


# ***IT 2525 - Income tax: retirement from or termination of office or employment***

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TAXATION RULING NO. IT 2525

INCOME TAX: RETIREMENT FROM OR TERMINATION OF OFFICE  
OR EMPLOYMENT

F.O.I. EMBARGO: May be released

REF

N.O. REF: 88/6166-8

DATE OF EFFECT: Immediate

B.O. REF:

DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I1011142	TERMINATION OF OFFICE OR EMPLOYMENT	26AC 160AA

PREAMBLE This ruling is issued in consequence of a decision of the Administrative Appeals Tribunal President Mr Justice Hartigan, dated 22 August 1988, reported as Case V128 88 ATC 812, AAT Case 4570 19 ATR 3812.

2. The issue before the Tribunal was whether a lump sum payment received by the taxpayer in the year of income ended 30 June 1980 was an amount paid to him in consequence of his retirement from or termination of an office or employment, in lieu of unused annual leave, loading bonus or other additional payment. Section 26AC includes such a lump sum payment in the taxpayer's assessable income and section 160AA allows a rebate which has the effect of limiting the rate of tax payable on the lump sum.

3. The issue before the Tribunal ultimately turned on whether there had been a retirement from or termination of an office or employment in the circumstances of the case.

FACTS

4. The taxpayer was employed as the regional director of a certain company in New South Wales. In the relevant income year the taxpayer accepted a three year posting as a statutory office holder with the NSW Government. He received a lump sum payment from the company and on 14 January 1981 took up the posting overseas.

5. In August 1982 the taxpayer resigned his post and returned to Australia to his old position as regional director. As an inducement to return to the company after the posting the taxpayer's superannuation and long service leave entitlements were maintained. He was told by the managing director of the company that a position would be available on his return if he wanted it. The taxpayer said in evidence that he left his options open in respect of this offer. The thrust of his evidence was that an offer of a position to be taken up on his return was made. It was not the continuation of his old employment. In his return of income, however, the taxpayer claimed that he had ceased employment with the company to take up duties "on secondment" to the NSW Government.

6. The Commissioner considered that the taxpayer always had an intention of returning to the company and that no termination of office or employment had occurred. He disallowed the taxpayer's claim to a rebate under section 160AA. The taxpayer lodged an objection against this assessment.

7. At the hearing the taxpayer's evidence was that he had ceased his office or employment with the company and that he had intended to remain in the NSW Government position until his retirement. He said his return to Australia was promoted by his wife's ill-health, and it was only by chance that his old position had become vacant.

#### THE DECISION OF THE TRIBUNAL

8. The Tribunal allowed the taxpayer's objection. It accepted the evidence of the taxpayer and found that he did not remain in the employ of the company when he took up his overseas post. The Tribunal concluded that the taxpayer resigned from his employment and that he resigned from his office of regional director of the company. The matter was remitted to the Commissioner for reconsideration in accordance with the Tribunal's finding that the taxpayer had retired from an office or employment.

9. The Tribunal declined to accept the Commissioner's argument based upon the test of Taxation Board Review Member, Mr J. A. Nimmo, for determining whether a retirement or termination had occurred, that test being "(a) that the taxpayer had in fact relinquished the office or employment, and (b) that at the time he relinquished it, he had no intention of ever resuming it" (Case C103 (1953) 3 TBRD 602, 606, applied in Case B19 70 ATC 88, Case N121 81 ATC 124, Case P3 82 ATC 5, Case P47 82 ATC 222, Case U163 87 ATC 948).

10. The decision represents a departure from the view that termination in the context of section 26AC means a termination of all contractual employer/employee relationships, and not merely a particular contractual relationship (Case N11 (1962) 13 TBRD 33, approved in Case P3 and Case U163).

#### RULING

11. Decisions of the Tribunal are made on the particular facts of each individual case. In Case V128, AAT Case 4570 the Tribunal found that a termination of employment had occurred in the circumstances before it. Mr Justice Hartigan said in his reasons for decision, "I accept the evidence of the taxpayer and I base my findings of fact on his evidence ... No other person was called to give evidence to the contrary." The Commissioner has decided not to appeal against this decision.

12. All future cases which raise a similar issue will be considered on their own particular facts. It is the Commissioner's policy that in order for the rebate under section 160AA to apply, there must be an actual and not merely a ostensible retirement from, or termination of, employment. The Tribunal's decision does not warrant any variation of that policy. The Commissioner considers that it will be an

exceptional case that a genuine retirement or termination occurs where contractual employment benefits continue to accrue following the "retirement or termination" of a taxpayer's office or employment.

COMMISSIONER OF TAXATION  
4 May 1989