


CR 2012/28 - Fringe benefits tax and income tax: employer contributions to the WA Construction Industry Redundancy (No. 2) Fund

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Class Ruling

Fringe benefits tax and income tax: employer contributions to the WA Construction Industry Redundancy (No. 2) Fund

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❶ 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 taxation provision(s)

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

- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA);
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- section 6-5 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is employers who make a contribution to the WA Construction Industry Redundancy (No. 2) Fund (WACIRF No. 2) for an employee who is a member of the WACIRF No. 2.

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 10 to 21 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 April 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).

Previous Rulings

9. This ruling replaces Class Ruling CR 2006/13 which applied to contributions made to the WACIRF No. 2 during the period from 1 April 2006 to the date of its withdrawal on 31 March 2011.

Scheme

10. The scheme that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form and are part of and are to be read with the description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the Class Ruling application dated 28 February 2011;
- the WACIRF No. 2 Trust Deed and Regulations (Trust Deed);
- the Deed of Amendment No. 4 (Trust Deed and Regulations) dated 15 December 2011;
- information contained in the email dated 19 December 2011;
- the National Building and Construction Industry Award 2000 (NBCIA);
- the Building Trades (Construction) Award 1987, Western Australia (BTCA);
- the Plumbing Industry (QLD and WA) Award 1999 (PIA);
- the Building and Construction General On-Site Award 2010 (BCGOSA); and
- the Plumbing and Fire Sprinklers Award 2010 (PFSA).

11. The WACIRF No. 2 was established in March 2004 to receive contributions from employers in the Western Australian construction industry who are required to provide redundancy entitlements for their employees pursuant to various awards and industrial agreements.

12. The relevant awards under which industrial agreements have been made include:

- the NBCIA which in clause 16.2:
 - creates an obligation for employers covered by the award to pay redundancy/severance amounts for an employee who becomes redundant; and
 - provides that a death benefit is payable to the estate of a deceased employee who dies during a period of eligible service with an entitlement to a redundancy payment;
- the BCGOSA which in clause 17.3:

- creates an obligation for employers covered by the award to pay redundancy/severance amounts for an employee who becomes redundant; and
- provides that a death benefit is payable to the estate of a deceased employee who dies during a period of eligible service with an entitlement to a redundancy payment;
- the PIA which in clause 34.2 creates an obligation for employers covered by the award to pay redundancy/severance amounts for an employee who becomes redundant;
- the PFSA which in clause 18.3:
 - creates an obligation for employers covered by the award to pay redundancy/severance amounts for an employee who becomes redundant; and
 - provides that a death benefit is payable to the estate of a deceased employee who dies during a period of eligible service with an entitlement to a redundancy payment; and
- the BTCA which in clause 51(3) creates an obligation for employers covered by the award to pay redundancy/severance amounts for an employee who becomes redundant.

13. Each of the awards enables employers who are bound by the award to utilise a fund to meet the liabilities created by the relevant clauses.

14. The trustee of the WACIRF No. 2 is WA Construction Industry Redundancy Fund. The trustee has an Australian Business Number (ABN).

15. To become a Participating Employer Member of the WACIRF No. 2 an employer will either execute an agreement called a Contribution Agreement or lodge a Contribution Return which sets out the amount to be contributed by the employer in respect of each worker calculated by reference to:

- the minimum base contribution rate;
- the minimum base contribution rate plus increments; or
- a redundancy payment rate as provided for in a nominated industrial award or industrial agreement.

16. As outlined in clause 4.2 of the Trust Deed, all contributions made to the WACIRF No. 2 by an employer will be placed into separate member accounts that identify the contributions that have been made for each individual member.

17. Under regulation 4.1 of the Fund Regulations, the Trustee is required to pay the balance of an employee member's account to either:

- the employee member where the employee member satisfies the Trustee that he or she is not on Paid leave and is redundant; or
- to the 'legal personal representative' (as defined in subsection 995-1(1) of the ITAA 1997) of a deceased employee member.

18. Under clause 2.5A of the Trust Deed, the trustee may accept a transfer of benefits accumulated by a member with another redundancy fund into the WACIRF No. 2.

19. Under clause 4.1A of the Trust Deed, the trustee may transfer the amount credited to the members account from the WACIRF No. 2 to another redundancy fund..

20. Under regulation 4.3 (Schedule E) of the trust deed, an employer may receive a refund of contributions credited to the account of a member who is not an employee of the employer.

21. The WACIRF No. 2 was prescribed as being an approved worker entitlement fund with effect from 1 April 2003 by Fringe Benefits Tax Amendment Regulations 2004 (No. 3) (51 of 2004).

Ruling

22. The payment of a contribution to the WACIRF No. 2 by an employer pursuant to an 'industrial instrument' will be an exempt benefit under section 58PA of the FBTAA.

23. Provided the contribution does not relate to the earning of exempt income or non-assessable non-exempt income, an employer who pays a contribution to the WACIRF No. 2 pursuant to an award or industrial agreement will be entitled to claim an income tax deduction under section 8-1 of the ITAA 1997 for the amount of the contribution.

24. A refund of contributions made to the WACIRF No. 2 by an employer in respect of a person who has ceased to be an employee of the employer will be assessable income under section 6-5 of the ITAA 1997 at the time the amount is derived by the employer.

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.*

Will a contribution made to the WACIRF No. 2 pursuant to an award or industrial agreement be an exempt benefit under section 58PA of the FBTAA?

25. Section 58PA of the FBTAA sets out the conditions that must be satisfied for a contribution to the WACIRF No. 2 to be an exempt benefit.

26. Section 58PA of the FBTAA states:

If:

- (a) a person makes a contribution to an approved worker entitlement fund; and
- (b) the contribution is made under an industrial instrument; and
- (c) the contribution is either:
 - (i) made for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or
 - (ii) for the reasonable administrative costs of the fund;

the contribution is an exempt benefit.

27. Therefore, to determine whether a contribution to the WACIRF No. 2 will be an exempt benefit under section 58PA of the FBTAA it is necessary to consider the following questions:

- (a) Is the WACIRF No. 2 an approved worker entitlement fund?
- (b) Is the contribution made under an industrial instrument?
- (c) Is the contribution made to ensure that an obligation to make leave payments, or payments when an employee ceases employment are met?

Is the WACIRF No. 2 an approved worker entitlement fund?

28. Section 58PB of the FBTAA sets out the conditions that must be met for the WACIRF No. 2 to be an approved worker entitlement fund. This section was amended by the *Tax Laws Amendment (2011 measures No. 2) Act 2011* (No. 41 of 2011) with effect from 28 June 2011.

Was the WACIRF No. 2 an approved worker entitlement fund during the period 1 April 2011 to 28 June 2011?

29. Prior to the amendment, subsection 58PB(2) of the FBTA stated:

A fund is also an **approved worker entitlement fund** if:

- (a) the fund is prescribed for the purposes of this paragraph; and
- (b) a declaration under subsection (3) is not in force in relation to the fund.

30. Both of these conditions were met during the period from 1 April 2011 to 28 June 2011 as:

- the WACIRF No. 2 had been prescribed as an approved worker entitlement fund; and
- a declaration under subsection 58PB(3) of the FBTA was not in force in relation to the fund.

31. Therefore, the WACIRF No. 2 was an approved worker entitlement fund during the period 1 April 2011 to 28 June 2011.

Is the WACIRF No. 2 an approved worker entitlement fund for the period since 28 June 2011?

32. Following the amendment subsection 58PB(2) of the FBTA states:

A fund is also an **approved worker entitlement fund** if:

- (a) the fund is endorsed as an approved worker entitlement fund under subsection (3); or
- (b) the entity that operates the fund is endorsed for the operation of the fund under subsection (3A).

33. For the purpose of determining whether a fund is endorsed as an approved worker entitlement fund, *Tax Laws Amendment (2011 measures No. 2) Act 2011* included the following transitional provisions which gave existing funds a six-month period to obtain an ABN:

13 Transitional provision – approved worker entitlement funds

Scope

- (1) This item applies to a fund that, just before the commencement of this item, was an approved worker entitlement fund under subsection 58PB(2) of the *Fringe Benefits Tax Assessment Act 1986*.

Fund taken to have been endorsed

- (2) Treat the fund as having been endorsed, on that commencement, by the Commissioner under subsection 58PB(3) of that Act, as amended by this Part.

- (3) To avoid doubt, sub item (2) does not prevent the Commissioner from revoking that endorsement at a later time under section 426-55 in Schedule 1 to the *Taxation Administration Act 1953*.

Fund not required to have ABN for 6 months

- (4) Paragraph 58PB(4)(f) of the *Fringe Benefits Tax Assessment Act 1986*, as added by this Part, does not apply to the fund before the end of the period of 6 months starting on the day this item commences.

34. As the WACIRF No. 2 was an approved worker entitlement fund at the time of the amendment, it was treated as being endorsed as an approved worker entitlement fund as of 28 June 2011. To maintain that endorsement, either the fund, or the trustee that operates the fund was required to obtain an ABN by 28 December 2011.

35. As the trustee of the WACIRF No. 2 has obtained an ABN, the WACIRF No. 2 is taken to be endorsed as an approved worker entitlement fund for the period since 28 June 2011.

Is the contribution made under an industrial instrument?

36. Paragraph 58PA(b) of the FBTA requires the contribution to be made under an industrial instrument. An 'industrial instrument' is defined in subsection 136(1) of the FBTA to mean:

a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law.

37. Any contribution that is made to the WACIRF No. 2 will be made pursuant to the terms of an award or industrial agreement. The question of whether the particular award or industrial agreement under which the contribution is made comes within the 'industrial instrument' definition is therefore a question of fact.

38. Although the answer to this question depends upon the particular award or industrial agreement under which the contribution is paid, it is accepted that each of the awards listed in paragraph 12 of this ruling are an 'industrial instrument' for the purposes of paragraph 58PA(b) of the FBTA. Therefore, it is accepted that where an employer in complying with their obligations under one of the listed awards makes a contribution to the WACIRF No. 2, the contribution will be made under an 'industrial instrument'.

Is the contribution made to ensure that the leave payment obligation has been met?

39. Paragraph 58PA(c) of the FBTA requires that the contribution is either for:

- the purpose of ensuring that an obligation that arises under the industrial instrument to make leave

payments or payments when an employee ceases employment is met; or

- for the reasonable administrative expenses of the fund.

40. This requirement will be met where the employer makes a contribution to the WACIRF No. 2 to enable the obligation to make a redundancy/severance payment under the relevant industrial instrument to be met.

Conclusion

41. Each of the three conditions in section 58PA of the FBTA will be met where the award or industrial agreement under which a contribution is paid is an 'industrial instrument'. In such a situation, the contribution paid by the employer to the WACIRF No. 2 will be an exempt benefit.

Is an employer who makes a contribution to the WACIRF No. 2 pursuant to an award or industrial agreement entitled to claim an income tax deduction for the amount of the contribution under section 8-1 of the ITAA 1997?

42. Subsection 8-1(1) of the ITAA 1997 enables an employer to claim an income tax deduction for a loss or outgoing that is incurred:

- in gaining or producing assessable income; or
- in carrying on a business for the purpose of gaining or producing assessable income.

43. However, subsection 8-1(2) of the ITAA 1997 prevents a deduction being claimed under subsection 8-1(1) where the loss or outgoing is:

- a loss or outgoing of a capital, private or domestic nature; or
- incurred in gaining or producing exempt income or non-assessable non-exempt income; or
- where a provision of the *Income Tax Assessment Act 1997* (ITAA 1997) prevents an income tax deduction from being claimed.

Will a contribution be a loss or outgoing that comes within subsection 8-1(1) of the ITAA 1997?

44. Where an employer makes a contribution to the WACIRF No. 2 in order to fulfil an obligation imposed on the employer by an award or industrial agreement the employer does so to meet an obligation that arises from carrying on a business. Therefore, where the business is carried on for the purpose of gaining or producing assessable income, the contribution will come within subsection 8-1(1) of the ITAA 1997.

Will subsection 8-1(2) of the ITAA 1997 prevent an income tax deduction being claimed for a contribution?

45. As set out above, there are three circumstances in which subsection 8-1(2) of the ITAA 1997 will prevent a deduction being claimed for a loss or outgoing that meets the requirements of subsection 8-1(1). The application of these three circumstances is considered below:

Is a contribution a loss or outgoing of a capital, private or domestic nature?

46. In discussing whether a payment to a superannuation fund was capital, Hill J. in *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428; 2003 ATC 5076; (2003) 4 ATR 423 (*Walstern*) said:

However, it cannot be said that the question whether a payment is a one-off payment or whether it is a recurrent payment is a matter irrelevant to whether the outgoing is capital. In a case such as the present where the payment operates to create the capital of a trust fund the outlay will ordinarily be seen as capital both because of the lasting qualities enjoyed and the fact that what is being made is a final payment to secure future benefits. However, if a contribution is one of a number of 'recurrent' contributions for employees, so that it can be seen to be part of the ordinary flow of business expenditure of a taxpayer, the character of the outlay will take on a different complexion.

47. In applying these comments, the contributions that are paid to the WACIRF No. 2 can be distinguished from the payment in the decision in *Walstern*. In that case the payment operated to create the capital of a trust fund. By contrast, the contributions paid to the WACIRF No. 2 are recurrent payments that are part of the ordinary flow of business expenditure as they are paid to discharge an obligation imposed on the employer by an award or industrial instrument. As such, the contributions are revenue in nature.

48. Similarly, the contributions paid to the WACIRF No. 2 will not be of a private or domestic nature as they are paid in relation to employees engaged in the business of their employer. As such, they are an employment expense that is treated in the same manner as the payment of salary or wages or other forms of employee remuneration.

Is a contribution a loss or outgoing incurred in gaining or producing exempt income or non-assessable non-exempt income?

49. The question of whether a contribution is a loss or outgoing incurred in gaining or producing exempt income or non-assessable non-exempt income will be a question of fact that will depend upon the employer's circumstances.

Does a provision of the ITAA prevent an income tax deduction from being claimed for the contribution?

50. No provisions of the ITAA will prevent an income tax deduction being claimed for a contribution to the WACIRF No.2 that is made pursuant to an industrial award or agreement where the contribution comes within subsection 8-1(1) of the ITAA 1997 and does not come within the other paragraphs of subsection 8-1(2) of the ITAA 1997.

Conclusion

51. Provided a contribution does not relate to the earning of exempt income or non-assessable non-exempt income, an employer who makes a contribution to the WACIRF No. 2 pursuant to an industrial award or agreement will be entitled to claim an income tax deduction for the amount of the contribution.

Will the refund of a contribution made to the WACIRF No. 2 form part of the employer's assessable income?

52. A refund of contributions under regulation 4.3 (Schedule E) of the Trust Deed will be made where an employee has not been engaged in works on any building project, maintenance site or other site or under a nominated industrial award/agreement for more than three months (or lesser period determined by the trustee).

Conclusion

53. Where an employer receives a refund of contributions made for a person who has ceased to be an employee of the employer, the refund is considered to be income received in the ordinary course of business and assessable under section 6-5 of the ITAA 1997 in the income year in which it is derived.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2006/13W; TR 2006/10

Subject references:

- assessable recoupments
- deductions and expenses
- exempt benefits
- fringe benefits tax
- income
- worker entitlement funds

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 8-1
- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 58PB
- FBTAA 1986 58PB(2)

- FBTAA 1986 58PB(2)(a)
- FBTAA 1986 58PB(3)
- FBTAA 1986 58PB(4)(c)
- FBTAA 1986 136(1)
- TAA 1953
- Tax Laws Amendment (2011 Measures No. 2) Act 2011 Transitional Provisions
- Copyright Act 1968

Case references:

- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 90 ATC 4413; (1990) 21 ATR 1
- Sun Newspapers Ltd v. FC of T (1938) 61 CLR 337
- Walstern Pty Ltd v. Federal Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423

ATO references

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