater sense of certainty, enhanced autonomy, and to reduce the day-to-day paperwork involved in the provision of attendant care services.

14. Payments received by participants under the scheme are made on the basis of the approved hours of attendant care and must be used solely for the purpose of obtaining services as described in the Agreement. A participant may incur costs in excess of the scheme funding however these are at the participant's own expense.

15. The funds are paid electronically into a bank account which is separate to any other account maintained by the participant. The level of payments is determined when the person is approved to receive scheme funding and is included in the Agreement.

16. Any interest earned on funds deposited in an account must be applied by the participant as if those amounts of interest were monies received from the Authority under the Agreement.

17. It is intended that there will be no unexpended monies on the expiry, termination or cessation of an Agreement.

18. Clauses 5.3 and 5.4 of the Agreement deal with unexpended monies at the expiry, termination or cessation of an Agreement:

5.3 If there are unexpended monies at the expiry, termination or cessation of this Agreement and the parties enter into a new funding agreement, the Authority may, in its absolute discretion:

- (a) require the repayment of those monies by the Participant to the Authority, or
- (b) agree to set off its right to repayment of those monies against its obligation to make payments to the participant under the new Agreement

5.4 If there are unexpended monies at the expiry, termination or cessation of this Agreement and the parties do not enter into a new funding agreement, the Authority may, in its absolute discretion:

- (c) require the repayment of these monies by the Participant to the Authority, or
- (d) allow the participant to keep these monies on condition that the Participant agrees to spend the money only for other treatment and care needs under a new funding agreement.

19. Participants are required to maintain an expenditure declaration form in respect of the scheme funding. These records are to be maintained and made available for inspection by the Authority as required.

20. Clause 6.6 of the Agreement details the participants acknowledgement that the funds are public funds:

6.6 In spending any money received under this Agreement or dealing with the Authority, the Participant:

- (a) must act at all times in good faith and with honesty; and
- (b) must acknowledge that the Scheme Funding is provided from public revenue and must be spent in accordance with the LTCS Guidelines and the Act.

Ruling

21. The payments received by a participant under the scheme are not included in assessable income under section 6-5.

22. The payments received by a participant under the scheme are:

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

23. The interest earned on funds deposited into an account specially maintained for the purposes of receiving the payments is not included in assessable income.

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

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

Commissioner of Taxation

21 September 2011

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.*

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

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

Ordinary Income

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

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

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

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

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

30. When considering the first and last factors of paragraph 29 of this Ruling it is appropriate to look at the nature of the relationship between the participants and the Authority.

Nature of relationship between the Authority and the participant

31. The Authority is responsible for providing lifetime care and support for persons who suffer catastrophic injuries such as spinal cord injury and brain injury in motor vehicle accidents.

32. Participants in receipt of payments under the scheme are required to utilise the funds received to directly purchase approved attendant care services.

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

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

34. By entering into the Agreement a participant agrees to apply the funds to pay for approved attendant care services which otherwise would have been paid by the Authority. Therefore, the participant can be said to be acting on behalf of the Authority in discharging its duty to pay attendant care services.

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

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

37. The safeguards against a participant from profiting from the scheme are clearly present in the Agreement. Clause 6.4 states that a participant must not spend any of the monies received to pay persons with whom the participant has a personal relationship. Clause 6.3 states that any interest earned on monies deposited in an account must be applied by the participant as if those amounts of interest were monies received from the Authority under the Agreement.

38. The fact that the funds may be used to obtain attendant care for a participant personally does not mean that that person profits from the arrangement in the sense referred to in the authorities. The person would receive the same level of attendant care if he or she were not participating in the scheme.

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

40. This obligation is clearly present. Clause 6.2 of the Agreement states:

Any monies received by a Participant from the Authority ... must be paid into an account which is separate to any other account maintained by the Participant.

41. These characteristics of the arrangement strongly point to the participant being in a fiduciary relationship with the Authority.

The scope of the fiduciary relationship

42. The purpose of the scheme is the provision of funds to the participant to obtain attendant care. Apart from holding and applying the funds for the approved purposes, the participant has no other obligations to the Authority under the arrangement. It is clear, then, that the scope of the participant's fiduciary obligations to the Authority under the scheme relates to the participant's holding and application of the funds.

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

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

45. The participant under the Agreement is neither an employee of the Authority nor in receipt of the payments in relation to the carrying on of a business.

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

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

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

49. A participant cannot deal with the money as his or her own. The participant's obligations in dealing with the monies paid have the nature of fiduciary obligations and this view is supported by clause 6.6 of the Agreement:

6.6 In spending any money received under this Agreement or dealing with the Authority, the Participant:

- (a) must act at all times in good faith and with honesty; and
- (b) must acknowledge that the Scheme Funding is provided from public revenue and must be spent in accordance with the LTCS Guidelines and the Act.

50. The exclusion of agency by Clause 3.1 of the Agreement may be effective in preventing the participant from binding the Authority under the participant's own contracts with attendant care service providers. However, this does not prevent the relationship between the participant and the Authority from being a fiduciary one.

51. A primary motive of the Authority in providing for the self-purchasing of treatment, rehabilitation and care services is to give participants a greater sense of certainty, enhanced autonomy, and to reduce the day to day paperwork involved in the provision of attendant care services. This motive is apparent in the objects and principles of the MAA and the Authority's duty in section 6 of that Act to ensure that services are provided and funded in accordance with those objects and principles

52. For the reasons given above, it is concluded that the payments are not ordinary income in the hands of a participant under the Agreement for the purposes of section 6-5.

Statutory income

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

Employment or services rendered

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

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

55. As discussed above, the participants do not receive the scheme funding for any employment or services rendered. Therefore the payments to the participants are not statutory income under section 15-2.

Assessable recoupment

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

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

57. As no deduction is allowable or would be allowable to the participant in respect of the expenditure incurred for the attendant care, the payments received by them from the Authority are not assessable recoupments and therefore no amounts are included in their assessable income under Subdivision 20-A.

Interest earned

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

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

60. Interest accruing to the account is therefore not ordinary or statutory income of the participant.

General deductions

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

Medical expenses tax offset

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

Medical expenses include payments:

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

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

Employer obligations

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

Appendix 2 – Detailed contents list

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

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References

Related Rulings/Determinations:

TR 2006/10

Subject references:

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

Legislative references:

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

- ITAA 1997 20-20(3)

- ITAA 1997 20-30

- TAA 1953

- Copyright Act 1968

Case references:

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

ATO references

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 Income Tax ~~ Assessable income ~~ government payments
 Income Tax ~~ Exempt income ~~ government payments
 Income Tax ~~ Tax offsets, credits and benefits ~~ medical expenses tax offset – calculation
 Income Tax ~~ Deductions ~~ miscellaneous expenses