


# ***CR 2013/86 - Income tax and fringe benefits tax: taxation implications of the Australian Portable Leave Scheme for employers***

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## Class Ruling

### Income tax and fringe benefits tax: taxation implications of the Australian Portable Leave Scheme for employers

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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

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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 8-1 of the ITAA 1997,
- section 26-10 of the ITAA 1997,
- section 12-35 of Schedule 1 of the *Taxation Administration Act 1953* (TAA),
- section 12-90 of Schedule 1 to the TAA,
- Division 426 of Schedule 1 to the TAA,
- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), and

- section 58PB of the FBTA.

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

## **Class of entities**

3. The class of entities to which this Ruling applies is all employers that will make contributions to the Australian Portable Leave Scheme (APLS) equal to the current and/or future leave payment obligations of their employees covered by an industrial agreement.

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise arrangement 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 8 to 22 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.

## **Date of effect**

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7. This Ruling applies from 1 April 2013. 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**

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8. The following description of the scheme is based on a number of documents provided to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:

- the application for class ruling dated 9 October 2012,
- the constitution of the corporate trustee of the APLS, and

- the APLS Trust Deed dated 28 March 2013 (the Trust Deed).

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

### **Description of arrangement**

9. The APLS is a trust, created under a deed, settled by Australian Portable Leave Scheme Pty Ltd, a company limited by shares under the *Corporations Act 2001* (the Trustee) and the Victorian Branch of the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (as the sponsor).

10. The APLS has been endorsed as an approved worker entitlement fund under subsection 58PB(3) of the FBTA.

11. The object of the APLS is set out at clause 3 of the Trust Deed, which states:

The overriding objects of the Scheme are the acceptance of Contributions and the preservation of Entitlements to facilitate the satisfaction of the obligations of Employers under an Industrial Agreement to pay Entitlements to Employees.

(Capitalised terms are defined in the Trust Deed).

12. The term 'Entitlements' is defined in clause 1 of the Trust Deed as '... amounts payable to an Employee as required by law in respect of leave'.

### **Contributions to the APLS**

13. Under clause 5 of the Trust Deed, contributions can be made to the APLS by employers on account of any employee as contemplated by an industrial agreement and such contributions will form part of the APLS Trust Fund. The term 'Contribution' is defined in clause 1 of the Trust Deed as '... a payment to the Scheme by an Employer in respect of any Employee in accordance with the provisions of this Deed'.

14. An employer's obligation to participate in the APLS may be mandated under an industrial agreement (such as an enterprise agreement). An employer may also elect to join the APLS voluntarily. Under clause 7 of the Trust Deed, employers can participate in the APLS by providing the Trustee with an application for admission and executing a Deed of Adherence, and meeting other ongoing requirements. In the absence of a Deed of Adherence, an employer that is obligated to participate in the APLS may also be admitted to the APLS where they have made contributions to the APLS, the Trustee notifies them that they have been admitted to the APLS and the employer continues to make contributions.

15. Clause 8 of the Trust Deed requires employers to pay a 'Minimum Contribution' for each employee in accordance with the terms of the relevant industrial agreement, the Deed of Adherence or as otherwise agreed between the Trustee and the employer.

16. Schedule 1 of the Trust Deed states that by applying to enter into the APLS the employer agrees to pay into the APLS, as contributions, the employee's entitlements monthly in arrears and within seven calendar days from the end of any monthly period.

17. Clause 11 of the Trust Deed requires the Trustee to establish an 'Employee Member Account' in respect of each employee who is admitted to the membership of the APLS. Amounts received by the APLS from an employer in respect of a particular employee's entitlements must be credited to that employee's Employee Member Account and, on payment, will be debited against the same account.

### ***Payments from the APLS***

18. Payments can be made out of the income or the capital of the APLS to satisfy the objects of the APLS.

19. Payments from amounts received by the APLS as contributions from employers can only be applied for the purposes set out at clause 6.4(a)(i) to (ix) of the Trust Deed, which include making payments to employees, reimbursing employers who have paid entitlements (in respect of which they have already made a contribution) to employees, returning contributions to employers and to pay an employment termination payment.

20. Payments from the APLS to employees will be payable:

- as and when they take leave (in accordance with their entitlement to do so under the industrial agreement) during the year; and/or
- upon the termination of their employment.

21. In practical terms, payments of benefits from the APLS to employees will be made in one of, or both, of the following ways:

- from the APLS directly to the employees; and/or
- from the APLS to the employer in order to reimburse the employer who has made a payment to an employee in respect of their entitlement, where the employer has already made a contribution to the APLS representing that employee's entitlement.

22. The Trustee has rigorous substantiation and evidentiary requirements to ensure that payments of benefits are made from the APLS, either directly to employees or to employers as a reimbursement, only in circumstances contemplated by the Trust Deed and consistently with the objects of the APLS.

## **Ruling**

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### **Deduction**

23. An employer who makes contributions to the APLS under the Trust Deed can claim a deduction under section 8-1 for the amount of the contribution.

### **Pay As You Go (PAYG) withholding obligations**

24. Where the Trustee pays benefits representing entitlements to an employee directly, the employer of that employee will not be subject to any PAYG withholding obligations under Part 2-5 of Schedule 1 to the TAA with respect to that payment as these obligations are imposed on the entity making the payment to the employee which in this case is the Trustee.

25. Where an employer makes a payment of entitlements to an employee for which they will later claim a reimbursement from the Trustee, the employer is subject to PAYG withholding obligations under Part 2-5 of Schedule 1 to the TAA with respect to that payment as in this situation the employer is the entity making the payment to the employee.

### **Assessability of reimbursement**

26. A reimbursement received by an employer from the APLS for an amount paid directly to an employee will be assessable income of the employer under section 6-5 at the time the amount is derived by the employer.

### **Fringe benefits tax**

27. The payment of a contribution to the APLS by an employer under an industrial agreement that requires payments to be made to cover future leave payments or payments when the employee ceases employment is an exempt benefit under section 58PA of the FBTAA.

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**Commissioner of Taxation**

13 November 2013

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## Appendix 1 – Explanation

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**ⓘ** *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.*

### Application of section 8-1

28. Section 8-1 provides that you can deduct from your assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income or is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income and is not:

- capital, private or domestic in nature,
- incurred in gaining or producing exempt income, or
- prevented from being deductible by a provision of the ITAA 1997.

### Positive Limbs

#### ***Nexus to gaining and producing assessable income***

29. In carrying on business activities an employer is required to fulfil their obligations in respect of the entitlements of their employees. These entitlements may be contained in the governing award, enterprise agreement, or other industrial instrument negotiated between the employer and the relevant union on the employee's behalf.

30. In addition to the employer's legal obligations under the relevant industrial instrument/s, a participating employer is also required to meet its obligations under the APLS. The employer's obligations include the making of contributions to the APLS in respect of employee entitlements.

31. It is accepted that there is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for employee entitlements, such that payment of the employee entitlements is incidental and relevant to the production of the assessable income of the business.

***Incurring the amount***

32. At the point at which an employer makes the contribution to the Trustee of the APLS the amount is placed into the relevant member account and the amount/s are no longer owned by the employer. This differs from the situation in *Walstern v. Federal Commissioner of Taxation* (2003) 138 FCR 1; [2003] FCA 1428; (2003) 54 ATR 423; (2003) 2003 ATC 5076 where at the time the employer made contributions to a superannuation fund none of its employees were members of the fund. As the employer remained the sole owner in equity of the funds contributed, Hill J found that at the time of making the contributions it did not incur outgoings for the purposes of the relevant general deductions provision.

33. The fact that amounts may be returned to the employer under the Trust Deed when the employer is reimbursed for payments made directly to an employee (a factor which does not prevent the APLS being an approved worker entitlement fund under section 58PB of the FBTA) does not affect whether the monthly contributions are incurred by the employer.

34. Even though the Trust Deed enables the employer to seek reimbursement in certain circumstances, the contributions to the APLS are definite payments which the employer is required to make to meet the legal obligations under the industrial instruments or Deed of Adherence which arise in the course of carrying on their business activities. As such the employer incurs the expenditure on contributions when the liability to make the payment arises each month.

***Conclusion***

35. The employer's monthly contributions to the APLS are outgoings incurred in carrying on a business for the purposes of section 8-1.

**Negative Limbs*****Is the contribution revenue or capital in nature?***

36. Whether the payment of worker entitlements to the APLS is revenue or capital in nature depends on the character of the payment when made by the employer. As stated in *G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124 at 137; 90 ATC 4413 at 4419; (1990) 21 ATR 1 at 7:

The character of expenditure is ordinarily determined by reference to the nature of the asset acquired or the liability discharged by the making of the expenditure, for the character of the advantage sought by the making of the expenditure is the chief, if not the critical, factor in determining the character of what is paid: *Sun Newspapers Ltd v. FC of T* (1938) 61 CLR 337 at p 363.

37. In making the contributions to the APLS in relation to leave entitlements, the employer meets their immediate obligation under an industrial instrument or the Deed of Adherence.

38. The employer is making ongoing contributions to discharge an immediate obligation which is recurring and directly connected to the income earning capacity of the business. Accordingly, the payment of the contributions is revenue in nature.

### ***Is the contribution precluded from deduction by section 26-10?***

39. Section 26-10 provides that an outgoing for leave is not deductible except where the outgoing is an amount which is paid in the income year to the individual to whom the leave relates (or if the individual is deceased to their dependant or legal representative), or it is an accrued leave transfer payment that is made in the income year.

40. An outgoing will be for leave when it has the purpose of making a payment to an employee while on leave. Therefore, an outgoing will be for leave where it discharges the obligation of an employer to make a payment to a current employee while that employee is on leave.

41. The contributions made by the employer to the APLS are contributions made to discharge the employer's immediate legal obligations in respect of employee entitlements. While the contribution is calculated with reference to the employee's future leave entitlements, the immediate outgoing of the employer is not an outgoing for leave. As such the employer's contribution to the APLS is not affected by the operation of section 26-10.

### ***Conclusion***

42. The employer's contribution to the APLS is not capital in nature, and is not an outgoing for leave. As such the outgoing is not prevented from deduction under section 8-1 by being capital in nature, or by the operation of section 26-10.

### **PAYG withholding obligations**

43. Section 12-35 of Schedule 1 to the TAA requires an entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity).

44. Section 12-90 of Schedule 1 to the TAA requires an entity to withhold an amount from any of the following payments it makes to an individual:

- an unused annual leave payment;

- an unused long service leave payment, to the extent that the payment is included in the individual's assessable income.

45. An entity includes the trustee of a trust (subsection 960-100(2)).

46. Sections 12-35 and 12-90 impose the PAYG withholding obligations on the entity making the payment. Therefore, where the Trustee pays benefits representing entitlements to an employee directly, the Trustee rather than the employer of that employee will be subject to the PAYG withholding obligations. For the same reason, where an employer makes a payment of entitlements to an employee for which they will later claim a reimbursement from the Trustee, the employer is subject to PAYG withholding obligations.

### **Assessability of reimbursement**

47. Where an employer has paid an employee their entitlement directly, and the employer has already made a contribution to the APLS representing that employee's entitlement, the employer may apply to the APLS for a reimbursement of this amount.

48. A reimbursement received by an employer from the APLS is considered income received in the ordinary course of business and therefore assessable under section 6-5 in the income year in which it is derived.

### **Fringe benefits tax**

49. Section 58PA of the FBTA states:

#### **EXEMPT BENEFITS – WORKER ENTITLEMENT CONTRIBUTIONS**

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.

50. Exemption under section 58PA of the FBTAA requires that all paragraphs contained therein are met in full and, consequently, a failure to meet the requirements of one or more of those paragraphs means that exemption under that section cannot be granted.

51. Therefore, to determine whether a contribution to the APLS will be an exempt benefit under section 58PA of the FBTAA, it is necessary to consider the following questions:

- (a) Is the APLS 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 is met?

### ***Is the APLS an approved worker entitlement fund?***

52. Section 58PB of the FBTAA sets the conditions that must be met in order for the APLS to qualify as an 'approved worker entitlement fund'. Subsection 58PB(2) of the FBTAA 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) ...

53. Subsection 58PB(3) of the FBTAA states:

The Commissioner must endorse a fund as an approved worker entitlement fund if:

- (a) the fund is entitled to be endorsed as an approved worker entitlement fund (see subsection (4)); and
- (b) the fund has applied for the endorsement in accordance with Division 426 in Schedule 1 to the *Taxation Administration Act 1953*.

54. It has been determined that the fund is entitled to be endorsed as an approved worker entitlement fund pursuant to subsection 58PB(4) of the FBTAA; and the APLS has applied for the endorsement in accordance with Division 426 in Schedule 1 to the TAA.

55. As the requirements of subsection 58PB(2) of the FBTAA are met, the APLS is an approved worker entitlement fund.

### ***Is the contribution made under an industrial instrument?***

56. Paragraph 58PA(b) of the FBTAA requires that the contribution to a worker entitlement fund (WEF) 'is made under an industrial instrument'.

57. In the 'Detailed explanation of new law' section of the Explanatory Memorandum (EM) to *Tax Laws Amendment (2005 Measures No.2) Act 2005*, which removed the previous conditions in paragraphs 58PA(b) and 58PA(c) of the FBTA that contributions to a WEF must be 'required' under an industrial instrument, it is stated:

8.10 Industrial instruments, such as awards, may include an obligation for employers to provide leave or redundancy payments for employees based on the length of an employee's service. Employers may have the option of providing for the payments themselves, or by way of making contributions to a worker entitlement fund. Thus the wording of these industrial instruments may make contributions to a worker entitlement fund optional. The industrial instruments may not require employers to meet their obligation to provide those payments by way of a contribution to a worker entitlement fund.

8.11 Prior to these amendments, contributions needed to be 'required under an industrial instrument' in order for the contribution to be eligible for an exemption from FBT. As a result, employers may be liable to pay FBT on their contributions to approved worker entitlement funds in cases where the contributions are optional, but not required, under the relevant industrial instrument.

58. The above EM indicates that although current paragraph 58PA(b) of the FBTA (and also current paragraph 58PA(c) of the FBTA) no longer demand the relevant industrial instrument must contain a legal requirement for the contribution to be made to a WEF, there still has to exist, for the purposes of the aforementioned paragraphs, some logical link between the industrial instrument and the subsequent contribution to the WEF.

59. The Administrative Appeal Tribunal (AAT) case of *Eldersmede Pty Ltd & Ors v. FCT* [2004] AATA 710; 2004 ATC 2129; (2004) 56 ATR 1179 examined what the word 'under' may mean in various legislative and contractual contexts. After examining various earlier court decisions the AAT stated (at ATC 2158, ATR 1210):

The authorities to which we have referred indicate that, in various contexts, the word 'under' in the expression 'under a scheme' in s 270(10)(1) of the [*Income Tax Assessment Act 1936*] may mean 'pursuant to', 'in accordance with', 'provided for in', 'by virtue of', 'authorised or required by', 'directly effected by' or 'through the operation of, as a matter of legal effect'. In saying this though, we are mindful of the High Court's warning in *Minister for Immigration and Ethnic Affairs v. Guo* [1997] 144 ALR 567 that it is dangerous to treat a word phrase as synonymous with a statutory term and we do not propose to do so. What is common to all these authorities is that there must be a sufficient nexus or connection between two matters so that one may be said to be under the other or to have occurred under the other.

60. As such, for a contribution to a WEF to be said to have been 'made under an industrial instrument', for the purposes of paragraph 58PA(b) of the FBTA, there must exist a 'sufficient nexus or connection' between that contribution and an industrial instrument.

61. The Full Federal Court in *J&G Knowles and Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; (2000) 44 ATR 22; 2000 ATC 4151, in the course of examining the question of whether on the facts of the case there was a sufficient or material connection or relationship between a 'benefit' and 'employment', stated (at FCR 410, ATR 30, ATC 4158);

29. To put the matter another way, although the process of characterising the benefit provided in a particular case can involve questions of fact and degree, it is not sufficient for the purposes of the Act merely to enquire whether there is some casual connection between the benefit and the employment: see *FC of T v. Rowe* 95 ATC 4691 at 4703 and 4710; (1995) 60 FCR 99 at 114 and 123. Although Brennan, Deane and Gaudron JJ observed in *Technical Products* (at Aust Torts Reports 68, 622; CLR 47), that the requisite connection will not exist unless there is 'some discernible and rational link' between the two subject matters which the statute requires to be linked, as was pointed out by Dawson J (at Aus Torts Reports 68,624; CLR 51), the connection must be 'material'.

62. It is considered, therefore, that for a 'sufficient nexus or connection' to exist between a contribution and the relevant industrial instrument the link between the two must have 'some discernible and rational link' that is 'material' in its extent.

63. Subsection 136(1) of the FBTAA defines 'industrial instrument' as meaning:

...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.

64. Employees engaged under the terms of awards, orders, determinations or industrial agreements, have their rights either sanctioned directly by Commonwealth, State or Territory legislation or by an industrial court authorised by statute to make and enforce such employee rights. The ensuing obligations of employers towards such employees are similarly legislatively or court sanctioned.

65. There is a ready nexus between an employer's obligations arising under an industrial agreement and the subsequent meeting of such obligations by that employer. Consequently, contributions by employers to a WEF in such circumstances can, indeed, be said to have been 'made under an industrial instrument' (up to the extent of the contribution authorised by that instrument) and the requirements of paragraph 58PA(b) of the FBTAA will be met. Therefore, provided such contributions are made for one of the specific purposes required under paragraph 58PA(c) of the FBTAA, those contributions to APLS (which meets the requirements of paragraph 58PA(a) of the FBTAA) will be exempt under section 58PA of the FBTAA as the requirements of all the paragraphs of that section have been met.

***Is the contribution made to ensure that the leave payment obligations have been met?***

66. Paragraph 58PA(c) of the FBTAA 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.

67. This requirement will be met where the employer makes a contribution to the APLS to enable the obligation to make a leave payment under the relevant industrial instrument to be met.

***Conclusion***

68. Each of the three conditions in section 58PA of the FBTAA will be met where the award or industrial agreement under which a contribution is paid is an 'industrial instrument' which requires the contribution to be paid to cover future leave payments or payments when the employee ceases employment. In such a situation, the contribution paid by the employer to the APLS will be an exempt benefit.

## **Appendix 2 – Detailed contents list**

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

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**Appendix 2 – Detailed contents list**

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*TR 2006/10; TR 2005/16;  
TR 2003/15*Subject references:*

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

*Legislative references:*

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 26-10
- ITAA 1997 960-100(2)
- TAA
- TAA Sch 1 Pt 2-5
- TAA Sch 1 12-35
- TAA Sch 1 12-90
- TAA Sch 1 Div 426
- FBTAA
- FBTAA 58PA
- FBTAA 58PA(a)
- FBTAA 58PA(b)
- FBTAA 58PA(c)

- FBTAA 58PB
- FBTAA 58PB(2)
- FBTAA 58PB(3)
- FBTAA 58PB(4)
- FBTAA 136(1)
- Corporations Act 2001
- Tax Laws Amendment (2005 Measures No. 2) Act 2005

*Case references:*

- Walstern v. Federal Commissioner of Taxation (2003) 138 FCR 1; [2003] FCA 1428; (2003) 54 ATR 423; (2003) 2003 ATC 5076
- G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- Eldersmede Pty Ltd & Ors v. FCT [2004] AATA 710; (2004) 2004 ATC 2129; (2004) 56 ATR 1179
- J&G Knowles and Associates Pty Ltd v. Federal Commissioner of Taxation (2000) 96 FCR 402; (2000) 44 ATR 22; 2000 ATC 4151

## ATO references

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