



CR 2001/54 - Income tax: Approved Early Retirement Scheme - New South Wales Department of State and Regional Development

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Class Ruling

Income tax: Approved Early Retirement Scheme – New South Wales Department of State and Regional Development

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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* (‘ITAA 1936’).

Class of persons

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

- all employees of the New South Wales Department of State and Regional Development who are declared excess to its needs,

and receive a payment under the early retirement scheme described below in paragraphs 10 to 23.

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 23 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 - (b) this Ruling may be withdrawn or modified.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 1 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 30 June 2002. 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. 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 the New South Wales Department of State and Regional Development (DSRD) dated 3 May 2001, 3 August 2001 and 13 August 2001; and
- records of telephone conversations with a representative of the DSRD on 19 July 2001, 21 September 2001 and 8 October 2001.

11. The Department of State and Regional Development (DSRD) is seeking approval for an early retirement scheme under section 27E of the *Income Tax Assessment Act 1936* (the Act).

12. As the New South Wales government's principal economic development agency, the Department is reviewing its organisational structure in the post Olympics business environment. The DSRD's ongoing restructure will allow it to implement new trade and export initiatives, expand regional services and initiate new investment attraction and enterprise improvement strategies.

13. The purpose for implementing the scheme is primarily the introduction of new technology processes or systems or productivity increases designed to improve client service delivery and/or operational efficiency and effectiveness. In addition the scheme may also be implemented when there is the cessation of, or the reduction in some of the DSRD's operations.

14. The class of persons to whom the Ruling applies is all employees of the New South Wales Department of State and Regional Development who are declared excess to its needs. It is anticipated that less than 10 employees will fall within the specified category.

15. The early retirement scheme will be conducted in accordance with the Public Sector Management Office's policies regarding "Displaced Employees" and is subject to the approval of the Minister, Unions and the Workforce Management Centre.

16. A limited right of veto would be applied to applications by key personnel who cannot be readily replaced and whose loss would impair the efficiency of the Department's business operations.

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17. The scheme is proposed to operate for a period of twelve months from 1 July 2001 to 30 June 2002.
18. The applicant realises that no tax concession will apply to staff aged 65 years and over. Within the state public sector, there is no specified retirement age. No special restrictions will be applied to the age of the staff.
19. Advice regarding an early retirement scheme will be made available to displaced staff who have expressed interest, including redeployment information.
20. Payments made under the scheme are as follows:
- four weeks notice or payment in lieu; plus
 - severance pay at the rate of three weeks per year of continuous service up to a maximum of 39 weeks; with a pro rata payment for incomplete years of service on a quarterly basis; plus
 - an additional one week's notice or pay in lieu for employees aged 45 years and over, with five or more years of completed service.
21. In addition, those staff who accept an offer within two weeks of it being made and terminate employment within the time nominated by the employer will be entitled to the following additional payment:
- less than 1 year's service; 2 weeks pay
 - 1 year and less than 2 year's service; 4 weeks pay
 - 2 years and less than 3 year's service; 6 weeks pay
 - 3 years service and above; 8 weeks pay.
22. The successful applicants will also receive the following payments from the DSRD but these do not form part of an approved early retirement scheme payment:
- the benefit allowable as a contributor to a retirement fund; and
 - pro-rated annual leave loading in respect of leave accrued at the date of termination.
23. The DSRD confirms that there is and will be no agreement at the termination time between the employee and the Department, or the Department and any other person, to employ the employee at a later date.

Payments made under the Scheme

24. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the following conditions must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.
25. 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.
26. The payment must not be made from an eligible superannuation fund.
27. The payment must not be made in lieu of superannuation benefits.
28. 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 employment because of the taxpayer attaining a certain age or completing a certain period of service.
29. 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.
30. 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

31. The Early Retirement Scheme offered by the New South Wales Department of State and Regional Development is an approved early retirement scheme for the purposes of section 27E of the *Income Tax Assessment Act 1936*.
32. 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

33. 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.’

34. 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.

35. 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

36. 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).

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

- all employees of the New South Wales Department of State and Regional Development who are declared excess to its needs.

38. This class of employees does not come within any subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraph 27(1)(a)(v), namely, all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph. In approving this class of employees the Commissioner has considered the nature of the rationalisation or re-organisation of the operations of the DSRD. It is

therefore considered that these employees meet the requirements of an approved class of employees for the purposes of subparagraph 27E(1)(a)(v).

39. It is noted, however, the DSRD will retain a right of veto over which employees are provided with a early retirement package based on the operational requirements of the organisation. 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

40. 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).

41. The purposes of the scheme are described at paragraphs 12 and 13 of this ruling. The proposed scheme meets the requirements set out in subparagraphs 27E(1)(b)(iii) and (v); accordingly the second condition for approval has been met.

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

42. Application for approval of the scheme dated 3 May 2001, was received in this office on 7 May 2001. The scheme is proposed to operate for a period from 1 July 2001 to 30 June 2002. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

43. However, subsection 27E(2) allows the Commissioner to overlook the failure to comply with any of the three conditions if special circumstances exist in relation to the scheme. Paragraph 30 of TR 94/12 states:

“Special circumstances include circumstances where: a scheme is implemented before approval has been obtained because, for example, there has been a delay in processing an application made for its approval....”.

44. It is considered that this case falls within special circumstances as set out in subsection 27E(2), and the Commissioner will waive compliance with the third requirement of subsection 27E(1).

45. The scheme will be in operation for twelve months which is within the period recommended in TR 94/12.

Other relevant information

46. 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.

47. 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 ETP 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.

48. 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.'

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

50. For the year ending 30 June 2002, the tax-free amount is limited to \$5 295 plus \$2 648 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.

51. The total of the following payments qualify as an approved early retirement scheme payment:

- four weeks notice or payment in lieu;
- severance pay at the rate of three weeks per year of continuous service up to a maximum of 39 weeks;
- an additional one week's notice or pay in lieu for employees aged 45 years and over, with five or more years of completed service; and
- any additional payments as detailed in paragraph 21 for accepting and terminating employment at the nominated time.

52. The total of the payments described in the previous paragraph will be measured against the limit calculated in accordance with paragraph 50 to determine the "tax-free amount".

53. The tax-free amount will:

- not be an 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.

54. 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.

55. It should be noted that the amount of an approved early retirement scheme payment that is over the tax-free amount may be subject to the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

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

Detailed contents list

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

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Commissioner of Taxation

24 October 2001

Previous draft:

Not previously issued in draft form

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

- Approved early retirement scheme payments;
- Eligible termination payments
- Eligible termination payments components

Legislative references:

- TAA 1953 Part IVAAA
- ITAA 1936 27A(1)
- ITAA 1936 27E
- ITAA 1936 27E(1)
- ITAA 1936 27E(1)(a)
- ITAA 1936 27E(1)(b)
- ITAA 1936 27E(1)(c)
- 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)(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(2)
 - ITAA 1936 27E(4)
 - ITAA 1936 27E(5)
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ATO References

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