

TD 2018/16 - Income tax: payments received under the National Redress Scheme for Institutional Child Sexual Abuse Act 2018



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Taxation Determination

Income tax: payments received under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*

❶ This publication provides you with the following level of protection:

This publication (excluding appendices) 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 Determination, the Commissioner must apply the law to you in the way set out in the determination (unless the Commissioner is satisfied that the determination 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 Determination if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. If an application made under the National Redress Scheme for people who have experienced institutional child sexual abuse (Redress Scheme) is approved, the applicant may receive:

- a lump sum redress payment of up to \$150,000
- a payment of up to \$5,000 for counselling and psychological services.

2. Neither of these payments will be assessable income of the recipient¹, and neither of the payments will be subject to tax as a capital gain because any capital gain would be disregarded.²

Date of effect

3. This Determination applies from 1 July 2018.

Commissioner of Taxation

5 December 2018

¹ Neither of the payments are ordinary income within the meaning of section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

² Section 118-37 of the ITAA 1997 would apply to disregard any capital gain.

Appendix 1 – Explanation

① *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.*

The Redress Scheme

4. The Government announced the Redress Scheme on 4 November 2016 to provide redress to survivors of child sexual abuse in Commonwealth institutions. The Redress Scheme enables States, Territories and non-government institutions to opt-in on a 'responsible entity pays' basis.

5. The main objects of the Redress Scheme are to:

- recognise and alleviate the impact of past institutional child sexual abuse and related abuse, and
- provide justice for the survivors of that abuse.

6. The Redress Scheme payments are provided for by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act), and supported by referral or adoption legislation enacted by State governments. The State governments have referred their powers under section 51(xxxvii) of the Constitution to facilitate their own participation in the Redress Scheme.

7. A person may be eligible and entitled to apply for a redress payment under the Redress Scheme if they meet the entitlement requirements³ and the eligibility requirements.⁴ Eligibility requirements include:

- the person was sexually abused
- the abuse occurred when the person was a child
- the abuse occurred while the person was in a participating State, Territory or outside Australia
- the abuse occurred before 1 July 2018
- one or more participating institutions was responsible for the abuse⁵
- the abuse is of a kind for which the maximum amount of redress payment that could be payable to the person (worked out under the *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018* (Assessment Framework)) would be more than nil, and
- the person is an Australian citizen or a permanent resident at the time the person applies for redress.⁶

³ Subsection 12(2) of the Act.

⁴ Subsection 13(1) of the Act.

⁵ Under section 15 of the Act, the institution has to be responsible, either primarily or equally, for the abuser having contact with the child.

⁶ Section 20 of the Act provides that a person cannot apply if the person has already made an application for redress under the Redress Scheme; if a security notice is in force in relation to the person; the person is a child who will not turn 18 by 30 June 2028; the person is in gaol; or the application is made after 30 June 2027. However, the Operator has the discretion to accept applications from persons in gaol or applications made between 1 July 2027 and 30 June 2028.

8. An eligible person is an individual who has applied for a payment under the scheme and been assessed by the National Redress Scheme Operator, being the Secretary of the Department of Social Services⁷ or an engaged Independent Decision Maker⁸ (Operator), as meeting the eligibility criteria.

9. Applications will be accepted from eligible persons from 1 July 2018 to 30 June 2027⁹ unless the Operator determines that exceptional circumstances apply.

10. After assessing an application against the Assessment Framework, the Operator must make a determination¹⁰ to approve or not approve an application for redress as soon as practicable. If the Operator considers there is a reasonable likelihood that a person is eligible for redress, the Operator will determine¹¹:

- each participating institution that is responsible for the abuse, and
- the amount of the redress payment.

11. Redress available for a person under the Act includes:

- a redress payment of up to \$150,000
- a counselling and psychological component which, depending upon where the person lives, could consist of access to counselling and psychological services provided under the scheme or a payment of up to \$5,000 for the person to access counselling and psychological services, and
- a direct personal response from each participating institution that the Operator has determined to be responsible for the abuse of the person.¹²

12. By agreeing to accept an offer of a redress payment, an eligible person agrees to release¹³ only the relevant responsible participating institutions and their officials¹⁴ from future civil proceedings. If a responsible participating institution is a member of a participating group, the eligible person also agrees to release the other associated institutions and officials within that group from any civil liability for instances of sexual abuse and related non-sexual abuse within the scope of the scheme.¹⁵

13. The Operator may make two types of payments to an eligible person under the Redress Scheme:

- a redress payment of up to \$150,000, and
- a counselling and psychological payment of up to \$5,000.

Assessability of the payments as income according to ordinary concepts

14. Subsection 6-5(1) of the ITAA 1997 provides that the assessable income of a taxpayer includes income according to ordinary concepts (ordinary income).

⁷ Section 9 of the Act provides that the Operator is the Secretary of the Department of Social Services.

⁸ Section 185 of the Act provides that an Independent Decision Maker may be appointed.

⁹ Paragraph 20(1)(e) of the Act.

¹⁰ An Operator must satisfy the requirements set out in section 29 of the Act.

¹¹ Under subsection 29(2) of the Act.

¹² Subsection 16(1) of the Act sets out the elements of redress.

¹³ Subsection 42(2) of the Act sets out the terms of release.

¹⁴ As listed on the acceptance documents.

¹⁵ The release may include the Commonwealth or State or Territory governments, but only if they were the responsible participating institution or part of a participating group that included the responsible participating institution.

15. The legislation does not explain the meaning of 'income according to ordinary concepts', however, a substantial body of case law exists which identifies likely characteristics.

16. Amounts that are periodical, regular or recurrent, relied upon by the recipient for their regular expenditure and paid to them for that purpose are likely to be ordinary income, as are amounts that are the product in a real sense of any employment of, or services rendered by the recipient.¹⁶ Amounts paid in substitution for salary or wages foregone or lost may also be ordinary income.¹⁷

17. Ultimately, whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient.¹⁸ The whole of the circumstances must be considered¹⁹ and the motive of the payer may be relevant to this consideration.²⁰

18. Payments under the Redress Scheme are made to eligible persons who accept a payment offer from the Operator, and sign a release. The payments are not:

- the product of employment or services rendered by the applicant
- payment of wages foregone or lost, or
- relied upon by the applicant for their regular expenditure or paid for that purpose.

19. The payments made under the Redress Scheme do not possess the characteristics of ordinary income, and are not assessable under section 6-5 of the ITAA 1997.

Assessability of the payment as statutory income

20. An amount that is not ordinary income may still be assessable income as a result of the operation of section 6-10 of the ITAA 1997 which includes statutory income in assessable income. A capital gain is included in assessable income as statutory income.

Assessability of the payment as a capital gain

21. Section 102-5 of the ITAA 1997 includes a net capital gain in the assessable income of a taxpayer. In broad terms a net capital gain is the difference between a person's capital gains and capital losses for an income year.

22. Generally a capital gain or capital loss is made when a CGT event happens to a CGT asset.

23. A CGT asset is defined under section 108-5 of the ITAA 1997.

¹⁶ *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124 at 138; 90 ATC 4413 at 4420; (1990) 21 ATR 1 at 7; *Commissioner of Taxation (Cth) v. Rowe* (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392.

¹⁷ *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR.

¹⁸ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 375, *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73; (1956) 6 AITR 248 at 254 and *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation* 77 ATC 4255 at 4273; (1977) 7 ATR 519 at 539.

¹⁹ *The Squatting Investment Company Limited v. Federal Commissioner of Taxation* (1953) 86 CLR 570 at 627-628 per Kitto J.

²⁰ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 527, 528; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 376.

24. An eligible person's entitlement to receive a payment under the Redress Scheme is a CGT asset. The entitlement arises when a person has done everything necessary to be entitled to the payment, including making an application and satisfying the eligibility criteria.

25. CGT event C2 under section 104-25 of the ITAA 1997 happens when a person's entitlement to receive the payment under the Redress Scheme comes to an end, which is when the entitlement is satisfied. This happens at the time when the Operator makes the payment.

26. However, under subparagraph 118-37(1)(a)(ii) of the ITAA 1997, a capital gain or capital loss from a CGT event is disregarded when the CGT event relates directly to compensation or damages received for any wrong, injury or illness an individual suffers personally.

27. The treatment of compensation receipts for personal wrong or injury under the capital gains and losses provisions, is discussed in paragraphs 19 to 22 of Taxation Ruling TR 95/35 *Income tax: capital gains: treatment of compensation receipts*. In particular, paragraph 20 of TR 95/35 explains that a CGT exemption is available if the taxpayer receives compensation in an un-dissected lump sum which relates wholly to the personal wrong or injury suffered by the taxpayer.

28. Payments made under the Redress Scheme are made to eligible persons in recognition of, and to alleviate the impact of, past institutional child sexual and related abuse, to provide justice for the survivors of that abuse and to enable survivors to access psychological and counselling services. A payment made under the Redress Scheme is not an un-dissected lump sum but rather an amount payable in recognition of the personal injury suffered by the person as a result of sexual and related abuse. A Redress Payment is therefore in the nature of compensation for a personal wrong, injury or illness suffered by an eligible person.

29. Accordingly, any capital gain or capital loss arising from the CGT event C2 happening is disregarded under subparagraph 118-37(1)(a)(ii) of the ITAA 1997 as the payment under the Redress Scheme relates directly to compensation for a wrong, injury or illness suffered personally.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 95/35

Legislative references:

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10
- ITAA 1997 102-5
- ITAA 1997 104-25
- ITAA 1997 108-5
- ITAA 1997 118-37
- ITAA 1997 118-37(1)(a)(ii)
- TAA 1953
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 9
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- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 15
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 16(1)
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- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 20(1)(e)
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 29
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 29(2)
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 42(2)
- National Redress Scheme for Institutional Child Sexual Abuse Act 2018 185

Cases relied on:

- Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation 77 ATC 4255; (1977) 7 ATR 519
- Federal Commissioner of Taxation v. Dixon (1952) 86 CLR 540; [1952] HCA 65
- Commissioner of Taxation (Cth) v. Rowe (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- Hayes v. Federal Commissioner of Taxation (1956) 96 CLR 47; (1956) 11 ATD 68; (1956) 6 AITR 248
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 14 ATD 286; (1966) 10 AITR 367

Other references:

- National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018

ATO references

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Income tax ~~ Capital gains tax ~~ Exemptions ~~ Other

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