

CR 2018/22 - Income tax: employment termination payment - NSW Ministry of Health

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Class Ruling

Income tax: employment termination payment – NSW Ministry of Health

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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 NSW Ministry of Health and related parties (NSW Health) defined in paragraph 11 of this Ruling who receive a payment under paragraph 12 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 May 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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 NSW Ministry of Health (NSW Health) is a department of the New South Wales Government and is primarily responsible for the public health system in New South Wales.
8. NSW Health comprises both the NSW Ministry of Health and all the local health districts, statutory health corporations and affiliated health organisations which make up the NSW public health system.
9. These entities are independently governed under the *Health Services Act 1997* but must comply with relevant state and national legislation, regulations and NSW Health policy directives and procedures as issued by NSW Health.
10. NSW Health has partnered with private healthcare operator Healthscope Limited (Healthscope), who will design, build, operate and maintain the new Northern Beaches Hospital.
11. The class of employees to whom the Scheme applies are those employees of NSW Health who meet the following criteria:
 - (1) Employees of the North Sydney Local Health District (NSLHD) who:
 - are currently engaged at the Manly and Mona Vale Public Hospitals

- will cease employment with the NSLHD as a result of their transfer from Manly and Mona Vale hospitals to the new Northern Beaches Hospital
- will accept an offer to take up new employment with Healthscope or an approved subcontractor of Healthscope, and
- will receive a payment under the Transfer Payment Scheme as a result of the termination of their employment.

(2) Employees of NSW Health Pathology who:

- are currently engaged at the Manly and Mona Vale Public Hospitals
- will cease employment with the NSW Health Pathology as a result of their transfer from Manly and Mona Vale hospitals to the new Northern Beaches Hospital
- will accept an offer to take up new employment with Healthscope or an approved subcontractor of Healthscope, and
- will receive a payment under the Transfer Payment Scheme as a result of the termination of their employment.

(3) Employees of the NSW Health Service – Health Support Division (Healthshare NSW) who:

- are currently engaged at the Manly and Mona Vale Public Hospitals
- will cease employment with Healthshare NSW as a result of their transfer from Manly and Mona Vale hospitals to the new Northern Beaches Hospital
- will accept an offer to take up new employment with Healthscope or an approved subcontractor of Healthscope, and
- will receive a payment under the Transfer Payment Scheme as a result of the termination of their employment.

12. NSW Health will provide the following incentives to staff who change employment under this arrangement:

- a transfer payment, paid by the relevant current employer entity, based on the employee's years of service as follows:

| Continuous years of service | Transfer payment (weeks of base rate of pay) |
|--|---|
| Less than one year | 0 weeks |
| One year but less than two years | 2 weeks |
| Two years or more but less than three years | 3.5 weeks |
| Three years or more but less than four years | 5 weeks |
| Four years or more but less than five years | 6 weeks |
| Five years or more but less than six years | 7 weeks |
| Six years or more | 8 weeks |

13. The transfer payment for part-time employees will be calculated based upon the average weekly hours worked in the 12 month period prior to the transfer date, or contracted hours, whichever is higher. Overtime hours will not be included in this calculation.

14. The transfer payments will be paid around the time of the employees transferring to Healthscope or an approved subcontractor of Healthscope.

15. The transfer payments will not be paid to employees who continue their employment with NSW Health, who transfer to other NSW Government entities, or who resign or retire.

16. The transfer payment will be made in recognition of the employees ceasing employment within the NSW public health system.

17. A 'clawback' provision will apply to all eligible employees in receipt of a transfer payment: if a transferring employee leaves Healthscope and re-commences employment with a NSW Health entity within 12 months of transferring to Healthscope they will be required to repay the transfer payment should they seek to have former NSW Health Service (and service with Healthscope) recognised for the purposes of leave accrual. Employees can choose to keep the transfer payment but the employee will not be able to retain the enhanced recognition of service provisions.

18. The 'clawback' provision will not apply if the transferring employee commences employment with an unrelated third party at any time after transferring to Healthscope.

Ruling

19. The proposed Transfer Payment to be made to employees of NSW Health is an employment termination payment.

Commissioner of Taxation

30 May 2018

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)

20. 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.

21. 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.

22. 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?

23. 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 ...

24. In this case, eligible employees will cease employment with NSW Health and take up employment with private healthcare operator Healthscope or an approved subcontractor of Healthscope, which are separate entities to NSW Health. Once an eligible employee accepts a permanent position with Healthscope or an approved subcontractor of Healthscope, their employment with NSW Health will be terminated.

25. Therefore, it is considered that eligible employees' employment with NSW Health will be terminated.

Paid in consequence of the termination of your employment

26. 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: employment termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'*.

27. 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.

28. 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.

29. In this case, the transfer payment is to be paid to employees whose employment with NSW Health is terminated because they have accepted permanent positions with Healthscope or an approved subcontractor of Healthscope.

30. The transfer payment will be made in recognition of the employees ceasing employment within the NSW public health system.

31. The transfer payments will not be paid to employees who continue their employment with NSW Health, who transfer to other NSW Government entities, or who resign or retire.

32. 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

33. 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.

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

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Payment is not a payment mentioned under section 82-135

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

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

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

Appendix 2 – Detailed contents list

38. 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
- ITAA 1997 995-1(1)
- ITAA 1936
- TAA 1953
- Health Services Act 1997

ATO references

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