



TD 96/36 - Income tax: in what circumstances will an eligible termination payment (ETP) be accepted as having been 'immediately' paid to a roll-over fund for the purposes of subsection 27A(12) of the Income Tax Assessment Act 1936?

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 This document has changed over time. This is a consolidated version of the ruling which was published on 4 September 1996

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Taxation Determination

Income tax: in what circumstances will an eligible termination payment (ETP) be accepted as having been 'immediately' paid to a roll-over fund for the purposes of subsection 27A(12) of the *Income Tax Assessment Act 1936*?

1. An ETP qualifies for roll-over relief from personal income tax if it is paid to a complying superannuation fund, a complying approved deposit fund or to a provider of an eligible annuity *immediately* after it is made (subsection 27A(12)). The word *immediately* implies 'prompt, vigorous action, without any delay' (*R v. The Justices of Berkshire* (1879) 4 QBD 469 per Cockburn CJ at 471) and that the making of the ETP and payment to the roll-over fund takes place 'without any other intervening occurrence' (*R v. Horseferry Road Metropolitan Stipendiary Magistrate, ex p Siadatan* [1991] 1 All ER 324 at 329).

2. A roll-over of an ETP will therefore be regarded as having been *immediately* paid to a roll-over fund where:

- the funds are electronically transferred from the payer to the roll-over fund nominated by the taxpayer;
- the payer draws a cheque payable solely to the roll-over fund nominated by the taxpayer and sends the cheque directly to the roll-over fund; or
- the payer draws a cheque payable solely to the roll-over fund nominated by the taxpayer and sends the cheque to the taxpayer or his or her representative who, in turn, forwards it to the roll-over fund together with any other documents required to complete the investment.

A roll-over will not be regarded as having been *immediately* paid to a roll-over fund where:

- the funds are transferred under the instructions of the taxpayer, either electronically or by negotiation of a cheque, to an account for the taxpayer or other party distinct from the originally nominated roll-over fund; or
- the funds are otherwise put to any intervening purpose not incidental to completing the roll-over.

It is incumbent on all parties to act expeditiously to complete a roll-over.

3. In order for a taxpayer to make roll-over decisions, a payer is required to provide the taxpayer with an opportunity to elect that the ETP be rolled over to one or more nominated

roll-over funds prior to making the payment. However, circumstances sometimes arise where a payer either fails to give the taxpayer an opportunity to elect a roll-over, or fails to effect a roll-over as instructed and consequently pays the ETP direct to the taxpayer. In both these situations, the subsequent payment of the ETP to the roll-over fund will be regarded as having been *immediately* paid to the roll-over fund if the taxpayer promptly elects to roll-over the ETP and deposits the payment with a roll-over fund without having put the funds to any intervening purpose. Such roll-over payments made within 7 days of payment of the original ETP will generally be acceptable.

4. A period greater than 7 days may be acceptable if, for example:
 - either the taxpayer or a dependant of the taxpayer was seriously ill;
 - the taxpayer had to go on an unavoidable overseas trip; or
 - the taxpayer's place of residence was remote from available roll-over facilities.
5. An extended period will not be justified where, for example:
 - the taxpayer was given an opportunity by the payer to elect to roll-over but, for whatever reason, failed to act on that opportunity; or
 - it is clear the taxpayer had no intention of preserving the payment. For example, if the taxpayer used the payment to finance a particular venture and after coming into funds from another source seeks to roll-over an amount equal to the whole or a part of the original ETP.
6. Taxpayers who wish to roll-over an ETP outside the suggested 7 day time period should request approval from the Tax Office at which the taxpayer normally lodges his or her tax return. For more information about what a taxpayer needs to do to roll-over some or all of an ETP, contact the Tax Office for a *Roll-Over Fact Sheet* or get the booklet *Superannuation and Other Termination Payments* from any Tax Office.

Example 1

Melissa is dismissed on 3 November 1996 and, at the time she is dismissed, her employer pays her an ETP without giving her any opportunity to elect to have any amount rolled over. Melissa makes an election to roll-over all of the payment and pays the relevant amount to the roll-over fund on 9 November 1996. The payment to the roll-over fund is accepted as immediate for the purposes of subsection 27A(12).

Commissioner of Taxation

4 September 1996

FOI INDEX DETAIL: Reference No. I 1015177

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Related Determinations:

Related Rulings:

Subject Ref: eligible termination payments; roll-overs; superannuation

Legislative Ref: ITAA 27A(12)

Case Ref: R v. The Justices of Berkshire (1879) 4 QBD 469; R v. Horseferry Road Metropolitan Stipendiary Magistrate, ex p Siadatan [1991] 1 All ER 324

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