TR 94/D20 - Income tax: compensation payments for personal injury

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Draft Taxation Ruling
Income tax: compensation payments for personal injury

other Rulings on this topic

IT 2193; TD 93/3; TD 93/58

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What this Ruling is about

1. This Ruling considers

   (a) whether amounts of compensation received in respect of personal injury are assessable income under subsection 25 and paragraph 26(j) of the *Income Tax Assessment Act 1936* (ITAA); and

   (b whether income support payments and other benefits payable under the *Social Security Act 1991* (SSA) or other legislation (for instance workers' compensation or motor accidents compensation legislation) or under personal disability insurance, received during the period of the disability caused by the personal injury are assessable income under subsection 25(1).

2. This Ruling does not deal with the application of the capital gains and losses provisions of the ITAA to amounts of compensation for personal injury. Subsection 160ZB(1) provides that a compensation payment received by a person for any wrong or injury suffered by that person to his or her person does not give rise to either a capital gain or a capital loss (subsection 160ZB(1)). The scope of that subsection is currently being reviewed as foreshadowed in the Pre-Ruling Consultative Document on capital gains and compensation payments of 12 August 1993 and will be considered in a later Ruling.

Ruling

Taxation treatment of amounts received by way of compensation for personal injury

3. Whether a lump sum or other compensation payment is assessable in the hands of the recipient depends on whether it is a receipt of a capital or income nature which in turn depends upon a consideration of all the circumstances surrounding the payment. It is the character of the receipt in the hands of the recipient that must be determined. For income tax purposes, a compensation amount generally bears the character of that which it intends to replace.

Amounts of compensation paid under statute or under a personal disability insurance policy

4. The character of an amount of compensation for personal injury which is paid other than under a negligence claim (for instance, paid under statute or under an insurance policy), depends on all the circumstances surrounding the payment including its purpose as disclosed by the terms of the statute or of the insurance policy. The description of the payment in the statute or the policy is not determinative of the character of the payment for taxation purposes. However, the purpose of a payment as disclosed by the terms of the statute or policy itself will be strong evidence in determining whether it is income in the hands of the recipient.

5. Payments made in substitution of lost wages or otherwise intended to be a periodic supplement are of an income nature, whether paid in a lump sum or as periodic amounts. The fact that such payments are aggregated (for instance lump sum payment of arrears) into a lump sum payment is not sufficient to change their character.

6. Where a taxpayer has an entitlement to a lump sum in full satisfaction of all the taxpayer's entitlements under a statute (including rights to payment of medical and other expenses) or opts for the payment of such a sum (rather than for periodic payments), we consider such sum to be of a capital nature and therefore not assessable under subsection 25(1).

7. If a taxpayer with an entitlement to compensation opts to receive periodic payment but later commutes all rights under the statute (including the right to the periodic payments and the right to payment of medical and other expenses) into a lump sum, the lump sum is of a capital nature and not included in assessable income.

8. However, if the lump sum is paid in commutation of all future weekly payments which would otherwise be received under the

compensation statute but the injured person's other entitlements under the statute (for example to payment of medical expenses) are not affected, the entire lump sum is of a revenue nature.

9. On the other hand, lump sum compensation in respect of the loss of income earning capacity of the injured person is capital in nature and not assessable. However, where such compensation is paid by way of periodic payments, the circumstances and manner of the payments may change what would otherwise be capital payments into income. For example, periodic amounts payable for a term that is indefinite when the payments commence, are of an income character. Nevertheless, if a fixed sum is payable for loss of earning capacity, it may be of a capital nature even though payable by instalments.

10. A fixed sum payable for permanent or temporary physical injury (for instance, a payment for loss of limb made under a statutory table of maims) is not of an income nature and is not assessable even if paid in instalments. Similarly, payments for medical, nursing and other similar expenses are not in the nature of income and are therefore not assessable amounts in the hands of the injured person.

11. However, amounts for future care costs which are included in the periodic payments which the injured person receives as substitution for loss of earnings are assessable income. Such payments as are made by an injured person to an employed carer are assessable income of the carer as salary and wages. The injured person is not entitled to a deduction for the payments to the carer because the payments are of a private nature and specifically excluded from deduction by subsection 51(1).

12. If, having regard to the above factors, the *whole* compensation or settlement payment is in the nature of income (for instance, if it is received to replace earnings or the loss of additional superannuation benefits) the whole amount is assessable income under subsection 25(1) (even where the basis of the calculation of the lump sum cannot be determined). On the other hand, a lump sum received *wholly* in relation to claims such as for lost earning capacity, pain and suffering and cost of medical treatment, would not have an income character in the hands of the recipient and it would be a receipt of capital.

Dissected lump sums

13. Where a lump sum is received in relation to both claims of an income nature and claims of a capital nature and is dissected under a court order or under a settlement agreement into specific amounts for particular items, it is assessable income in so far as it relates to a revenue item, and capital in nature in so far as it relates to an item of a capital nature.

Undissected lump sums

14. If a single undissected compensation or settlement sum is received in respect of a number of heads of income and non-income claims, then if at least some of the claims are liquidated (i.e. for specific amounts) or are ascertainable by calculation, the single payment may be apportioned among the several heads to which the payment relates and an income or non-income nature attributed to the various portions. To the extent that a portion of the payment is identified as income, it is assessable under subsection 25(1). For example, this would be the case if a statutory compensation amount included an ascertainable amount such as an amount in respect of loss of earnings (rather than an amount in respect of loss of earning capacity).

15. However, where a single amount is paid in respect of a claim or claims for an unliquidated amount only and is made under a compromise which treats it as a single, undissected amount, no apportionment may be made and no part of the amount is of an income nature and assessable under subsection 25(1).

Evidence of the nature of the compensation amount

16. The individual circumstances of each particular case must be considered to determine whether a lump sum is dissected or undissected and, if undissected,

(i) whether the individual claims can be identified; and

(ii) whether some of the claims satisfied by payment of the sum are for a liquidated amount or can be ascertained by calculation (e.g. actuarial calculation).

17. In the case of a court ordered lump sum, the court order will indicate whether the sum relates to specific items, or whether it is an entire and undissected sum. In the case of an undissected sum, the particulars of the taxpayer/plaintiff 's claim would indicate whether some of the claims satisfied by payment of the compensation sum are for a liquidated amount and whether individual claims can be identified.

18. In the case of a lump sum paid by way of settlement of a personal injury claim and of amounts payable under a personal disability insurance policy, the settlement documents (e.g. the letters of offer and acceptance) and the terms of the policy respectively will be evidence of the matters examined above. Other evidence may equally be relevant to determining the real agreement between the parties. It must be remembered that in this context the taxpayer bears the onus of proving that the whole or part of the amount in issue is not

assessable income (paragraphs 14ZZK(b) and 14ZZO(b) of the *Taxation Administration Act* 1953).

Damages paid under a common law action in negligence in respect of personal injuries

19. A lump sum payment of damages for personal injuries under a common law action in negligence is not assessable because its components (damages for loss of earning capacity, non-pecuniary loss, hospital and other care costs) are of a capital nature and therefore not assessable under subsection 25(1) even if they are calculated by reference to lost earnings. In particular, damages paid in relation to a common law negligence claim are paid for the loss of earning capacity (that is, a capital asset) rather than for loss of earnings. Furthermore they are not assessable under paragraph 26(j) because they are not an indemnity for or in respect of any loss of income.

Assessability of periodic amounts received during periods of disability

20. Sickness benefits received under the SSA during a period of disability have the characteristics of income. They are fully assessable in the year of receipt under subsection 25(1) of the ITAA. Workers' compensation payments received on a regular basis to replace earnings lost during a period of disability also have the characteristics of income and are assessable income. Similarly, amounts received under a personal disability insurance policy aimed at substituting for the insured person's income lost due to injury are of an income nature and are assessable under subsection 25(1).

Date of effect

21. This Ruling generally applies to years of income commencing both before and after the date on which it is issued.

22. However, in any case in which paragraph 8 of this Ruling is less favourable to a taxpayer than advice we provided to that taxpayer or to the body which paid compensation to that taxpayer, this Ruling only applies to a lump sum received under an agreement with the compensation payer entered into after the date of this Ruling. In addition, a public ruling cannot withdraw an earlier inconsistent legally binding private ruling if the year of income to which the private ruling relates has already commenced (see Taxation Determination TD 93/34).

23. Furthermore, this Ruling does 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 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Background

24. A payment for compensation for personal injuries may be made under a personal disability insurance policy, under a claim for negligence at common law, or a claim under specific legislation such as workers' compensation legislation, motor accidents compensation legislation etc. A court or tribunal may order that a payment be made to compensate a person for personal injuries or alternatively the parties to an action in respect of personal injuries may agree to payment of a sum or sums in settlement of the action.

25. Depending on the claim made by the plaintiff, compensation amounts may be calculated by reference to various elements, such as:

pecuniary loss

- loss of earning capacity
- partial or total loss of income from the date of the event giving rise to the claim up to retirement age
- loss of competitiveness
- loss of ability to perform housekeeping functions
- loss of additional superannuation benefits
- cost of medical treatment
- cost of home help.

non-pecuniary loss

- pain and suffering
- loss of amenities
- loss of expectation of life.

26. While in some cases the court order or the settlement agreement dissects the amount of compensation payable into the various elements, in other cases a lump sum is paid without reference to the individual elements.

27. During the disability period, i.e. between the event giving rise to the claim and the resolution of the claim (whether by withdrawal or settlement of the claim or by court or tribunal order), the injured person may be entitled to receive certain income support payments

under the SSA or other legislation e.g. workers' compensation or motor accident compensation legislation.

Taxation treatment of an amount paid by way of compensation for personal injuries

28. Whether a receipt constitutes assessable income in the hands of the recipient depends on whether it is income or capital which in turn depends upon a consideration of all circumstances. It is the character of the receipt in the hands of the recipient that must be determined (*FC of T v. Slaven* 84 ATC 4077; 15 ATR 242 discussed in Taxation Ruling IT 2193). For income tax purposes, a compensation amount generally bears the character of that which it intends to replace (*Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue* (1922) 12 TC 427; *FC of T v. Dixon* (1952) 86 CLR 540).

Amounts of compensation paid under statute or under a personal disability insurance policy

29. The character of a payment made by way of compensation under statute or under a personal disability insurance policy (rather than at common law for negligence), other than as compensation for an asset or right which is realised or sterilised, depends upon the purpose of the payment as revealed by the statute and the circumstances of its receipt by the taxpayer (*Tinkler v. FCT* 79 ATC 4641 at 4643).

30. What the compensation statute calls the rights created should not be decisive for the purpose of deciding the true nature of the payment without regard to the circumstances of the payments. However, the purpose of a payment as disclosed by the terms of the statute or policy itself will be strong evidence in determining whether it is income in the hands of the recipient. (*FCT v. Inkster* 89 ATC 5142, 20 ATR 1516, *Slaven*).

31. The assessability of a compensation amount will depend on whether the amount is payable in respect of the loss of earnings or in respect of an impairment or destruction of the injured's earning capacity. The courts have likened a person's earning capacity to a tree and income to the fruit produced by the tree (*FCT v. Smith* 81 ATC 4114) and, subject to the considerations discussed below, compensation for the loss of the former is of a capital nature and compensation for the loss of the latter is of a revenue nature.

32. Thus periodic payments by way of compensation for loss of earnings are of a revenue nature and form part of the assessable income of the recipient. For example, benefits under an insurance policy which has the expressed purpose of diminishing the adverse

economic consequences of injury by accident and to provide a regular indemnity against the income loss arising from the inability to earn are clearly stamped with a revenue character and are assessable under subsection 25(1) (*Smith*) .

33. A lump sum received to replace past and future earnings also has the character of income in the hands of the recipient because it bears an income character and therefore forms part of assessable income under subsection 25(1). The receipt of compensation amounts of a revenue nature in a lump sum (for example a lump sum comprising the aggregation of periodic payments of a revenue nature) cannot change their income character ((1959) 10 TBRD *Case K34*; 8CTBR (NS) *Case 107*; (1968) 18 TBRD *Case T45*; 14 CTBR (NS) *Case 61*).

34. Where a taxpayer has an entitlement to a lump sum in full satisfaction of all his entitlements under a statute (including rights to payment of medical and other expenses) or opts for the payment of such a sum (rather than for periodic payments), we consider such sum to be of a capital nature and therefore not assessable under subsection 25(1).

35. Taxation Determination TD 93/3 deals with a case of partial commutation of weekly compensation amounts and treats the lump sum as income. That Determination also states that where a taxpayer has opted to receive periodic payment but later commutes all rights under the statute (including rights to payment of medical and other expenses) into a lump sum, that lump sum is of a capital nature and not included in assessable income.

36 However, if the lump sum is paid in commutation of all future weekly payments which would otherwise be received under the compensation statute but the injured person's other entitlements under the statute (for example to payment of medical expenses) are not affected, we consider that the entire lump sum is of a revenue nature. This is because the lump sum is considered to be a prepayment of future income rather than being in redemption of all of the injured person's rights. We consider that in this case the lump sum is simply a different form of payment, but that the nature of the payment is unchanged. In this aspect, the lump sum is not dissimilar from the prepayment of salary in a lump sum - such lump sum would retain the income nature of the stream of future income which it represents.

37. This case is different from that of a lump sum received in respect of the sale of the source of future payments - for example the sale of an annuity. In the case of the sale of an annuity, what is sold is the contractual right to be paid the annuity, the income-producing right, the structure that produces the future income. However, in the case of a commutation of periodic compensation amounts payable under statute, the commutation does not act as the transfer or the

redemption or surrender of the statutory entitlement to compensation. Rather the statutory right to compensation is unaffected but the form of the payment is changed. The same result would follow if a lump sum was received in commutation of the right to payment for services rendered. The discussion of the decision of the Court of Appeal in the case of *I.R. Commrs v. Paget* (1938) 2 K.B. 25 by the Full High Court in *FCT v. The Myer Emporium Ltd* (1987) 163 CLR 199; 87 ATC 4363; 18 ATR 693 supports this view. The taxation treatment of lump sums paid in commutation was not in issue in *Inkster* and in his *obiter* comments at ATC 5159-5160 Lee J did not reach a conclusion on the question.

38. On the other hand, lump sum compensation in respect of the loss of income earning capacity of the injured person is capital in nature and not assessable (*Slaven*). Where such compensation is converted into periodic payments, the circumstances and manner of the payments may change what would otherwise be capital payments into income (*Inkster*).

39. In *Inkster*, Lee J (with whom Gummow J agreed), in considering the assessability of certain amounts payable under workers' compensation legislation, stated at ATC 5159 that 'periodicity of payment alone may not be determinative of the question of whether the payments are in the nature of income but such a circumstance is important and additional circumstances may make it clear that the periodical payments do have such character.' In that case the Court decided that the amounts received were of an income nature because although not in substitution of lost wages, they were intended to be a weekly supplement and that in addition, each payment was intended to operate 'as a weekly amelioration of any realisation of [the taxpayer's] impaired capacity to earn a weekly income'. Therefore the receipt of regular periodical payments was able to give what otherwise may have been a capital receipt the character of income.

40. Payments in respect of medical and similar expenses do not have an income character in the hands of the injured person and are therefore not assessable income.

41. Periodic amounts for future care costs which are included in the periodic payments which the injured person receives as substitution for loss of earnings are of an income nature and therefore assessable under subsection 25(1). Such payments as are made by an injured person to an employed carer are assessable income of the carer as salary and wages. The injured person is not entitled to a deduction for the payments to the carer because the payments are of a private nature and specifically excluded from deduction by subsection 51(1).

42. Where an amount is received by way of insurance or indemnity for or in respect of any loss of income which would have been

assessable, paragraph 26(j) operates to include the amount in assessable income (*Smith*). The paragraph only applies if actual loss of income has been indemnified (*Inkster*). For example, it does not apply to amounts which are payable under statute or under an insurance policy whether or not the taxpayer incurs a loss of income. Furthermore it does not apply to amounts payable in respect of the loss of income earning capacity (*Slaven*).

Dissected and undissected lump sums

43. In *McLaurin v. FC of T* (1960-1961)104 CLR 381, the High Court considered the case of a taxpayer who had commenced an action to recover damages caused by a fire originating on the defendant's land. In the negligence action, the taxpayer/plaintiff had supplied the defendant with a list setting out particulars of damage. On the basis of its own list of particulars of damage, the defendant offered the taxpayer a lesser amount as a lump sum in full settlement of his claim, and the taxpayer accepted the sum without knowing the basis of calculation of the sum offered. The Commissioner sought to assess the taxpayer on that portion of the lump sum which was of an income nature as based on the defendant's list of particulars.

44. The High Court held that the lump sum was not assessable income because the settlement offer was of a single undissected amount rather than of a total of itemised amounts and that it would have been unacceptable to determine the character of the receipt in the hands of the recipient by taking into account the uncommunicated reasoning of the payer.

45. The Court stated that no apportionment is appropriate where the payment or receipt is in respect of a claim or claims for unliquidated damages only and is made or accepted under a compromise which treats it as a single undissected amount of damages. The Court said, however, that a single payment or receipt of a mixed nature may be apportioned amongst the several heads to which it relates and an income or non-income nature attributed to portions of it accordingly, if the amount is 'in settlement of distinct claims of which some at least are liquidated (*Carter v. Wadman* (1946) 28 TC 41) or are otherwise ascertainable by calculation (*Tilley v. Wales* (1943) AC 386)'.

46. In *Tilley v. Wales*, the House of Lords decided that where an undissected settlement amount partly represented the capitalisation of a pension and the reduction of salary, it should be apportioned with the result that the pension capitalisation component was of a capital nature (in terms of the specific U.K. provisions) and the salary reduction component of a revenue nature.

47. The decision was applied in *Carter v. Wadman* which dealt with the assessability of a lump sum paid to an employee in full settlement of all claims including a claim for services rendered and a claim for loss of employment. The Court of Appeal decided that the lump sum should be apportioned between two sums bearing the same proportion to one another as the claim for the loss of employment and the claim for services rendered.

48. In *Carter*, the Court distinguished the case of *Du Cros v. Ryall* 19 TC 444 in which the whole settlement lump sum was regarded as capital and therefore not assessable (and not apportioned into assessable and non-assessable components) and the terms of the release showed that the claims were not settled or discharged in any way but that there was a complete release from all claims. Atkinson J (whose decision in the first instance was affirmed by the Court of Appeal) had said that in the *Du Cros* case the payment was for damages for repudiation of agreement (rather than being partly for lost commission) and that

> 'if the sum is paid by way of damages for repudiation of an agreement, and the claims, whether they were good, bad or indifferent, were withdrawn, and there was no suggestion that the agreement was not a bona fide representation of the real bargain, it is very difficult to see that any part of the ... damages ought to be deemed to be paid in discharge of claims which had been withdrawn'.

49. In *Allsop v. C of T* (1965) 113 CLR 341, the High Court decided that because the settlement amount payable was an entire sum paid by way of compromise of a number of claims and no part of it could be attributed solely to a refund of permit fees (which would have been assessable), the amount could not be treated as an income receipt.

50. Although the above cases deal with the apportionment of lump sum amounts paid by way of compensation of claims other than for personal injuries, the principles relating to the assessability of dissected and undissected amounts apply equally to lump sums compensation amounts payable in respect of personal injuries claims, whether by way of settlement or under a Court order.

Damages paid under a common law action in negligence in respect of personal injuries

51. Under a common law claim for negligence, the plaintiff's loss is one and indivisible and accrues at the date of the event giving rise to the claim. It is said that the only form of compensation known to the common law is a lump sum award and therefore the plaintiff in a negligence action must sue 'once and for all' his loss: past, present and

future (Fleming, *The law of torts*, 8th Edition, p.225). As a matter of practicality and in order to allow the calculation of interest on pre-trial amounts, damages are categorised sometimes into pre-trial and post-trial damages (or alternatively into special and general damages). An additional distinction is made between damages in respect of pecuniary and non-pecuniary loss (F.Trindade & P.Cane, *The law of torts in Australia*; see also the discussion in *Paff v. Speed* (1961) 105 CLR 549).

52. A lump sum payment of damages for personal injuries under a common law action in negligence is not assessable because its components are of a capital nature (damages for loss of earning capacity, non-pecuniary loss, hospital and other care costs).

53. In particular, damages are awarded for loss of earning capacity rather than for loss of earnings even though the amount of damages payable may be quantified by reference to the earnings which have been lost as a result of the event giving rise to the negligence claim. The courts have emphasised that there is a clear distinction between the character of a payment and the manner of its calculation or quantification (*Tinkler*; *Graham v. Baker* (1961) 106 CLR 340, 347; *Redding v. Lee; Evans v. Muller* (1983) 57 ALJR 393, 398; *O'Brien v. McKean* (1968) 118 CLR 540; *Paff v. Speed*; *Atlas Tiles Ltd v. Briers* (1976) 144 CLR 202; *Slaven*).

54. As the ground for damages for economic loss due to personal injury is the destruction or impairment of earning capacity rather than 'loss of income', the damages are not an indemnity for or in respect of loss of income and are therefore not assessable under paragraph 26(j) (*Groves v. United Pacific Transport Pty Ltd and Thompson* (1965) Qd.R. 62; *Slaven*).

Assessability of sickness benefits and other periodic benefits received during the period of disability

55. Periodic amounts of workers' compensation received during the period of disability are part of the taxpayer's assessable income in the year of receipt because they are considered to be paid in substitution for other amounts which would have been assessable as income. They acquire the income character of the amounts for which they are substituted and to which they are added (*Dixon*; *Inkster*; *Case M85* 80 ATC 618).

56. Unemployment benefits and sickness benefits received during the period of disability are also considered to be part of the person's assessable income under subsection 25(1) because they have the characteristics of income, namely periodicity, recurrence and regularity (*Dixon's* case). Any contingent liability to repay the

periodic benefits in the event of the compensation claim being successful (for example the requirement imposed by the SSA to repay sickness benefits in the event of a successful compensation claim) does not alter the income character of those benefits so as to cause them not to be assessable income (*Case V16* 88 ATC 185).

57. Similarly, amounts received under a personal disability insurance policy are assessable if the policy is entered into for the purpose of making provision against a periodic loss of earnings and the amounts received substitute for the insured's income lost due to the injury. That would be the case whether the receipts are periodic or payable in a lump sum (*Smith*).

Commissioner of Taxation

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