

# ***CR 2013/87 - Income tax: assessable income: payments received by employees under the Australian Portable Leave Scheme***

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## Class Ruling

### Income tax: assessable income: payments received by employees under the Australian Portable Leave Scheme

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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

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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 83-10 of the ITAA 1997,
- section 83-75 of the ITAA 1997,
- section 83-80 of the ITAA 1997,
- section 83-175 of the ITAA 1997,
- Subdivision 83-A of the ITAA 1997,
- Subdivision 83-B of the ITAA 1997,
- section 12-35 of Schedule 1 to the *Taxation Administration Act 1953* (TAA), and

- section 12-90 of Schedule 1 to the TAA.

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 employee members of the Australian Portable Leave Scheme (APLS) (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 the APLS, and
  - the legal personal representatives of deceased employees.

## **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 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.

## **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 *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

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 Trust 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. Under the Trust Deed, payments of an employee's entitlements may be made to their legal personal representative in the event of their death.

23. The Trustee has rigorous substantiation and evidentiary requirements to ensure that payments of benefits are made from the APLS only in circumstances contemplated by the Trust Deed and consistently with the objects of the APLS.

## **Ruling**

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

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. A payment of unused annual leave entitlements by the Trustee to an employee on termination of their employment in circumstances where there is a genuine redundancy is subject to concessional tax treatment under Subdivision 83-A where the payment is made at the same time as a genuine redundancy payment.

31. A payment of unused long service leave entitlements by the Trustee to an employee on termination of their employment in circumstances where there is a genuine redundancy is subject to concessional tax treatment under Subdivision 83-B where the payment is made at the same time as a genuine redundancy payment.

32. A payment of unused annual or long service leave 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 relevant employer.

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**Commissioner of Taxation**

13 November 2013

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## Appendix 1 – Explanation

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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.***

33. 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).

34. 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.

35. In *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; [1966] HCA 48, Windeyer J stated:

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

36. In *G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1, the Full High Court stated (at CLR 138; ATC 4420; ATR 7;):

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.

37. 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.<sup>1</sup> Ordinary income will include payments received in the capacity as an employee or otherwise in connection with employment activities.

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<sup>1</sup> *The Squatting Investment Co Ltd v. Federal Commissioner of Taxation* (1953) 86 CLR 570, 633.

## **Entitlements paid by the Trustee to a continuing employee**

38. 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***

39. 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.

40. 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). 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.

41. 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***

42. 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.

43. 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). 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.

44. 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***

45. 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.

46. 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). 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.

47. 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**

48. In certain circumstances, an employee will claim their employee entitlements directly from the APLS 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

49. 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***

50. 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).

51. 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). 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.

***Payment of unused long service leave to a terminating employee***

52. 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).

53. 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). 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.

54. 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**

55. 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.

56. 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.

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

58. 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.

## **Payment of unused annual leave and unused long service leave entitlements by the Trustee on the death of an employee**

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

60. 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.

61. Subsection 101A(2) of the *Income Tax Assessment Act 1936* (ITAA 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.

## **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 2009/2

*Subject references:*

- assessable income
- assessable leave payments
- salary and wages
- termination payments
- worker entitlement funds
- PAYG withholding

*Legislative references:*

- ITAA 1936
- ITAA 1936 101A(2)
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 83-10
- ITAA 1997 83-10(2)
- ITAA 1997 83-75
- ITAA 1997 83-80
- ITAA 1997 83-80(1)
- ITAA 1997 83-175

- ITAA 1997 Subdiv 83-A
- ITAA 1997 Subdiv 83-B
- TAA 1953
- TAA 1953 Sch 1 10-5(1)
- TAA 1953 Sch 1 12-35
- TAA 1953 Sch 1 12-90
- FBTA 1986
- FBTA 1986 58PB(3)
- Corporations Act 2001

*Case references:*

- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; [1966] HCA 48
- Squatting Investment Co Ltd v. Federal Commissioner of Taxation (1953) 86 CLR 570; [1953] HCA 13

## ATO references

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