



CR 2003/14 - Income tax: Approved Early Retirement Scheme - NSW Department of Public Works and Services

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 March 2003*



Class Ruling

Income tax: Approved Early Retirement Scheme - NSW Department of Public Works and Services

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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.
2. Broadly, this Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for persons receiving payments under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met before relying on this Ruling.

Tax law(s)

3. The tax laws dealt with in this Ruling are sections 27E and 27CB of the *Income Tax Assessment Act 1936* (‘ITAA 1936’).

Class of persons

4. The class of persons to which this Ruling applies is all staff who are declared ‘displaced’ and are excess to the requirements of the NSW Department of Public Works and Services who receive a payment under the arrangement described below in 12 to 25.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 12 to 25 in this Ruling.
7. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
 - 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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9. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Date of effect

10. This Ruling applies from 1 March 2003 unless and until it is withdrawn (see paragraph 11 of this Ruling). However, this 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

11. This Ruling is withdrawn and ceases to have effect after 29 February 2004. 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

12. 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 NSW Department of Public Works and Services,
- record of telephone conversation with a representative of the NSW Department of Public Works and Services on 7 February 2003,
- e-mail from representative of the NSW Department of Public Works and Services on 11 February 2003, and
- record of telephone conversation with a representative of the NSW Department of Public Works and Services on 11 February 2003.

13. The NSW Department of Public Works and Services is seeking approval for an early retirement scheme.

14. The Department is currently undertaking a number of Strategic Management Reviews aimed at better aligning their core business functions and activities with client, market and product demands. These take the form of both 'product' and 'business performance' reviews, with each examining issues such as financial performance, market opportunities, resource requirements, staff utilisation and locality considerations.

15. Preliminary indications are that a number of Department of Public Works and Services product and service lines do not match the

existing resource base; nor will they in the future. There is only limited scope to move staff members to other product/service areas (however, where this has been a viable and practical option, every effort has been, and will continue to be made to pursue this course of action). In addition, the Department has also undertaken a major corporate services review program in recent years that has significantly reduced the resources required in overhead areas. Implementation of reforms in this area continues to be applied and monitored.

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

- four weeks pay in lieu of notice,
- severance pay of three weeks pay for each year of continuous service, to a maximum of 39 weeks, and
- one week's pay of gratuity for staff members aged 45 years or over who have more than five years service.

17. In addition, those employees who accept an offer of voluntary redundancy within 2 weeks of the offer being made and terminate employment within the time nominated by the employer will be entitled to the following additional payments:

- less than 1 year of service – 2 weeks pay,
- 1 year but less than 2 years service – 4 weeks pay,
- 2 years but less than 3 years service – 6 weeks pay, and
- 3 years service and over – 8 weeks pay.

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

- Pro-rata extended leave payments for staff members with service between five and ten years, and
- Unused recreation leave.

Payments made under the Scheme

19. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the conditions set out in paragraphs 20 to 25 must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

20. 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.

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

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

23. The employee must terminate his or her employment before the earlier of:

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

24. 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.

25. 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

26. The early retirement scheme offered by the NSW Department of Public Works and Services is an approved early retirement scheme for the purposes of section 27E of the *Income Tax Assessment Act 1936*.

27. Accordingly, so much of the 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.

28. In addition, so much of the approved early retirement scheme payment as falls within the threshold calculated in accordance with subsection 27A(19) of the ITAA 1936 is non-assessable and is ignored in working out whether a capital gain has been made via the operation of section 27CB of the ITAA 1936.

Explanations

29. Where a scheme satisfies the requirements of section 27E of the ITAA 1936 that scheme will be an ‘approved early retirement scheme.’

30. 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.

31. 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

32. 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).

33. The class of employees to which the scheme is proposed to be offered is:

- all staff who are declared ‘displaced’ and are excess to the requirements of the NSW Department of Public Works and Services.

34. This class of employees does not come within any of subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraph 27E(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 employer. 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).

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*

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

36. Paragraphs 14 to 15 describe the nature of the rationalisation or re-organisation of the NSW Department of Public Works and Services' operations. In approving the objectives of the scheme, although the nature of the rationalisation or re-organisation of the employer's operations does not fit within one of the specific objectives identified in subparagraphs 27E(1)(b)(i) to (v), the Commissioner has had regard to the fact that the re-organisation is being implemented with a view to a restructuring of the work force or operations of the employer. It is therefore considered that the scheme is to be implemented by the employer with a view to rationalising or re-organising the operations of the employer for the purposes of subparagraph 27E(1)(b)(vi).

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

37. The scheme is proposed to operate for a period from 1 March 2003 to 29 February 2004. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

38. 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....'

39. Based on the full circumstances of the application 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).

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

Other relevant information

41. 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 resignation or retirement is an approved early retirement scheme payment.

42. 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.

43. 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.'

44. 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'.

45. For the year ending 30 June 2003, the tax-free amount is limited to \$5,623 plus \$2,812 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. The \$5,623 and \$2,812 limits will be indexed to rise in each subsequent year in line with increases in average weekly ordinary time earnings.

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

- four weeks pay in lieu of notice,
- severance pay of three weeks pay for each year of continuous service, to a maximum of 39 weeks,
- one week's pay of gratuity for staff members aged 45 years or over who have more than five years service, and
- any additional payments as detailed in paragraph 17 for accepting and terminating employment at the nominated time.

47. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 45 to determine the 'tax-free amount'.

48. 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.

49. 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.

50. 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.

Detailed contents list

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Commissioner of Taxation

5 March 2003

Previous draft:

Not previously released in draft form.

- eligible termination payments components

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 94/12
TR 97/16; CR 2001/1;

Legislative references:

- ITAA 1936 27A(1)
- ITAA 1936 27A(19)
- ITAA 1936 27CB
- ITAA 1936 27E
- ITAA 1936 27E(1)(a)
- ITAA 1936 27E(1)(b)

Subject references:

- approved early retirement scheme payments
- eligible termination payments

- 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(1)
 - ITAA 1936 27E(2)
 - ITAA 1936 27E(4)
 - ITAA 1936 27E(5)
 - TAA 1953 Part IVAAA
 - Copyright Act 1968
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ATO References

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