

***CR 2012/120 - Income tax: employment termination
payment: Australian Football League Players'
Association Incorporated***



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Class Ruling

Income tax: employment termination payment: Australian Football League Players' Association Incorporated

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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 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
 - section 83-295 of the ITAA 1997.

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 comprises all Australian Football League players leaving their football club who receive a payment under the scheme described in this Ruling

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 8 to 21 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 19 December 2012 for up to three years thereafter. The Ruling continues to apply after the three years 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. In 1999, as part of a program designed to create a source of cash for Australian Football League (AFL) footballers after their professional playing career ends, the Australian Football League Players' Association Incorporated (AFLPA) established a Player Retirement Account (PRA). This was operated by and within the AFLPA.

10. The PRA has been funded over the years under the ordinary Collective Bargaining Agreement (CBA) between the AFL and the AFLPA. There has not been a new CBA since the 2007-2011 Agreement was executed during 2007.

11. When a player retires from his professional playing career the AFLPA have provided him with a cash payment. The quantum of this cash is a pre defined payment at the end of their career based on the number of years they played in the AFL competition with any one or more AFL teams.

12. The payment was dependent on the ability of the AFLPA to fund it, that is, the payment was not guaranteed in timing or quantum.

13. There is now a proposed Heads of Agreement between the AFL and the AFLPA. It states that the new CBA will commence from 1 November 2011 and apply for a period of five years.

14. The AFL is the controlling body of the national competition between eighteen AFL clubs. The AFL, as a controlling body, has the power to bind the AFL clubs to the Heads of Agreement.

15. AFLPA is the representative body of the players participating in the AFL competition.

16. The AFL and the AFLPA have bargained for certain terms and conditions in relation to the AFL competition and other matters affecting the welfare of the AFL, the clubs, AFLPA and the players.

17. Under the new model, players will have annual contributions made by the AFLPA based upon their years of service. The more years of service a player has, the greater the amount contributed on a per annum basis.

18. The account will be administered by the AFLPA. The amount will be invested by them and accrue interest.

19. When a player is delisted from an AFL club it is proposed that the balance accrued on his behalf will be paid out, that is, contributions plus investment earnings. They will be paid out as follows:

- Player with 1-4 years' service – the player will receive accrued balance as a lump sum within 12 months of being delisted as a player.
- Player with 5-7 years' service – the player will receive 30% of his retirement account within 12 months of being delisted and the balance will be retained for a further 5 years accruing investment returns. After that 5 year period, the balance will be remitted to the player in equal periodic instalments over the following 5 years.

- Player with 8-10 years' service – the player will receive 25% of his retirement account within 12 months of being delisted and the balance will be retained for a further 5 years accruing investment returns. After that 5 year period, the balance will be remitted to the player in equal periodic instalments over the following 10 years.
- Player with 11 or more years' service – the player will receive 20% of his retirement account within 12 months of being delisted and the balance will be retained for a further 5 years accruing investment returns. After that 5 year period, the balance will be remitted to the player in equal periodic instalments over the following 15 years.

20. Players are delisted no later than 31 October each year. A player may be relisted by a club during the ensuing trading period prior to the commencement of the following season.

21. A retirement benefit will be paid to the player within 12 months of the player's retirement when the player has service prior to 31 October 2011.

22. Where a player has service pre and post 31 October 2011, a proportion of the member's retirement benefit will be paid as a lump sum within 12 months of the player's retirement.

23. The proportion of the benefit paid as a lump sum within 12 months of retirement depends upon the years of service that the player has with the AFLPA. The balance of this payment will be paid as an annuity.

Ruling

24. A payment to be made to a football player within 12 months of termination in accordance with the scheme described in this ruling will be an employment termination payment under section 82-130.

25. A payment to be made to a football player more than 12 months after termination will not be an employment termination payment under section 82-130. The payment will be assessable income under section 83-295.

26. A payment to be made on the death of a football player to a dependant or the legal personal representative of the deceased, where the player 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.

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.*

27. This ruling applies to players who receive a payment under the scheme.

Is the payment an employment termination payment?

28. 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'.

29. Section 995-1 the *Income Tax Assessment Act 1997* (ITAA 1997), states that an employment termination payment has the meaning given by section 82-130.

30. Subsection 82-130(1) provides:

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.

31. 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.

32. 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 termination of employment

33. 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.

34. 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 (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.

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

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

37. 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 (Le Grand)*.

38. *Le Grande* 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.

39. 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'* (TR 2003/13).

40. 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

41. Therefore 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.

42. The Courts' views in the *Reseck*, *McIntosh* and *Le Grand* cases were that for a payment to be made in consequence of the termination of employment it had to follow on as a result or effect of the termination of employment. Additionally, while it is not necessary to show that termination of employment is the sole or dominant cause, a temporal sequence alone would not be sufficient.

43. Therefore if the payment follows as an effect or a result from the termination of employment, the payment will be made 'in consequence of' the termination of employment for the purposes of subparagraph 82-130(1)(a)(i). Hence the payment will be an employment termination payment unless the payment is specifically excluded under section 82-135.

44. In the present case, the players are employed by their respective AFL clubs and the payment is being made by the AFLPA. However, the AFL and AFLPA have bargained for terms and conditions in relation to AFL competitions and matters affecting the players, which include payments to be made to them.

45. A payment will only be made where a player is delisted from the AFL for a period of at least 12 months. Therefore, the payment will be made in consequence of the player ceasing to play for his club. Consequently, it is evident that the payment is being made on termination of his employment. The payment would not have been made had there been no termination of employment. The termination of employment and the payment are intertwined and connected.

46. Based on the principles stated in *Reseck, McIntosh, Le Grande* and the Commissioner's views expressed in TR 2003/13, the facts presented demonstrate a clear connection or link exists between the termination of the player's employment and the payment. The player would not otherwise have received the payment except for the termination of his employment.

47. Consequently, the requirement of subparagraph 82-130(1)(a) has been met. The other conditions of subsection 82-130(1) will now be considered.

Exclusions under section 82-135

48. Section 82-135 provides the following payments are not employment termination payments:

- a superannuation benefit;
- a pension or annuity payment;
- an unused annual leave payment;
- an unused long service leave payment;
- the tax-free amount of a genuine redundancy payment or early retirement scheme payment;
- a foreign termination payment;
- a CGT exempt amount under the small business retirement exemption;
- an advance or a loan;
- an amount deemed to be a dividend;
- a reasonable capital payment for, or in respect of, personal injury;
- a reasonable capital payment for, or in respect of, a legally enforceable contract in restraint of trade;
- a commutation of a pension payable from a constitutionally protected fund wholly applied in paying superannuation contributions surcharge;
- a commutation of a pension payable by a superannuation provider wholly applied in paying superannuation contributions surcharge; or
- an amount that is assessable as part of an employee share scheme.

49. In the present case, the payment to be made to a player does not include any of the payments listed in section 82-135. Therefore this condition is satisfied.

Received no later than 12 months after the termination

50. To qualify as an employment termination payment, the payment must be received no later than 12 months after the termination of the taxpayer's employment (paragraph 82-130(1)(b)).

51. Therefore when payments are made within 12 months of termination this condition will be satisfied and the payments will be employment termination payments.

Payments made later than 12 months of termination

52. Paragraph 82-130(4)(a) states that the 12 month rule will not apply if a person is covered by a determination made by the Commissioner under either subsection 82-130(5) or subsection 82-130(7), or if the payment is a genuine redundancy payment or an early retirement scheme payment.

53. The Commissioner has issued two determinations under subsection 82-130(7), namely, Employment Termination Payments (12 month rule) Determination 2007 (SPR 2007/1) and Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009 (SPR 2009/1). SPR 2007/1 applies where legal action is commenced within 12 months of termination of employment in relation to the payment, or where the payment is made by a liquidator, receiver or trustee in bankruptcy of an entity that is otherwise liable to make the payment and where the liquidator, receiver or trustee is appointed no later than 12 months after the termination of employment. SPR 2009/1 applies to payments made by Redundancy Trusts.

54. As none of the above circumstances apply in this case, subsection 82-130(7) will not apply.

55. The Commissioner's discretion under subsection 82-130(5) applies on an individual basis by a written determination. Therefore, for this subsection to apply, an individual player in receipt of a payment will need to lodge an application based on their particular circumstances.

56. Consequently, subject to any individual determination by the Commissioner, for a payment made more than 12 months after termination of employment this condition will not be satisfied and the payment will not be an employment termination payment.

57. Consequently, these payments are assessable income in the relevant income year the amounts are received. This is in accordance with section 83-295, which states:

A payment received by you that would be an employment termination payment but for paragraph 82-130(1)(b) is assessable income.

Periodic instalments paid over a period of years subsequent to termination of employment

58. The periodic payments to be made to players after their playing career is over are also being made in consequence of the termination of the same employment. This is because, but for the termination of employment, the payments would not be made. They satisfy the first condition of subsection 82-130(1).

59. For the same reasons as explained in paragraphs 52 to 56, these payments are also not employment termination payments because they will be paid more than 12 months after termination of employment.

60. These payments will also be taxable in the manner outlined in paragraph 60.

Payment after death

61. Where the player was engaged in employment at the time of that person's death the payment received from the PRA will be considered to be in consequence of the termination of employment.

62. If the player was not engaged in employment at the time of that person's death the payment received from the PRA will not be in consequence of the termination of employment. Accordingly, where the player was not engaged in employment at the time of death any payment received on the death of the player will not be an employment termination payment.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2003/13

Subject references:

- employment termination
- employment termination payments
- superannuation business line
- superannuation case reports
- superannuation, retirement & employment termination

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(b)
- ITAA 1997 82-130(4)(a)
- 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 83-295

- 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

ATO references

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