


***CR 2011/95 - Income tax: assessable income:
payments made by John Holland Group Worker
Entitlement Fund to members***

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Class Ruling

Income tax: assessable income: payments made by John Holland Group Worker Entitlement Fund to members

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	20
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	28
Appendix 2:	
<i>Detailed contents list</i>	59

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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 83-10 of the ITAA 1997
- section 83-80 of the ITAA 1997
- section 83-175 of the ITAA 1997
- Subdivision 83-C of the ITAA 1997

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

Class of entities

3. The class of entities to which this Ruling applies is:
- all employee members of the John Holland Group Worker Entitlement Fund (JHGWEF) (collectively referred to as 'employees') who, upon satisfying the requirements to receive employee entitlements under the relevant industrial agreement, receive a payment of employee entitlements directly from the Trustee of JHGWEF, and
 - the legal personal representatives of deceased employees.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in the 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 19 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 2010 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

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 10 February 2011;
- John Holland Group Worker Entitlement Fund Trust Deed dated 11 August 2010.

Description of arrangement

10. Employers are required under various industrial instruments to make contributions for employee entitlements to JHGWEF. JHGWEF will accept these contributions and hold them until they become payable under the terms of the Trust Deed (Deed).

11. Employee entitlements are defined in clause 1.1 of the Deed as:

any dollar amount which:

- (a) is an Entitlement specifically required by an Industrial Instrument to be paid by an Employer to this Fund with respect to a Member; or
- (b) is an Entitlement payable to a Member under a right provided under an Industrial Instrument and the relevant Employer has elected to pay such Entitlement to the Fund with respect to a Member by way of its Employer Application.

12. An Entitlement is defined in clause 1.1 of the Deed to mean:

- (a) annual leave and annual leave loading;
- (b) sick leave;
- (c) long service leave;
- (d) severance or redundancy; or

- (e) any other amount from time to time payable by an Employer to a Member under an Industrial Instrument with respect to leave payments (including payments in lieu of leave) and payments made to an Employee when an Employee ceases to be employed.

13. An employer is required to sign a Deed of Adherence (Clause 9 of the Deed) to ensure that the employer agrees to contribute their employee's entitlements into JHGWEF in accordance with the JHGWEF Trust Deed within 7 calendar days of such dates as agreed with the Trustee. Clause 10.1 of the Deed outlines the minimum contribution requirement:

Employee Entitlements Contributions

Each Employer must pay to the Trustee, or as directed by it, on such dates as agreed with the Trustee an amount equal to the Minimum Contribution for each Member employed or whose services are used by the relevant Employer, in accordance with the rights of a Member under an Industrial Instrument in relation to the Employees of the relevant Employer.

14. In accordance with clause 10.9 of the Deed, all employer contributions to JHGWEF are credited to separate member (employee) accounts identifying the contributions for that member:

Payments into Accounts

All Contributions by an Employer for Members shall be allocated to individual Member Accounts as directed by the Employer and credited to an account or accounts nominated by the Trustee from time to time.

15. The Deed governs the conditions under which monies are held and payments are made under the Trust in relation to the employee's entitlement. Payments may be made by the Trustee of JHGWEF to the employer and/or directly to the employee, as outlined in clause 11.1 and 11.2 of the Deed.

16. Under clause 11.1, it is the employer's responsibility for payment of employee entitlements to an employee when they become eligible. In these circumstances, the employer will then become entitled to reimbursement from the JHGWEF.

17. Where the employer has become insolvent or is otherwise unable to meet an employee's entitlement, clause 11.2 provides for the employee to apply direct to the Trustee for payment.

18. Clause 11.3 requires the Trustee to return to the relevant employer the funds representing the balance of an employee's Member Account if, following an application by an employee for payment the Trustee determines that the employee is not entitled to any employee entitlements.

19. Clause 12 of the Deed provides that in the event of the death of an employee, the employee's entitlements will form part of their estate and will be paid to their legal personal representative.

Ruling

20. A payment of employee entitlements by the Trustee of JHGWEF to an employee will receive the same taxation treatment, including concessional treatment, which would have been applicable had the payment been made directly by the employer to the employee.

21. A payment of annual leave entitlements by the Trustee to a continuing employee is a payment of ordinary income and is assessable income of the employee under section 6-5.

22. A payment of long service leave entitlements by the Trustee to a continuing employee is a payment of ordinary income and is assessable income of the employee under section 6-5.

23. A payment of sick leave by the Trustee to a continuing employee is a payment of ordinary income and is assessable income of the employee under section 6-5.

24. A payment of unused annual leave entitlements by the Trustee to an employee on termination of their employment is assessable income of the employee under section 83-10.

25. A payment of unused long service leave entitlements by the Trustee to an employee on termination of their employment is assessable income of the employee under section 83-80.

26. A payment for genuine redundancy entitlements by the Trustee to an employee on termination of their employment is income of the employee under Subdivision 83-C.

27. A payment of employee entitlements by the Trustee to the legal personal representative of a deceased employee will receive the same taxation treatment, including concessional treatment, which would have been applicable had the payment been made directly by the employer.

Commissioner of Taxation

19 October 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.*

28. 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).

29. Ordinary income is not defined in the taxation legislation. It is therefore necessary to apply the principles developed by the courts to the facts of a particular case.

30. In *Scott v. Federal Commissioner of Taxation*¹ Windeyer J stated:

Whether or not a particular receipt is income depends upon its quality in the hands of the recipient.

31. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,² the Full High Court stated (at CLR 138; ART 7; ATC 4420):

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.

32. A generally decisive consideration is whether the payment is the product in a real sense of any employment, services or business carried on by the recipient.³ Ordinary income will include payments received in the capacity as an employee or otherwise in connection with the employment activities.

¹ (1966) 117 CLR 514; (1966) 10 AITR 367; (1966) 14 ATD 286

² (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1

³ *Squatting Investment Co Ltd v. Federal Commissioner of Taxation* (1953) 86 CLR 570 at 633

Entitlements paid by the Trustee to a continuing employee

33. In the present case, the character of the payment of an employment-related entitlement to a continuing employee is not changed by the fact that the Trustee, rather than the employer, makes the payment. The payment of such an entitlement to the employee by the Trustee attracts the same income tax treatment in the hands of the employee as if the employer had made the payment.

Payment of annual leave and annual leave loading to a continuing employee

34. A payment of annual leave or annual leave loading to a continuing employee is a payment of ordinary income and is part of the employee's assessable income under section 6-5.

35. This is a payment from which an amount of tax must be withheld (refer to subsection 10-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)). The Trustee who makes this payment to the employee will withhold an amount of tax as required by section 12-35 of Schedule 1 to the TAA 1953.

36. Payments of annual leave and annual leave loading received by a continuing employee do not give rise to any tax concessions.

Payment of long service leave to a continuing employee

37. A payment of long service leave to a continuing employee is a payment of ordinary income and is part of the employee's assessable income under section 6-5.

38. This is a payment from which an amount of tax must be withheld (refer to subsection 10-5(1) of Schedule 1 to the TAA 1953). The Trustee who makes this payment to the employee will withhold an amount of tax as required by section 12-35 of Schedule 1 to the TAA 1953.

39. Payments of long service leave received by a continuing employee do not give rise to any tax concessions.

Payment of sick leave to a continuing employee

40. A payment of sick leave to a continuing employee is a payment of ordinary income and is part of the employee's assessable income under section 6-5.

41. This is a payment from which an amount of tax must be withheld (refer to subsection 10-5(1) of Schedule 1 to the TAA 1953). The Trustee who makes this payment to the employee will withhold an amount of tax as required by section 12-35 of Schedule 1 to the TAA 1953.

42. Payments of sick leave received by a continuing employee do not give rise to any tax concessions.

Entitlements paid by the Trustee to a terminating employee

43. In certain circumstances, an employee will claim their employee entitlements directly from JHGWEF on the termination of their employment. Accordingly, the Trustee may make the following relevant payments to the employee on termination of their employment:

- unused annual leave and annual leave loading; and
- unused long service leave

44. A payment of employee entitlements by the Trustee to the employee on the termination of their employment is treated in the same way as a payment by the employer to the employee.

Payment of unused annual leave or annual leave loading to a terminating employee

45. A payment for unused annual leave and annual leave loading is assessable income of the employee in the year in which it is received under subsection 83-10(2).

46. As the payments are assessable income of the employee, these are payments from which amounts of tax must be withheld (refer to subsection 10-5(1) of Schedule 1 to the TAA 1953). The Trustee who makes these payments to the employee will withhold amounts of tax as required by section 12-90 of Schedule 1 to the TAA 1953.

Payment of unused long service leave to a terminating employee

47. A payment for unused long service leave received is an unused long service leave payment if it satisfies section 83-75. Subsection 83-80(1) provides that to the extent that the payment is for leave that accrued before 16 August 1978, 5% of the amount is included in the assessable income of the employee. To the extent that the payment is for leave that accrued after 15 August 1978, 100% of the payment is included in the assessable income of the employee. This payment is assessable income of the employee in the year it is received under subsection 83-80(1).

48. The payment of unused long service leave is a payment of assessable income to the employee. Therefore, this is a payment from which an amount of tax must be withheld (refer to subsection 10-5(1) of Schedule 1 to the TAA 1953). The Trustee who makes this payment to the employee will withhold an amount of tax as required by section 12-90 of Schedule 1 to the TAA 1953.

49. This Ruling does not examine the concessional treatment of payments on termination of employment. For the purposes of any concessional treatment, the payment by the Trustee is treated in the same way as a payment by the employer to the employee.

Genuine Redundancy Payments

50. A genuine redundancy payment is so much of a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of dismissal.

51. All conditions under section 83-175 must be satisfied before the payment is a genuine redundancy payment. Failure to satisfy any of the conditions will result in the payment not being considered a genuine redundancy payment.

52. In those circumstances where there is a *genuine redundancy*, Subdivisions 83-A and 83-B provides for concessional tax treatment of annual and long service leave payments if they are made at the same time as a genuine redundancy payment.

53. Whether a genuine redundancy has occurred will depend on the specific facts surrounding the termination of employment. Refer to Taxation Ruling TR 2009/2 *Income tax: genuine redundancy payments* for guidance on this matter.

Entitlements paid by the Trustee on the death of an employee

54. On the death of an employee the Trustee may pay an employee entitlement directly to the employee's legal personal representative.

Payment of unused annual leave and unused long service leave

55. A payment of unused annual or long service leave by the Trustee to an employee's legal personal representative is treated in the same way as a payment of unused annual or long service leave made by the employer to the employee's legal personal representative.

56. Subsection 101A(2) of the *Income Tax Assessment Act 1936* ensures that if an employee dies, any amount which would have been included in the assessable income of the deceased under sections 83-10 and 83-80 of the ITAA 1997 had it been received during their lifetime, will not form part of the assessable income of the deceased's estate.

Special rules for death benefits

57. A death benefit termination payment paid by the Trustee is treated in the same way as a payment made by the employer.

58. Sections 82-65, 82-70 and 82-75 provide concessional treatment for a death benefit termination payment paid to dependants, non-dependants and the legal representative of a deceased person.

Appendix 2 – Detailed contents list

59. 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	20
Appendix 1 – Explanation	28
Entitlements paid by the trustee to a continuing employee	33
<i>Payment of annual leave and annual leave loading to a continuing employee</i>	34
<i>Payment of long service leave to a continuing employee</i>	37
<i>Payment of sick leave to a continuing employee</i>	40
Entitlements paid by the Trustee to a terminating employee	43
<i>Payment of unused annual leave or annual leave loading to a terminating employee</i>	45
<i>Payment of unused long service leave to a terminating employee</i>	47
Genuine redundancy payments	50
Entitlements paid by the trustee on the death of an employee	54
<i>Payment of unused annual leave and unused long service leave</i>	55
<i>Special rules for death benefits</i>	57
Appendix 2 – Detailed contents list	59

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10, TR 2009/2

Subject references:

- Assessable income
- Assessable leave payments
- Salary and wages
- Termination payments
- Worker entitlement fund
- PAYG

Legislative references:

- ITAA 1936
- ITAA 1936 101A(2)
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 82-65
- ITAA 1997 82-70
- ITAA 1997 82-75
- ITAA 1997 83-10
- ITAA 1997 83-10(2)
- ITAA 1997 83-75
- ITAA 1997 83-80
- ITAA 1997 83-80(1)

- ITAA 1997 83-80(2)
- ITAA 1997 83-175
- ITAA 1997 Subdiv 83-A
- ITAA 1997 Subdiv 83-B
- ITAA 1997 Subdiv 83-C
- TAA 1953
- TAA 1953 Sch 1
- TAA 1953 Sch 1 10-5(1)
- TAA 1953 Sch 1 12-35
- TAA 1953 Sch 1 12-90
- Copyright Act 1968

Case references:

- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation [1990] HCA 25, (1990) 170 CLR 124, 90 ATC 4413, (1990) 21 ATR 1
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514, (1966) 10 AITR 367, (1966) 14 ATD 286
- Squatting Investment Co Ltd v. Federal Commissioner of Taxation (1953) 86 CLR 570

ATO references

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