CR 2001/29 - Income tax: Approved Early Retirement Scheme - Overseas Projects Corporation of Victoria Limited

This document has changed over time. This is a consolidated version of the ruling which was published on *18 July 2001*

Class Ruling
Income tax: Approved Early Retirement Scheme – Overseas Projects Corporation of Victoria Limited

Contents Para

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 are

- all employees of the Overseas Projects Corporation of Victoria Limited (OPCV)

who receive a payment under the arrangement described below in paragraphs 10 to 27.

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 27 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(b) this Ruling may be withdrawn or modified.

Date of effect

8. This ruling applies from 18 July 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 This ruling is withdrawn and ceases to have effect after 18 August 2001. This 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. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from OPCV dated 22 June 2001.

11. OPCV is a public company fully owned by the State Government of Victoria. OPCV was established in 1985 to export Victorian and Australian public sector and private sector skills, technologies and equipment to international development projects funded by multi-lateral aid agencies and Australia's aid agency. OPCV is thus a project management company tendering for, implementing and managing overseas development projects.

12. OPCV is based in Melbourne with an office staff of 35 people.

13. Owing to a marked downturn in the international aid market, the size of OPCV's operations will significantly diminish over the next financial year. International projects managed by OPCV at 1 July 2000 totalled 29. By the 22 June 2001, international projects managed totalled 25 and this number will further reduce during the next financial year as current projects come to a conclusion. OPCV's output will therefore be reduced and this reduction will affect all areas of its operations.

14. As a consequence of the downturn in the aid market, OPCV needs to rationalise its operations and reduce its staff numbers. Accordingly, it is proposed to offer early retirement to staff as a means of obtaining staff reductions.

15. The early retirement scheme offered by OPCV has the following features:

- it will be offered to all employees within OPCV and is seen as an alternative to retrenchments;
- OPCV will seek expressions of interest for early retirement from its staff;
- OPCV will retain a limited veto over all retrenchments to ensure that not any one area of its operations is severely disadvantaged;
- as an initial target, OPCV is seeking 5 early retirements from its staff;

- any expression of interest lodged by staff can be withdrawn at any time up to the date when the offer closes; and
- OPCV proposes to have the offer of early retirement open for one month from the date of notification of the Ruling in the Commonwealth of Australia Gazette.

16. As OPCV is a company fully owned by the Victorian State Government, it is OPCV's intention to mirror the early retirement scheme offered by the Victorian Government.

17. Under the arrangement, employees receive:

- 4 weeks notice (pay in lieu of notice);
- 2 weeks pay per year for continuous service up to a maximum of 15 years;
- a lump sum voluntary departure incentive of $10 000 (for a full time employee); and

18. The employees will also receive the following payments from OPCV but they do not form part of the approved early retirement scheme payment:

- payment of unused annual leave and long service leave.

19. OPCV is a respondent to the Victorian State Agencies Award which is a Federal Award.

20. OPCV also has an Enterprise Agreement with its staff which was certified by the Australian Industrial Relations Commission on

20 October 2000.

21. Normal retirement age for OPCV's employees is 65 but some staff are members of the Victorian Government's State Superannuation Scheme and they may retire from 55 years onwards.

Payments made under the Scheme

22. 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).

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

24. The payment must be made otherwise than from a superannuation fund.

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

26. The employee terminated his or her employment before the earlier of:

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

27. Where the employee and the employer are not dealing with each other at arm's length, the payment does not exceed what would have been paid to the employee had they been dealing at arm's length.

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

Ruling

29. Overseas Project of Victoria Limited's early retirement scheme for its staff is an approved early retirement scheme for the purposes of section 27E of the Income Tax Assessment Act 1936.

30. Accordingly, so much of the eligible termination payment (ETP) as exceeds the amount of an ETP 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

31. Where a scheme satisfies the requirements of section 27E of the ITAA 1936, that scheme will be an 'approved early retirement scheme.'

32. 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 outlines the requirements for an approved early retirement scheme under section 27E.

33. Paragraph 14 of TR 94/12 states that three conditions must be satisfied for a scheme to qualify as an approved early retirement scheme payment. 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.

34. 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).

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

- all employees of OPCV.

36. This class of employees is considered to have met the requirements of subparagraph 27E(1)(a)(i), that is, all employees of the employer.

37. It is noted, however, that OPCV has a limited right of veto, that is, it reserves the right to withdraw the offer in cases where the retirement of an employee will disadvantage the operations of the company. The scheme is not limited to a few selected employees and any veto will be based solely upon the employee's critical role in the operational requirements of the company. In accordance with paragraph 22 of TR 94/12, 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.

38. 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).

39. The purpose of the scheme is described at paragraphs 13 and 14 of this ruling. The proposed scheme meets the purpose set out in

subparagraph 27E(1)(b)(iii), that is, cessation, or reduction in output, of, or of part of, the operations of the employer; accordingly, the second condition for a scheme to qualify as an approved early retirement scheme has been met.

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

40. The scheme is proposed to operate for a period of one month from the date of notification of the ruling in the Commonwealth of Australia Gazette.

41. The scheme will be in operation for one month, which is within the period recommended in TR 94/12. The third condition is therefore satisfied.

Other relevant information

42. Pursuant to section 27E, so much of the payment received by the 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.

43. 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 ITAA 1936):

- 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, the amount of the payment does not exceed what would reasonably be expected to have been paid to the taxpayer if they 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 the 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 employ the taxpayer after the date of termination.

44. 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.

45. By virtue of section 27CB of the ITAA 1936, 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 ("tax-free amount").

46. The tax-free amount of an approved early retirement scheme is calculated in accordance with subsection 27A(19) of the ITAA 1936. For the year ending 30 June 2002, the tax-free amount is $5 295 plus $2 648 for each whole year of completed employment service to which the approved early retirement scheme relates. Please note that 6 months, 8 months or even 11 months does not constitute a whole year for the purposes of this calculation. The $5 295 and $2 648 limits will be indexed annually in line with increases in average weekly ordinary times earnings (AWOTE).

47. 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.

48. 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.

49. 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 superannuation surcharge legislation, whether it is taken in cash or rolled-over.

50. The following payments qualify as approved early retirement scheme payments and are exempt from tax within the limits described in paragraph 46:

- 4 weeks notice (pay in lieu of notice);

- 2 weeks pay per year for continuous service up to a maximum of 15 years; and
- a lump sum voluntary departure incentive of $10 000 (for a full time employee).

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

Detailed contents list

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

Commissioner of Taxation
18 July 2001

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 92/20;
TR 97/16; TR 94/12; TR 94/12E

Subject references:
- approved early retirement scheme payments
- eligible termination payments
- eligible termination payment components

Legislative references:
- ITAA 1936 27A(1)
- ITAA 1936 27A(19)
- ITAA 1936 27CB
- ITAA 1936 27E
- ITAA 1936 27E(1)(a)(i)
- ITAA 1936 27E(1)(a)(ii)
- ITAA 1936 27E(1)(a)(iii)
- ITAA 1936 27E(1)(a)(iv)
- ITAA 1936 27E(1)(a)(v)
- ITAA 1936 27E(1)(a)
- ITAA 1936 27E(1)(b)
- ITAA 1936 27E(1)(b)(i)
- ITAA 1936 27E(1)(b)(ii)
- ITAA 1936 27E(1)(b)(iii)
- ITAA 1936 27E(1)(b)(iv)
- ITAA 1936 27E(1)(b)(v)
- ITAA 1936 27E(1)(b)(vi)
- ITAA 1936 27E(1)(c)
- ITAA 1936 27E(4)
- ITAA 1936 27E(5)

ATO References
NO T2001/012033
BO
FOI number: I 1023568
ISSN: 1445 2014