



CR 2004/107 - Income tax: eligible termination payment: State Rail Authority of NSW and Rail Infrastructure Corporation - transfer of employment

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Class Ruling

Income tax: eligible termination payment: State Rail Authority of NSW and Rail Infrastructure Corporation – transfer of employment

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Preamble

*The number, subject heading, **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 laws dealt with in this Ruling are:
- the paragraph (a) definition of an ‘eligible termination payment’ in subsection 27A(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 27B of the ITAA 1936; and
 - section 27C of the ITAA 1936.

Class of persons

3. The class of persons to which this Ruling applies is all employees (‘Employees’) of the State Rail Authority of NSW (‘SRA’) and Rail Infrastructure Corporation (‘RIC’) who, in connection with the commencement of the ARTC Lease and Management Arrangements (defined below) between the SRA, RIC and the Australian Rail Track Corporation (‘ARTC’), resign from employment with the SRA/RIC to take up employment with the ARTC, and receive a payment under the arrangement described in paragraphs 10 to 25.

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 25.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
 - 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
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies from 6 June 2004. 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 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:
 - it is not later withdrawn by notice in the *Gazette*;
 - it is not taken to be withdrawn by an inconsistent later public ruling; or
 - the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 December 2005. 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

10. The arrangement that is the subject of this 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 applicant for the Ruling to the Australian Taxation Office ('ATO'); and
- records of telephone conversations with a representative of the applicant.

Note: certain information from the applicants has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

11. The NSW Government currently operates, manages and maintains certain country railway corridors, railway tracks and related assets in New South Wales through the State Rail Authority of NSW ('SRA') and the Rail Infrastructure Corporation ('RIC'). Ownership of certain land and infrastructure by the SRA and RIC is granted under the *Transport Administration Act 1988* (NSW) (TA Act).

12. The SRA is a statutory authority established under Part 2 of the TA Act. The SRA holds an interest (including freehold, or leasehold interest) and other rights over certain land and infrastructure in the country rail network.

13. The RIC, established on 1 January 2001, is a statutory State Owned Corporation under Part 2A of the TA Act. Pursuant to Schedule 6A of the TA Act, the RIC owns certain rail infrastructure in the country rail network. The RIC has been responsible for maintaining the NSW rail network on behalf of the NSW Government and provides access to the network for passengers and freight rail services.

14. It is now proposed that certain non-metropolitan railway corridors, railway track and related assets in New South Wales be operated, managed and maintained by the Australian Rail Track Corporation ('ARTC').

15. The ARTC, a Corporations Act company, is wholly owned by the Australian Commonwealth Government through the Federal Ministers for the Department of Finance and Administration and the Department of Transport and Regional Services.

16. The ARTC was created after the Commonwealth and State Governments agreed in 1997 to the formation of a 'one stop' shop for all operators seeking access to the national interstate rail network. ARTC currently owns or leases various rail corridors, primarily in Victoria, South Australia and Western Australia.

17. The ARTC operates as a rail access provider and a rail infrastructure manager. Its main activities include:

- provision of access to train operators over the rail network either owned or leased by the ARTC; and
- management of the interstate rail infrastructure and related assets owned or leased by the ARTC.

18. The proposal that the ARTC will operate, manage and maintain certain non-metropolitan railway corridors, railway track and related assets in New South Wales will involve, amongst other things:

- (a) where the SRA and RIC (together the Lessor) hold a freehold interest in various rail corridors and existing rail infrastructure, the Lessor granting a lease over those rail corridors and infrastructure to ARTC for a term of 60 years. This will take place pursuant to the Deed of Lease;
- (b) the ARTC providing management services in relation to managing and maintaining residual networks, being country branch line rail corridors retained by NSW. This will take place pursuant to the Residual Network Management Agreement; and
- (c) the SRA and RIC seconding certain of their employees to the ARTC.

This is collectively referred to as the 'ARTC Lease and Management Arrangements'.

19. The ARTC will also be directly employing approximately 300 managerial, technical, professional, administrative and team manager/leader regional employees. The ARTC is seeking to recruit the majority of these employees from the SRA and RIC. These relevant employees are likely to be mainly:

- Employees in country management, administrative, technical and professional positions whose role will no longer be required by the SRA/RIC following the commencement of the ARTC Lease and Management Arrangements.
- Team managers and leaders for the infrastructure maintenance gangs, based at regional infrastructure maintenance depots, and again whose role will no

longer be required by the SRA/RIC following the commencement of the ARTC Lease and Management Arrangements.

However, it is not compulsory for the SRA and RIC employees to accept employment with the ARTC or even to apply for the jobs. The ARTC will also recruit externally.

20. A 'transfer payment' is payable only to permanent full and part-time SRA/RIC Employees referred to in paragraph 19 who resign their employment with the SRA/RIC and who accept employment with the ARTC under the ARTC Lease and Management Arrangements. The transfer package, and this Class Ruling, do not apply to seconded employees mentioned in paragraph 18(c).

21. Employees who are not offered employment with the ARTC or are offered employment with the ARTC but do not accept it will become surplus staff and may elect to receive a voluntary redundancy package. Benefits paid to these employees are different to the transfer package described below.

22. The transfer package provides, amongst other benefits, for the payment of an amount referred to as a 'transfer payment'. The transfer payments will be paid by, and processed centrally through the SRA/RIC payroll systems shortly after termination of employment with the SRA/RIC, anticipated to be within 4 weeks of termination. The transfer payments will be calculated pursuant to the Employees' length of service, in accordance with the following table:

<i>LENGTH OF SERVICE</i>	TRANSFER PAYMENT WEEKS (calculated on weekly ordinary time payment base rate)
Less than 1 year	0
1 year or more but less than 2 years	7.5
2 years or more but less than 3 years	13.125
3 years or more but less than 4 years	18.75
4 years or more but less than 5 years	22.50
5 years or more but less than 6 years	26.25
6 years or more	30

23. The transfer payment is calculated on the basis of substantive base rates of pay applying at the date of commencement of the ARTC Lease and Management Arrangements.

24. The transfer payment is an amount in addition to any other benefits or statutory leave entitlements. Employees will have the option of transferring or cashing out their accrued Annual Leave, Long Service Leave and Accrued Public Holidays entitlements, upon the transfer of their employment.

25. The SRA and RIC are seeking confirmation as to whether the transfer payments made to the class of employees described in paragraph 3 constitute 'eligible termination payments' within paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

Ruling

26. The proposed transfer payment, payable only to State Rail Authority ('SRA')/Rail Infrastructure Corporation ('RIC') Employees following termination of their employment with the SRA/RIC and their appointment to a position in the Australian Rail Track Corporation ('ARTC'), is an eligible termination payment under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

Accordingly, the ETP received by an Employee is assessed under sections 27B and 27C of the ITAA 1936 to the extent that the ETP is not rolled-over.

Explanation

27. In the context of payments made by an employer, paragraph (a) of the definition of an 'eligible termination payment' in subsection 27A(1) of the ITAA 1936 means:

- (a) any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer, other than a payment:
 - (i) made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund;
 - (ii) of an annuity, or supplement, to which section 27H applies;
 - (iii) from a fund in relation to which section 121DA, as in force at any time before the commencement of section 1 of the Taxation Laws Amendment Act (No 2) 1989 has applied in relation to the year of income commencing on 1 July 1984 or any subsequent year of income;
 - (iiia) from a fund that is or has been a non-complying superannuation fund in relation to any year of income;
 - (iv) of an amount to which section 26AC or 26AD applies; or
 - (v) of an amount that, under any provision of this Act, is deemed to be a dividend, or a non-share dividend, paid to the taxpayer.

The proposed transfer payment does not fall within any of these exclusions, nor is it covered by the further exclusions in paragraphs (ja) to (s) of the definition.

28. In determining whether the payment constitutes an eligible termination payment it is necessary to determine whether:

- there has been a termination of employment; and
- the payment is 'in consequence of the termination of employment'.

Is there a termination of employment?

29. Those employees who accept an offer with the ARTC, will resign from their employment with the SRA/RIC to enable them to commence employment with the ARTC. Accordingly, there is a termination of employment with the SRA/RIC.

Is the making of the transfer payment 'in consequence of the termination of employment'?

30. A payment can be considered to be in consequence of termination where it follows from the termination, or the termination is a condition precedent to the payment. In *Reseck v. FC of T* (1975) 133 CLR 45; 75 ATC 4213; 5 ATR 538 (*Reseck's Case*), Gibbs J said at ATC pp 4216-7:

Within the ordinary meaning of the words a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination.....It is not in my opinion necessary that the termination of the services should be the dominant cause of the payment.

In the same case, Jacobs J said that 'in consequence of' did not import causation but rather a 'following on' (ATC p 4219).

31. The decision in *Reseck's Case* was considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation* (1979) 45 FLR 279; 79 ATC 4325; 10 ATR 13 (*McIntosh's Case*). The case concerned a taxpayer who became entitled to a payment subsequent to his retirement. In finding that the payment was in consequence of the taxpayer's termination, Brennan J said (at ATC p 4328):

...if the payment is made to satisfy a payee's entitlement, the phrase 'in consequence of retirement' requires that the retirement be the occasion of, and a condition of, entitlement to the payment. A sufficient causal nexus between the payment and the retirement is thus established.

32. The phrase 'in consequence of' and the decisions in the *Reseck Case* and *McIntosh's Case* were also considered more recently by the Federal Court in *Le Grand v Federal Commissioner of Taxation* [2002] 124 FCR 53; 2002 ATC 4907; 51 ATR 139 (*Le Grand's Case*).

33. *Le Grand's Case* involved a payment by the taxpayer as a result of accepting an offer of compromise in respect of claims brought by him against his former employer, in relation to the termination of his employment. The taxpayer had made claims for common law damages for breach of the employment agreement and for statutory damages for misleading and deceptive conduct to procure the taxpayer's employment with the employer. The payment was found to be in consequence of the taxpayer's termination. Goldberg J said (at ATC p4914):

I do not consider that the issue can simply be determined by seeking to identify the 'occasion' for the payment. The thrust of the judgments in *Reseck* and *McIntosh* is rather to the effect that payment is made 'in consequence' of a particular circumstance when the payment follows on from, and is an effect or result, in a causal sense, of the circumstance. ... there need not be identified only one circumstance which gives rise to a payment before it can be said that the payment is made 'in consequence' of that circumstance. ... it can be said that a payment may be made in consequence of a number of circumstances and that, for present purposes, it is not necessary that the termination of the employment be the dominant cause of the payment so long as the payment follows, in the causal sense referred to in those judgments, as an effect or result of the termination.

34. The Commissioner of Taxation ('the Commissioner') has issued Taxation Ruling TR 2003/13 titled: *'Income Tax: eligible termination payments (ETP): payments in consequence of the termination of any employment: meaning of the words 'in consequence of',* which considers the meaning of the phrase 'in consequence of the termination of any employment' in the definition of eligible termination payment in subsection 27A(1) of the ITAA 1936.

35. In paragraphs 5 and 6 of Taxation Ruling TR 2003/13, the Commissioner, after considering the above judgments, stated:

... a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer. The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant purpose of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

36. In Class Ruling CR 2002/1 titled: *'Income tax: Eligible Termination Payment – FreightCorp Sale and Transfer of Employment'*, the Commissioner considered the question of the taxation of 'transfer payments' payable to employees under a similar arrangement to that proposed between SRA/RIC and ARTC. The Commissioner concluded that the transfer payment payable to FreightCorp employees upon the sale of its business was a payment made in consequence of the termination of employment under paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

37. Notwithstanding that the transfer payment is only payable to Employees who take up employment with the ARTC, the transfer payment is payable only on the condition that these Employees have terminated their employment with the SRA/RIC. The payment follows as an effect or result of the termination and the payment would not have been made to the Employees but for the termination of their employment with the SRA/RIC.

38. The following aspects of the arrangement reinforce the characterisation of the 'transfer payment' as an eligible termination payment (as distinct from, for example, a transfer or sign-on fee):

- the payment is calculated by reference to each Employee's years of service with the SRA/RIC; and
- there are no obligations imposed on the Employees to continue their employment with the ARTC for any particular period after commencement of the employment with the ARTC.

39. Further, the transfer payment will be paid by, and processed centrally through the SRA/RIC payroll systems shortly after termination of employment with the SRA/RIC, anticipated to be within 4 weeks of termination. The timing of any transfer payments strengthens the connection between the payments and the termination of employment.

40. In view of the above, the transfer payment is in consequence of the termination of employment and is therefore an eligible termination payment under subsection 27A(1) of the ITAA 1936. The ETP will be split up into the pre-July 1983 and post-June 1983 (untaxed element) components. This amount can be rolled over.

41. It should be noted that the amount of an ETP may be subject to the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

Detailed contents list

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

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Commissioner of Taxation

29 September 2004

Previous draft:

Not previously issued as a draft

- ITAA 1936 27H

- Transport Administration Act 1988 (NSW)

*Related Rulings/Determinations:*CR 2001/1; CR 2002/1; TR 92/1;
TR 92/20; TR 97/16; TR 2003/13*Case References :*- Le Grand v. Federal
Commissioner of Taxation [2002]
124 FCR 53; 2002 ATC 4907; 51
ATR 139*Subject references:*- eligible termination payments
- employment termination- McIntosh v. Federal
Commissioner of Taxation (1979)
45 FLR 279; 79 ATC 4325; 10 ATR
13*Legislative references:*- ITAA 1936 26AC
- ITAA 1936 26AD
- ITAA 1936 27A(1)
- ITAA 1936 27B
- ITAA 1936 27C- Reseck v. Federal Commissioner
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ATC 4213; 5 ATR 538

ATO references

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