


CR 2012/29 - Income tax: PAYG withholding: payments made by local government bodies in Queensland for the transfer of long service leave entitlements to other local government bodies and to Queensland government agencies

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Class Ruling

Income tax: PAYG withholding: payments made by local government bodies in Queensland for the transfer of long service leave entitlements to other local government bodies and to Queensland government agencies

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ⓘ 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:
- Subsection 11-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
 - Section 12-35 of Schedule 1 to the TAA
 - Section 12-90 of Schedule 1 to the TAA
 - Subsection 6-5(4) of the *Income Tax Assessment Act 1997* (ITAA 1997).
 - Subsection 6-10(3) of the ITAA 1997.

- Section 15-5 of the ITAA 1997
- Section 26-10 of the ITAA 1997

Class of entities

3. The class of entities to which this Ruling applies is those members of the Local Government Association of Queensland (LGAQ) who make payments under the scheme described in paragraphs 9 to 23 of this Ruling.

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 23 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 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. The following documents, or relevant parts of them form part of and are to be read with the description:

- Application for Class Ruling dated 31 August 2011
- Additional information provided in phone conversations

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. Certain local government employees are entitled to participate in portable long service leave schemes under which their long service leave entitlements accrued with a former employer can be transferred to a new employer upon payment of an amount from the former employer to the new employer.

11. The three schemes covered in this class ruling are:

- (i) Portability of long service leave under Division 4, Part 3, Chapter 5 of the Local Government (Operations) Regulation 2010 (Qld)
- (ii) Portability of long service leave under Division 4, Part 3, Chapter 5 of the City of Brisbane (Operations) Regulation 2010 (Qld)
- (iii) Recognition of Previous Service and Employment under Directive Number 10/10 (made under subsection 54(1) of the *Public Service Act 2008* (Qld)).

12. An employee's long service leave entitlements can be transferred from a former employer to a new employer where they meet the criteria for the particular scheme.

13. Each of these schemes provides for the payment of an amount from a former employer to a new employer in respect of the accrued unused long service leave entitlement that is transferred.

14. There are three types of payments in respect of the transfer of long service leave entitlements which form part of the description of the scheme for the purpose of this class ruling:

- (i) payments made pursuant to regulation 102 of the Local Government (Operations) Regulation 2010 (Qld)
- (ii) payments made pursuant to regulation 99 of the City of Brisbane (Operations) Regulation 2010 (Qld)
- (iii) payments made pursuant to Queensland Public Service Directive 10/10.

Payments made pursuant to the Local Government (Operations) Regulation 2010 (Qld)

15. Under regulation 102 of the Local Government (Operations) Regulations 2010 (Qld) a payment is required to be made by the former employer¹ to the new employer² in respect of the employee's long service leave entitlements accrued with the former employer.

16. Regulation 102 of the Local Government (Operations) Regulations 2010 (Qld) states:

- (1) The former employer must pay the new employer an amount for the number of days of long service leave that the person:
 - (a) is entitled to take because of the person's period of employment with the former employer; or
 - (b) would have been entitled to take, because of the person's period of employment, if there was no minimum period of employment to be completed before the entitlement accrued.
- (2) The amount:
 - (a) is the amount the former employer would have been required to pay the person if the person had taken the long service leave; and
 - (b) must be paid within a reasonable time of being requested by the new employer.

Payments made pursuant to the City of Brisbane (Operations) Regulation 2010 (Qld)

17. Under regulation 99 of the City of Brisbane (Operations) Regulation 2010 (Qld) a payment is required to be made by the former employer³ to the new employer⁴ in respect of the employee's long service leave entitlements accrued with the former employer.

18. Regulation 99 of the City of Brisbane (Operations) Regulation 2010 (Qld) states:

- (1) The former employer must pay the new employer an amount for the number of days of long service leave that the person:
 - (a) is entitled to take because of the person's period of employment with the former employer; or
 - (b) would have been entitled to take, because of the person's period of employment with the former employer, if there was no minimum period of employment to be completed before the entitlement accrued.
- (2) The amount:

¹ A relevant entity under the Local Government (Operations) Regulations 2010 (Qld).

² A relevant entity under the Local Government (Operations) Regulations 2010 (Qld).

³ A relevant entity under the City of Brisbane (Operations) Regulation 2010 (Qld).

⁴ A relevant entity under the City of Brisbane (Operations) Regulation 2010 (Qld).

- (a) is the amount the former employer would have been required to pay the person if the person had taken the long service leave; and
- (b) must be paid within a reasonable time of being requested by the new employer.

Payments made pursuant to Queensland Public Service Directive 10/10

19. Queensland Public Service Directive 10/10 (the 'directive'), issued pursuant to subsection 54(1) of the *Public Service Act 2008 (Qld)* deals with the recognition of previous service and employment. The directive enables the portability of long service leave entitlements between various entities (including Queensland Local Government entities⁵) and Queensland government agencies covered by the directive.

20. The system has been set up with the aim of transferring of pre-tax sums in lieu of taking these entitlements upon termination.

21. Part A of the directive contains a table which outlines the terms attached to the recognition of long service leave entitlements when transferred from various categories of former employers to a relevant Queensland government agency covered by the directive. Item 4 of the table in Part A includes local government in Queensland in the category of former employers.

22. One of the terms upon which a transfer of a long service leave entitlement from a local government to a State government department is recognised, is the 'payment of the cash equivalent of long service leave by the former employer to the new employer'.⁶

23. We have assumed for the purposes of this ruling that all the recipients of the payments (the new employers) have an Australian Business Number that they have quoted in relation to the payment. Accordingly we have not considered the withholding obligations under section 12-190 of Schedule 1 to the TAA in relation to this scheme.

⁵ This includes all relevant entities.

⁶ This is not required where both employers are members of the Long Service Leave Central Scheme (see item 4 of Part A of the Schedule to the directive).

Ruling

24. The payment of accrued unused long service leave entitlements by a former employer to a new employer under the scheme is not subject to PAYG withholding under Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

Commissioner of Taxation

9 May 2012

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.*

No assessable income of an employee

25. Whilst assessable income is derived by an employee at the time payment is received, subsections 6-5(4) and 6-10(3) of the ITAA 1997 state that income is viewed as being derived and thus assessable to an employee when it is applied or dealt with in any way on behalf of or as directed by the employee.

26. The payments described under the scheme at paragraphs 15 to 23 above are amounts transferred between former employers and new employers in accordance with statutory arrangements or by a public service directive. The payments are not made to the individual employee. Accordingly there is no payment that the employee 'receives'.

27. In respect of payments made between employers under these arrangements, affected employees have no existing entitlement to the amounts transferred. It follows that employees neither derive nor receive income under these arrangements. Therefore the payments are not assessable income in the hands of the employee.

Accrued unused long service leave entitlement payment

28. A payment made by a former employer to a new employer, in respect of an accrued unused long service leave entitlement, falls within the definition of an 'accrued leave transfer payment'. This is defined under subsection 26-10(2) of the ITAA 1997 as a payment that an entity makes:

- (a) in respect of an individual's leave (some or all of which accrued while the entity was required to make payments in respect of the individual's leave, or leave the individual might take); and
- (b) when the entity is no longer required (or is about to stop being required) to make payments in respect of such leave; and
- (c) to another entity when the other entity has begun (or is about to begin) to be required to make payments in respect of such leave; and
- (d) under (or for the purposes of facilitating the provisions of) an Australian law, or an award, order, determination or industrial agreement under an *Australian law.

29. To the extent that the employers are income tax exempt⁷ there may be no income tax consequences in regard to these payments for the employers. Otherwise the amount of the payment will be deductible to the former employer under paragraph 26-10(1)(b) of the ITAA 1997 and assessable to the new employer under section 15-5 of the ITAA 1997.

PAYG withholding obligations

30. The PAYG withholding regime is established under Part 2-5 of Schedule 1 to the TAA. Under PAYG withholding, amounts are collected in respect of particular kinds of payments or transactions. Usually, someone who makes a payment to an individual is required to withhold an amount from the payment, and then to pay the amount to the Commissioner.

31. Section 10-5 of Schedule 1 to the TAA lists the payments and other transactions that are covered by PAYG withholding.

32. There is no specific withholding obligation in relation to 'accrued unused leave entitlement payments'. There are obligations in respect of payments to employees (section 12-35 of Schedule 1 to the TAA) and unused leave payments (section 12-90 of Schedule 1 to the TAA).

33. Both sections 12-35 and 12-90 of Schedule 1 to the TAA only require withholding where the payment is made to an individual. The payments described in the scheme are paid to the new employer, and not to the individual.

34. Subsection 11-5(1) of Schedule 1 to the TAA deals with constructive payments for the purposes of PAYG withholding and states:

In working out whether an entity has paid an amount to another entity, and when the payment is made, the amount is taken to have been paid to the other entity when the first entity applies to deals with the amount in any way on the other's behalf or as the other directs.

35. The words used in section 11-5 of Schedule 1 to the TAA are similar to those in subsections 6-5(4) and 6-10(3) of the ITAA 1997. As explained in paragraphs 28 and 29 above, the individual employee does not receive or derive the income for the purposes of subsection 6-5(4) and 6-10(3) of the ITAA 1997. Therefore the individual cannot be said to have received constructive payment under subsection 11-5(1) of Schedule 1 to the TAA for PAYG withholding purposes.

⁷ Municipal corporations and local governing bodies are generally exempt from income tax in accordance with section 50-1 of the ITAA 1997 and the table in section 50-25 of the ITAA 1997. State government entities are generally exempt from income tax under Division 1AB of Part III of the *Income Tax Assessment Act 1936*.

36. Therefore withholding will not be required under section 12-35 or 12-90 of Schedule 1 to the TAA for the payment described in the scheme.

Unused leave payments paid directly to employees

37. Where a payment for accrued unused long service leave is made directly to an employee in consequence of the termination of their employment with a Local Government employer the employer has a withholding obligation in accordance with section 12-90 of Schedule 1 to the TAA.

38. Paragraph 12-90(b) of Schedule 1 to the TAA requires an entity to withhold an amount from an 'unused long service leave payment'⁸ made to an individual, but only to the extent that the payment is included in the individual's assessable income.

⁸ 'Unused long service leave payment' is defined by subsection 995-1(1) of the ITAA 1997 to have the meaning given by section 83-75 of the ITAA 1997.

Section 83-75 of the ITAA 1997 states:

A payment that you receive in consequence of the termination of your employment is an **unused long service leave payment** if:

- (a) it is for long service leave you have not used; or
- (b) it is for long service leave to which you were not entitled just before the employment termination, but that would have been made available to you at a later time if it were not for the employment termination.

Appendix 2 – Detailed contents list

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References

- Previous draft:*
- ITAA 1997 26-10(1)(b)
 - ITAA 1997 26-10(2)
- Not previously issued as a draft
- ITAA 1997 50-1
- Related Rulings/Determinations:*
- ITAA 1997 50-25
 - ITAA 1997 83-75
 - ITAA 1997 995-1(1)
- TR 2001/10; TR 2006/10
- Subject references:*
- assessable income
 - employee
 - government
 - income
 - local government
 - long service leave
 - PAYG
- Legislative references:*
- ITAA 1997 6-5(4)
 - ITAA 1997 6-10(3)
 - ITAA 1997 15-5
 - ITAA 1997 26-10
 - TAA 1953
 - TAA 1953 Sch1 10-5
 - TAA 1953 Sch1 11-5(1)
 - TAA 1953 Sch1 12-35
 - TAA 1953 Sch112-90
 - TAA 1953 Sch112-90(b)
 - City of Brisbane (Operations) Regulation 2010 (Qld)
 - Local Government (Operations) Regulations 2010 (Qld)
 - Public Service Act 2008 (Qld)
 - Copyright Act 1968
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ATO references

- NO: 1-3H15OP0
- ISSN: 1445-2014
- ATOLaw topic: Income Tax ~~ Withholding tax ~~ pay as you go withholding
Income Tax ~~ Assessable income ~~ employment income – Australian sourced
Income Tax ~~ Assessable income ~~ other payments