



CR 2001/13 - Income tax: Approved Early Retirement Scheme for Borden Chemical Australia Pty Ltd.

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 April 2001*



Class Ruling

Income tax: Approved Early Retirement Scheme for Borden Chemical Australia Pty Ltd.

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is section 27E of the *Income Tax Assessment Act 1936*.

Class of persons

3. The class of persons to whom this Ruling applies is:

All employees over 60 years of age who are employed in the Sales operation of the company and receive a payment under the arrangement described below in paragraphs 10 to 29.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 29 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
- (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 23 April 2001. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of 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).

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 August 2001. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

The scheme

10. Borden Chemical Pty Ltd (hereafter referred to as Borden) is seeking approval for an early retirement scheme also known as the ERS scheme.

11. The following details of the arrangement have been obtained from Borden by correspondence dated 23 February 2001 and further telephone conversation on 9 April 2001.

12. The scheme is to operate and remain valid for the period 23 April 2001 until 31 August 2001.

13. The scheme is to be offered to all employees over 60 years of age who are employed in the Sales operation of the company.

14. These employees are responsible for the development of business in the formaldehyde resin markets. The primary skill of this group is field sales complemented by a knowledge of formaldehyde based resins.

15. Employees in this division are not covered by any award or industrial agreement. Although they are not party to Borden's enterprise agreement their general terms and conditions of employment default to *The Australian Workers' Union - Borden Australia Pty Ltd Award 1987*.

16. Borden reserves the right of veto should it receive an application from an employee who the company believes cannot readily be replaced.

17. The right of veto is required to ensure that Borden's operation is not adversely affected by the scheme. This would be the case should all of the employees in the designated area of operation accept the scheme.

18. The arrangement requires a number of employees to continue with Borden to assist in the training of replacement personnel.

19. The purpose of the scheme is to replace a number of employees who are approaching retirement age with younger employees, preferably in the 25-35 age group.

20. The payments offered are:

- 1.75 weeks of pay per completed years of service; plus
- a lump sum payment of \$6 000.

21. This payment is in addition to the normal entitlements that an employee would receive upon termination of employment.

22. The only other payments employees would receive are unused annual leave and long service leave payments.

Payments made under the scheme

23. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the following conditions must be met. Note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

24. The payment must be an eligible termination payment made in relation to the employee in consequence of his or her employment being terminated under the approved early retirement scheme.

25. The payment must not be made from an eligible superannuation fund.

26. The payment must not be made in lieu of superannuation benefits.

27. The employee terminated his employment before the earlier of:

- Age 65; or
- The date on which his or her employment would have necessarily terminated under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service.

28. Where the employee and the employer are not dealing with each other 'at arm's length' (for example, because they are related in some way), the payment does not exceed what would have been paid to the employee had they been dealing at arm's length.

29. At the termination time, there is no agreement in force between the employee and the employer or the employer and another person, to re-employ the employee after the date of termination.

Ruling

30. The ERS is an approved early retirement scheme for the purposes of section 27E of the *Income Tax Assessment Act 1936*.

31. Accordingly, so much of the eligible termination payment as exceeds the amount of an eligible termination payment that could reasonably be expected to have been made in relation to the taxpayer if the termination of employment had occurred at the termination time otherwise than in accordance with the approved early retirement

scheme, is an approved early retirement scheme payment in relation to the taxpayer.

Explanations

32. Where a scheme satisfies the requirements of section 27E of the *Income Tax Assessment Act 1936* (the Act), that scheme will be an ‘approved early retirement scheme.’

33. The Commissioner of Taxation (the Commissioner) has issued Taxation Ruling TR 94/12 titled: ‘*Income tax: approved early retirement scheme and bona fide redundancy payments*’ which sets out guidelines on the application of section 27E.

34. Paragraph 14 of TR 94/12 states that:

‘Three conditions need to be satisfied for a scheme to qualify as an approved early retirement scheme. Those conditions are:

- (i) the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
- (ii) the scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind (paragraph 27E(1)(b)); and
- (iii) the scheme must be approved by the Commissioner prior to its implementation (paragraph 27E(1)(c)).’

1. The scheme must be offered to all employees within a class identified by the employer

35. In order to satisfy the first condition, the scheme must be offered to all employees within one of the categories specified in subparagraphs 27E(1)(a)(i) to (v).

36. The class of employees to whom the scheme is proposed to be offered is:

All employees over 60 years of age who are employed in the Sales operation of the company. The primary skill of this group is field sales complemented by a knowledge of formaldehyde based resins.

37. This class of employees is considered to have met the requirements under subparagraph 27E(1)(a)(iv), namely all employees of the employer who have a particular occupational skill and who have attained a particular age.

38. It is noted, however, that Borden reserves the right of veto should it receive an application from an employee who the company

believes cannot be readily replaced. The right of veto is required to ensure that Borden's operation are not adversely affected by the scheme. The limitation of the scheme in this way is acceptable to the Commissioner.

2. The scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind

39. The proposed scheme must be implemented with a view to rationalise or re-organise the operations of the employer by means of one or more of the objectives set out in subparagraphs 27E(1)(b)(i) to (vi).

40. The applicant has stated that the purpose of the ERS is to replace a number of employees who are approaching retirement age with younger employees, preferably in the 25-35 age group.

41. As the proposed scheme meets the requirements under subparagraphs 27E(1)(b)(ii), accordingly the second condition for approval has been met.

3. The scheme must be approved by the Commissioner prior to its implementation

42. The applicant has requested that the offer of the scheme remain open to 31 August 2001, with the implementation date of the scheme as the earliest date the scheme is approved. Approval of the scheme will be given prior to the implementation date of 23 April 2001 and will be implemented by the company immediately after receiving written approval of the scheme. As approval will be given prior to the implementation date the third condition is therefore satisfied.

43. The scheme will be in operation for 19 weeks, which is within the period recommended in TR 94/12.

Other relevant information

44. Under section 27E, so much of the payment received by a taxpayer under the approved early retirement scheme, that exceeds the amount that would ordinarily have been received on voluntary retirement or resignation is an approved early retirement scheme payment.

45. It should be noted that, in order for a payment to qualify as an approved early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 27E(4) and (5) of the Act):

- the payment must be an eligible termination payment made in relation to the taxpayer in consequence of the taxpayer's employment being terminated under an approved early retirement scheme;
- the payment must not be from an eligible superannuation fund;
- the payment must not be made in lieu of superannuation benefits;
- if the taxpayer and the employer are not dealing with each other at arm's length (for example, because they are related in some way) the payment does not exceed what would have been paid to the taxpayer had they been dealing at arm's length;
- the date of termination was before age 65 or such earlier date on which the taxpayer's employment would necessarily have had to terminate under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service, whichever occurs first, and
- there was no agreement at the date of termination between the taxpayer and the employer, or the employer and another person to re-employ the taxpayer after the date of termination.

46. The term 'agreement' is defined in subsection 27A(1) as meaning 'any agreement, arrangement or understanding whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.'

47. An approved early retirement scheme payment made on or after 1 July 1994 that falls within the specified limits will be exempt from income tax, and called the "tax-free amount."

48. For the year ending 30 June 2001, the tax-free amount is limited to \$5062 plus \$2531 for each whole year of completed employment service to which the approved early retirement scheme payment relates. Please note that 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation.

49. Furthermore, the tax-free amount will:

- not be an eligible termination payment (ETP);
- not be able to be rolled-over;
- not include any amount from a superannuation fund or paid in lieu of a superannuation benefit; and

- not count towards the recipient's Reasonable Benefit Limit.

50. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

51. It should be noted that the amount of an approved early retirement scheme payment that is over the tax-free amount may be taxed under the provisions of the Surcharge legislation, whether it is taken in cash or rolled-over.

52. The following payments qualify as an approved early retirement scheme payment and are exempt from tax within the limits described above:

- (a) 1.75 weeks of pay per completed years of service; plus
- (b) a lump sum payment of \$6 000.

53. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Detailed contents list

54. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

 2 May 2001

<i>Previous draft:</i>	- ITAA 1936 27E
Not previously released in draft form	- ITAA 1936 27E(1)(a)(i)
	- ITAA 1936 27E(1)(a)(ii)
<i>Related Rulings:</i>	- ITAA 1936 27E(1)(a)(iii)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(a)(iv)
TR 97/16; TR 94/12; TR 94/12E	- ITAA 1936 27E(1)(a)(v)
	- ITAA 1936 27E(1)(a)
	- ITAA 1936 27E(1)(b)
<i>Subject references:</i>	- ITAA 1936 27E(1)(b)(i)
- Approved early retirement scheme payments;	- ITAA 1936 27E(1)(b)(ii)
- eligible termination payments	- ITAA 1936 27E(1)(b)(iii)
- eligible termination payments components	- ITAA 1936 27E(1)(b)(iv)
	- ITAA 1936 27E(1)(c)
	- ITAA 1936 27E(4)
	- ITAA 1936 27E(5)
<i>Legislative references:</i>	
- ITAA 1936 27A(1)	

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