


CR 2017/20 - Income tax: employment termination payment - Department of Communities, Child Safety and Disability Services Queensland

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Class Ruling

Income tax: employment termination payment – Department of Communities, Child Safety and Disability Services Queensland

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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.

Summary – what this ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997)
 - section 82-135 of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to whom this scheme applies is those employees of the Department of Communities, Child Safety and Disability Services Queensland (the Department) defined in paragraph 17 who receive a payment under paragraph 18 of this Ruling.

Qualifications

4. 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 under the heading *Scheme*.

5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- the Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- the Ruling may be withdrawn or modified.

Date of effect

6. This Ruling applies from 30 March 2017 to 30 June 2020. The Ruling continues to apply after 30 June 2020 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, the 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 the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

7. The National Disability Insurance Scheme (NDIS) Incentives Approach is an initiative of the Department associated with the implementation of the National Disability Insurance Scheme (NDIS) in Queensland.

8. The NDIS was created by the Australian Government under the *National Disability Insurance Scheme Act 2013* (NDIS Act 2013) to facilitate the development of a nationally consistent approach to the access to and the planning and funding of support for people with disability.

9. The National Disability Insurance Agency (NDIA) is a statutory authority established under the NDIS Act 2013 to administer the NDIS.

10. The responsibility for specialist disability services and basic community care for disabled people will transfer from the Queensland Government to NDIA by 30 June 2019 for those people whose needs are intended to be met by the NDIS.

11. The NDIS will be implemented in Queensland during the period 1 July 2016 to 30 June 2019.

12. The intergovernmental payments currently provided by the Commonwealth Government to the Queensland Government for the purpose of providing disability services to individuals will be paid to the NDIA in future in line with clients transitioning to the NDIS.

13. The Department will reduce its workforce as a result of the transfer of responsibilities to the NDIA and the reduced funding available for the Department to employ staff. The reduction of staff is expected to be completed by 30 June 2020.

14. The Department established the NDIS Incentives Approach to assist affected staff to take up pathways or employment opportunities outside of the Queensland Government while ensuring business continuity through the transition to the NDIS.

15. The NDIS Incentives Approach will assist staff to take up permanent job opportunities with the NDIA via first offer of employment arrangements.

16. The agreement between the Commonwealth and Queensland Governments on the NDIS provides that the first offer of employment for the NDIA in Queensland should be to appropriately skilled Queensland Government staff working on programs in the scope of the NDIS.

17. The class of employees to whom the Scheme applies are those employees of the Department who meet the following criteria:

- (a) are permanent employees, and
- (b) transition to a permanent position with the NDIA under the Department's NDIS Incentives Approach, and
- (c) receive a 'one off incentive payment' from the Department.

18. The Department will provide the following incentives to staff who accept first offer of employment arrangements with the NDIA:

- a one off incentive payment of 12 weeks' pay for permanent employees transitioning to a permanent position at level with NDIA via a first offer of employment arrangement.
- a one off incentive payment of 12 weeks' pay plus a further incentive amount equal to 12 months' salary maintenance for permanent employees transitioning to a permanent position at a lower level with NDIA via a first offer of employment arrangement.

19. The incentives will be retrospective for staff who have already accepted first offer of employment arrangements with the NDIA prior to the announcement of the NDIS Incentives Approach.
20. The incentive payments will be paid at the earliest time possible after the commencement date.
21. The payment date will not be more than 12 months from the date of the termination of employment for current staff or former staff where applied retrospectively.
22. Staff who accept first offer permanent placements in the NDIA will not be eligible for voluntary redundancy from the Department.
23. The Chief Executive will write to staff who accept positions with the NDIA to confirm the termination of their employment with the Department as at a specific date.
24. There is no requirement that former staff of the Department repay the incentive and salary maintenance payments in the event of ceasing employment with the NDIA or in the event of future employment with the Queensland Government.

Ruling

25. The proposed incentive payment to be made in accordance with the NDIS Incentives Approach is an employment termination payment.

Commissioner of Taxation

29 March 2017

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 (ETP)

26. A payment made to an employee is an ETP if it satisfies all the conditions set out in section 82-130 and is not specifically excluded under section 82-135.

27. 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 person's death, in consequence of the termination of the other person's employment; and
- (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.

28. Therefore, the incentive payment will be an ETP only if all the conditions in subsection 82-130(1) are satisfied.

Is there a termination of employment?

29. Paragraph 9 of Taxation Ruling IT 2152 titled: *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...

30. In this case, the responsibility for specialist disability services and basic community care for disabled people will transfer from the Department to the NDIA, which is a separate entity from the Department, is governed by a different Act, and has different conditions of employment. Once an eligible employee accepts a permanent position with the NDIA, their employment with the Department will be terminated.

31. Therefore, it is considered that eligible employees' employment with the Department will be terminated.

Paid in consequence of the termination of your employment

32. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the courts have interpreted the phrase in a number of cases. Whilst the courts have divergent views on the meaning of this phrase, the Commissioner's view on the meaning and application of the 'in consequence of' test are set out in 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'*.

33. While TR 2003/13 considered the meaning of the phrase 'in consequence of' in the context of the eligible termination payments, TR 2003/13 can still be relied upon as both the former provision under the *Income Tax Assessment Act 1936* and the current provision under the ITAA 1997 both use the term 'in consequence of' in the same manner.

34. In paragraphs 5 and 6 of TR 2003/13 the Commissioner states:

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.

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.

35. In this case, the incentive payment is to be paid to employees whose employment with the Department is terminated because they have accepted permanent positions with the NDIA.

36. The incentive payments will not be paid to employees who continue their employment with the Department, who transfer to other Queensland Government entities, or who resign or retire.

37. Therefore, the incentive payment is considered to be made in consequence of the termination of employment.

Payment is received no later than 12 months after termination

38. It is intended that the payment date will not be more than 12 months from the date of termination of employment for current employees or former employees where applied retrospectively.

39. Therefore, this condition will be satisfied if the proposed payment is made within 12 months of the termination date.

Payment is not a payment mentioned under section 82-135

40. Section 82-135 lists payments that are not ETPs, none of which apply to the incentive payment.

41. As the proposed incentive payment is not a payment mentioned in section 82-135, this condition is satisfied.

42. As all the conditions of section 82-130 have been met, the proposed incentive payment is an ETP.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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

Legislative references:

- ITAA 1997
 - ITAA 1997 82-130
 - ITAA 1997 82-130(1)
 - ITAA 1997 82-130(1)(a)
 - ITAA 1997 82-130(1)(b)
 - ITAA 1997 82-130(1)(c)
 - ITAA 1997 82-135
 - TAA 1953
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ATO references

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