



CR 2014/79 - Income tax: treatment of transfer payments to employees of Delta Electricity following the sale of the Delta Coast business to a private sector entity

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Class Ruling

Income tax: treatment of transfer payments to employees of Delta Electricity following the sale of the Delta Coast business to a private sector entity

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	7
Scheme	8
Ruling	23
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	24
Appendix 2:	
<i>Detailed contents list</i>	47

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 identified below applies to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision

2. The relevant provision dealt with in this Ruling is section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997). All subsequent references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The Class of entities to which this scheme applies are all Delta Electricity (including Delta Electricity corporate employees) at the time of the sale of the Delta Coast business (Delta Coast) who :

- cease employment with Delta Electricity
- take up employment with the successful purchaser of the business (by one of the options outlined in paragraph 13), and
- receive a 'transfer payment' from Delta Electricity or from the State of New South Wales (the State) as Delta Electricity's owner under the scheme described in paragraphs 9 to 22 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 in accordance with the scheme described in paragraphs 9 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

7. This Ruling applies from 1 October 2014 to 30 June 2015. This 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

8. The following description of the scheme is based on information provided by the applicant.

9. Delta Electricity is a statutory State Owned Corporation (SOC) under the (NSW) *State Owned Corporations Act 1989* (SOC Act) and the (NSW) *Energy Services Corporation Act 1995*.

10. Following the sale of the Mt Piper and Wallerawang power stations business (Delta West) in August 2013, Delta Electricity's business currently consists of the Delta Coast business (being the Vales Point and Colongra power station businesses and corporate head office operations).

11. The New South Wales Government (NSW Government) intends to sell the Delta Coast business conducted by Delta Electricity to a private sector entity (or entities).

12. The principals carrying out the scheme include Delta Electricity and the NSW Government.

13. The NSW Government is currently considering alternative options for the sale of Delta Coast under the (NSW) *Electricity Generator Assets (Authorised transition) Act 2012*. A number of options are under consideration which would result in either:

- (a) Delta Electricity employees ceasing employment with Delta Electricity and being employed by a private sector purchaser(s) and the assets of Delta Coast will be transferred (by way of a vesting order under the Act) directly to the private sector entity(ies); or
- (b) Delta Electricity employees ceasing employment with Delta Electricity and being transferred to a new proprietary limited company(ies) (NewCo) established and initially held by the NSW Government or Delta Electricity, which will then be sold immediately to the successful private sector purchaser(s). The assets of Delta Coast that are the subject of the sale may also be transferred to the NewCos or sold directly to the private purchaser(s) (by way of a vesting order under the Act) or the shares in Delta Electricity are sold to the private purchaser.

14. There may be a need to establish a NewCo(s) to better manage the transition of employees to the private sector. Specifically, the management of State legislated and preserved terms and conditions of employment, for example a four year employment guarantee, the application and management of the EBA and to provide time to harmonise employee terms and to limit potential Industrial Relations risk associated with the transition.

15. There may be more than one NewCo established as Delta Coast may be sold as either one business or as separate businesses (for example Vales Point and Colongra sales) to different purchasers. In any event, employees cease employment with Delta Electricity.

16. Purchasers may acquire shares in the NewCo(s) either directly or indirectly (by acquiring Delta Electricity). Where a purchaser acquires the shares in a NewCo indirectly by acquiring shares in Delta Electricity, Delta Electricity will also be converted from a SOC under the NSW legislation into a corporation governed by the (Cth) *Corporations Act 2001* and regulated by the Australian Securities and Investments Commission.

17. The class of entities to which this arrangement applies are all employees of Delta Electricity who:

- cease employment with Delta Electricity;
- take up employment with the successful purchaser of the Delta Coast business (by one of the options outlined in paragraph 13); and
- receive a 'transfer payment' from Delta Electricity under the scheme described in paragraphs 9 to 22 of this Ruling.

18. Upon the sale of Delta Coast, all permanent (full or part-time) employees with more than one year's service with Delta Electricity, who cease employment with Delta Electricity and take up employment with the purchaser(s) of Delta Coast (by one of the options outlined above) will receive a 'transfer payment' from Delta Electricity.

19. The 'transfer payment' reflects compensation for the loss of certain public sector employment conditions that will be lost following cessation of employment with Delta Electricity (notwithstanding that same or similar employment conditions may be obtained with the new employer) such as:

- no forced redundancies and voluntary redundancy provisions of public sector management policies;
- access to redeployment provisions, including salary maintenance (a period up to 12 months on full salary if an employee's position is made redundant) and professional career transition support with external providers;
- paid maternity leave provision;
- broader range of paid leave and leave without pay provisions;
- mandatory flexible working hours arrangements;
- access to provisions regarding the management of conduct and performance; and
- access to provisions regarding the advertising, eligibility, selection and appointment to positions.

20. The 'transfer payment' will be calculate by reference to each employee's years of service as set out in the following table:

Length of service	'Transfer payment' Week's ordinary time base rate of pay
Less than one year	0
1 year or more, but less than 2 years	7.5
2 years or more, but less than 3 years	13.125
3 years or more, but less than 3 years	18.75
4 years or more, but less than 5 years	22.5
5 years or more, but less than 6 years	26.25
6 years or more	30

21. The 'transfer payment' will be paid by Delta Electricity on:

- employees ceasing employment with Delta Electricity and being employed by the purchaser; or
- transfer of the NewCo(s) to the purchaser(s). This will be immediately following the cessation of employees' employment with Delta Electricity and employment with the NewCo(s).

22. There are no conditions imposed on the employees regarding continued employment with the new entity. As such, employees could retire in the week following the transfer of their employment to the purchaser and not forfeit their transfer payment.

Ruling

23. The proposed transfer payment made in accordance with the scheme described in paragraphs 9 to 22 of this Ruling is in consequence of the termination of employment. Unless the employee is covered by a determination exempting them from the 12 month rule, the payment must be received within 12 months of the employee's termination of employment to qualify as an employment termination payment under section 82-130.

Commissioner of Taxation

1 October 2014

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.***

Employment termination payment

24. A payment made to an employee is an employment termination payment if the payment satisfies all the requirements in section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997), and is not specifically excluded under section 82-135 of the ITAA 1997.

25. Section 995-1 states that an employment termination payment has the meaning given by section 82-130.

26. Subsection 82-130(1) states:

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 persons death, in consequence of the termination of the other persons employment,
- (b) it is received no later than 12 months after that termination (but see subsection (4)), and
- (c) it is not a payment mentioned in section 82-135.

27. Section 82-135 lists payments that are not employment termination payments. These include (among others):

- superannuation benefits,
- unused annual leave or long service leave payments, and
- the tax free part of a genuine redundancy payment or an early retirement scheme payment.

28. For a transfer payment to constitute an employment termination payment, all the conditions in subsection 82-130(1) of the ITAA 1997 must be satisfied. Failure to satisfy any of the three conditions under subsection 82-130(1) will result in the payment not being considered an employment termination payment.

29. Even where all the conditions in subsection 82-130(1) of the ITAA 1997 have been satisfied, generally, to qualify as an employment termination payment, the payment must be received by the person within 12 months of termination (paragraph 82-130(1)(b)). Generally, any termination payments received outside of the 12 months will be assessable at the person’s marginal tax rates (section 83-295), unless the person is covered by a determination exempting them from the 12 month rule (subsection 82-130(4)).

Is there a termination of employment?

30. Paragraph 9 of Taxation Ruling IT 2152 *Income tax: retiring allowances paid to employees upon restructuring of a business*, states:

Where a company or other employer ceases carrying on a business which has been transferred to an associated entity, it will be accepted that the employees of the company have had their employment terminated. This will apply in cases similar to the *Paklan Case* where it is clear that the business in question has been transferred to another entity and it is also clear that the employee's employment has, in fact, been terminated...

31. Furthermore, at paragraph 2 of Taxation Determination TD 93/140 *Income tax: if a company ceases carrying on a business which has been transferred to an associated entity, will a payment made by that company to a former employee be an eligible termination payment as defined in subsection 27A(1) of the Income Tax Assessment Act 1936?* confirms the view expressed in IT 2152 that employees of an entity ceasing business have had their employment terminated.

32. The facts in *Paklan Pty Ltd and others v. Federal Commissioner of Taxation (Cth)*¹ (*Paklan*) can be summarised as follows:

- The taxpayers were directors and shareholders of a company (the old company) which carried on business as consulting engineers;
- On 30 June 1977 the old company ceased to carry on business and the next day sold the business to another company (the new company) also controlled by the taxpayers;
- The new company commenced carrying on the business from the same premises and subject to the same arrangements for occupancy as the old company;
- All the old company's employees, including the taxpayers, became employees of the new company; and
- Six months later, it was decided to pay a lump sum to former directors. The payments were actually made a year after the company ceased business and out of outstanding fees received after the business had ceased.

¹ (1983) 14 ATR 457; (1983) 67 FLR 238; (1983) 83 ATC 4456.

33. The taxpayers in *Paklan* did not succeed in having the lump sums in question treated as a 'payment in consequence of termination' as they were paid under circumstances and at a time too remote to the termination. However, the Full Federal Court did not dispute the fact that employment had terminated when the old company had ceased business on 1 July 1977.

34. The facts in Board of Review Case Q118² are similar to those in *Paklan* and again involved the sale of a company's business as a going concern to a new company. All the employees of the old business were transferred across to the new company. The Board of Review did not dispute the fact that employees of the old company had ceased to be employees of the old company immediately before taking up employment with the new company.

35. Board of Review Case K76³ involved a taxpayer who ceased work with a subsidiary company due to a corporate restructure and immediately re-commenced work with the parent company on the same terms and conditions. It was held by the Board of Review that the taxpayer's employment with the subsidiary company had been terminated.

36. The relevant facts in respect of Delta Electricity indicate that employees who take up positions with the purchaser will cease employment with Delta Electricity. Therefore, there is a termination of employment for the purposes of subsection 82-130(1) of the ITAA 1997.

Is the making of the transfer payment 'in consequence of the termination of employment'?

37. 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*⁴ (*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.

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

² (1983) 83 ATC 610; (1983) 27 CTBR (NS) 312.

³ (1978) 78 ATC 703; (1978) 23 CTBR (NS) 24.

⁴ (1975) 133 CLR 45; (1975) 75 ATC 4213; (1975) 5 ATR 538.

39. The decision in *Reseck* was considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation*⁵ (*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.

40. 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. Federal Commissioner of Taxation*⁶ (*Le Grand*).

41. *Le Grand* involved a payment by 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.

42. 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'*. In paragraphs 5 and 6 of TR 2003/13, the Commissioner, after considering the judgments referred to in paragraphs 34 to 38 above, stated:

5. ...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.

⁵ (1979) 45 FLR 279; (1979) 79 ATC 4325; (1979) 10 ATR 13; (1979) 25 ALR 557.

⁶ [2002] FCA 1258; (2002) 124 FCR 53; (2002) 2002 ATC 4907; (2002) 51 ATR 139.

6. 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.

43. In the present case, whilst the transfer payment is payable only to the relevant transferring employees who take up employment with the purchaser, the transfer payment is payable only on the condition that the employees have terminated their employment with Delta Electricity. The payment follows as an effect or result of the termination and the payment would not have been made to the employees but for the termination of their employment with Delta Electricity.

44. The following aspects of the arrangement reinforce the characterisation of the transfer payment as an employment termination payment (as distinct from, for example, a transfer or sign-on fee):

- the payment will be made by Delta Electricity;
- the payment is calculated by reference to each transferring employee's years of service with Delta Electricity; and
- there are no obligations imposed on the relevant transferring employees to continue their employment with the purchaser for any particular period after the sale of the business.

45. The transfer payment is only payable on the condition that employees have terminated their employment with Delta Electricity. Although the transfer payment is payable to those who take up employment with the purchaser, it more directly relates to the termination of employment with Delta Electricity.

46. In view of the above, the transfer payment is in consequence of the termination of employment and is therefore an employment termination payment under section 82-130 of the ITAA 1997. Unless the employee is covered by a determination exempting them from the 12 month rule, the payment must be received within 12 months of the employee's termination of employment to qualify as an employment termination payment under section 82-130.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Ruling	23
Appendix 1 – Explanation	24
Employment termination payment	24
<i>Is there a termination of employment?</i>	30
<i>Is the making of the transfer payment ‘in consequence of the termination of employment’?</i>	37
Appendix 2 – Detailed contents list	47

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2152; TR 2003/13;
TR 2006/10

Subject references:

- eligible termination payments
- employment termination
- superannuation business line
- superannuation retirement & employment termination

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(4)
- ITAA 1997 82-135
- ITAA 1997 83-295
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968
- Fair Work Act 2009

Case references:

- Case K76 (1978) 78 ATC 703;
(1978) 23 CTBR (NS) 24

- Case Q118 (1983) 83 ATC 610; (1983) 27 CTBR (NS) 312
- Le Grand v. Federal Commissioner of Taxation (2002) 195 ALR 194; (2002) 2002 ATC 4907; (2002) 51 ATR 139; (2002) 124 FCR 53; [2002] FCA 1258
- McIntosh v. Federal Commissioner of Taxation (1979) 79 ATC 4325; (1979) 25 ALR 557; (1979) 45 FLR 279; (1979) 10 ATR 13
- Paklan Pty Ltd and others v. Federal Commissioner of Taxation (1983) 14 ATR 457; (1983) 67 FLR 238; (1983) 83 ATC 4456
- Reseck v. Federal Commissioner of Taxation (1975) 75 ATC 4213; (1975) 133 CLR 45; (1975) 49 ALJR 370; (1975) 6 ALR 642; (1975) 5 ATR 538; [1975] HCA 38

ATO references

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