


CR 2004/76 - Fringe Benefits Tax and Income Tax: Payments by employers to the Building Employees Welfare Trust (BEWT)

 This cover sheet is provided for information only. It does not form part of *CR 2004/76 - Fringe Benefits Tax and Income Tax: Payments by employers to the Building Employees Welfare Trust (BEWT)*

 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

 This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*



Class Ruling

Fringe Benefits Tax and Income Tax: Payments by employers to the Building Employees Welfare Trust (BEWT)

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Arrangement	9
Ruling	20
Explanation	22
Detailed contents list	38

Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **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:

- section 40 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- subsection 136(1) of the FBTAA
- subsection 26AAB(14) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)

Class of persons

3. The class of persons to which this Ruling applies is employers (participating employers) in the Queensland building and construction industry who make payments to the Building Employees Welfare Trust (BEWT).

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 9 to 19.
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.
7. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Intellectual Property Branch
Department of Communications, Information Technology
and the Arts
GPO Box 2154
CANBERRA ACT 2601

or by e-mail to: commonwealth.copyright@dcita.gov.au

Date of effect

8. This Ruling applies from 1 April 2004. Further, this Ruling only applies to the extent that:
 - there is no material change in the arrangement or in the class of persons involved in the arrangement;
 - 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.

Arrangement

9. 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 the description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Ruling application by Blake Dawson Waldron on behalf of Building Employees Welfare Trust Pty Limited (the trustee) the proposed trustee of BEWT;
- The draft trust deed of BEWT (Draft No.7, 23 October 2003) including schedules 1 & 2 (the draft trust deed);
- The draft sponsor's deed (Draft No.1, 15 October 2003) (the draft sponsor's deed).

10. BEWT is a trust (to be established) to be funded by participating employers in the building and construction industry in Queensland, for the purpose of providing funds to be used for the benefit of that industry.

11. In accordance with the draft trust deed, participating employers are defined to mean persons required to make contributions to BEWT, under the terms of this deed, any industrial instrument or deed of adherence. The draft trust deed also outlines when the contributions must be paid and how the amount of the contribution will be worked out.

12. Participating employers will be required to enter into a deed of adherence to ensure that their agreement to contribute the funds to BEWT is enforceable by the trustee.

13. The mechanism for contribution to BEWT will not be based on any specific employee and the contributions will not be held for the benefit of, or held in any particular employee members' account.

14. The contributions made to BEWT will be invested in appropriate investments. Each year any excess income of BEWT will be distributed to the beneficiaries of BEWT.

15. The only beneficiaries of BEWT will be employer organisations and unions which are defined and other approved institutions. Additional employer organisations and unions can be added in certain circumstances.

16. The draft trust deed specifically excludes any current or past employee of a participating employer from being a beneficiary.

17. The draft trust deed outlines how the trustee may apply the contributions to BEWT for industry purposes. It generally provides that the trustee may apply all or part of the contributions received in a year to an entity that the trustee determines will benefit the welfare of, or otherwise provide assistance to, the construction industry.

18. Examples of the application of BEWT funds for the benefit of the construction industry are given as:

- to promote, assist or advance education and training in the construction industry;
- to promote, assist or benefit the provision of chaplaincy, counselling and welfare services for participants in the construction industry;
- to promote, assist or benefit persons or institutions undertaking investigations or enquiries into issues which have affect for the construction industry (such as the incidents of suicide by workers in the construction industry and steps which might usefully be taken to reduce such incidents).

19. The draft trust deed outlines the powers and obligations of the trustee regarding the annual income of BEWT and distributions to beneficiaries. Any distributions by the trustee to beneficiaries who are employer associations or unions, must be expended by the them in pursuit of industry purposes.

Ruling

20. A payment by a participating employer to BEWT in accordance with the draft trust deed, will not constitute a fringe benefit as defined in subsection 136(1) of the FBTAA.

21. A payment by a participating employer to BEWT will be an allowable deduction to the employer under section 8-1 of the ITAA 1997 where the payment is made in order to satisfy an obligation imposed on the employer by an award, enterprise agreement or other industrial instrument.

Explanation

Fringe benefits tax

22. The definition of a fringe benefit in subsection 136(1) of the FBTA provides that a benefit will be a fringe benefit when that benefit is provided to an employee or an associate of the employee in respect of the employment of the employee by an employer (or its associate) or under an arrangement between the employer and a third party, unless the benefit is specifically excluded from being a fringe benefit.

23. As described in the arrangement, payments will be made by a participating employer to BEWT, which in accordance with Taxation Ruling TR 1999/5 may give rise to a property benefit. The Ruling provides that a payment of money by an employer in appropriate circumstances to the trustee of a trust in respect of the employment of an employee, which does not constitute salary or wages or is otherwise exempt by virtue of subsection 136(1), is a property benefit pursuant to section 40 of the FBTA. To be a fringe benefit such payment must be provided to an associate of an employee in respect of the employment of the employee.

24. A trustee may be considered to be an associate of an employee for the purposes of the definition of a fringe benefit. TR 1999/5 considers the circumstances in which a trustee of a trust which has been set up to provide benefits to employees, is an associate of the employee for the purposes of the FBTA.

25. The definition of 'associate' in the FBTA has the same meaning as that contained in subsection 26AAB(14) of the ITAA 1936. This subsection provides that a trustee will be an associate of a person if that person, or an associate of that person, '... is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust, either directly or through any interposed companies, partnerships or trusts ...'.

26. Whether or not an employee of a participating employer who makes a payment to BEWT is capable of benefiting under the trust (BEWT) or through any interposed companies, partnerships or trusts, is only material in deciding if a fringe benefit arises, if that payment is made in respect of the employment of the employee.

27. The expression 'in respect of' is defined in subsection 136(1) as including 'by reason of, by virtue of, or for or in relation directly or indirectly'. The term has been considered by the courts on numerous occasions. In *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22 it was noted that the term 'in respect of employment', includes benefits where

... there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment...

28. A participating employer makes a payment to BEWT because they have an obligation under an industrial instrument which arises from the employer's participation in the building and construction industry. Payments made to BEWT have no connection with employees of that employer other than that they are part of a class of persons that may ultimately benefit from BEWT's stated purpose of providing funds for the benefit of the industry. Such benefits which are available to all employees in the industry include welfare, counselling and training and education.

29. It is therefore considered that in these circumstances, the benefit provided by the participating employer in the form of a payment to BEWT does not possess a 'sufficient or material' connection to the employment of an employee of that employer. Accordingly the benefit provided is not in respect of employment.

30. As the payment made by the participating employer is not a benefit provided in respect of the employment of an employee of the employer, it is not a fringe benefit as defined in subsection 136(1) of the FBTA and no fringe benefits tax will be payable in respect of the contribution.

Income tax

31. Subsection 8-1(1) of the ITAA 1997 allows a deduction for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. However, subsection 8-1(2) of the ITAA 1997 prevents a deduction under subsection (1) where the outgoings are of a capital, private or domestic nature, or relate to the earning of exempt income.

32. For expenditure to be deductible under section 8-1 of the ITAA 1997 there must be a sufficient nexus or relationship between the outgoing and the production of assessable income so that the outgoing is incidental and relevant to the gaining or producing of assessable income (*Ronpibon Tin & Tongkah Compound NL v. FC of T* (1949) 78 CLR 47).

33. Where a participating employer is required to make a payment to BEWT in order to fulfil an obligation imposed on them by an award, enterprise agreement or other industrial instrument, they do so to meet their obligations in carrying on business activities. As such the payment has a sufficient nexus with their income producing activities.

34. However, to conclude that a payment to BEWT is deductible, the payment must also not be of a capital nature. Whether a participating employer's payment to BEWT is revenue or capital in nature depends on the character of the payment when made by the employer (*G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1).

35. The character of a payment made by an employer to a trust was considered by Hill J in *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428; 2003 ATC 5076; (2003) 4 ATR 423:

However it cannot be said that the question whether a payment is a one-off payment or whether it is a recurrent payment is a matter irrelevant to whether the outgoing is capital. In a case such as the present where the payment operates to create the capital of a trust fund the outlay will ordinarily be seen as capital both because of the lasting qualities enjoyed and the fact that what is being made is a final payment to secure future benefits. However, if a contribution is one of a number of 'recurrent' contributions for employees, so that it can be seen to be part of the ordinary flow of business expenditure of a taxpayer, the character of the outlay will take on a different complexion.

36. Where an employer makes repetitive payments to BEWT as required by an award, enterprise agreement or other industrial instrument to discharge an obligation, that obligation is directly connected to the income earning capacity of the business and is part of the ordinary flow of business expenditure. As such, the payment by the employer is revenue in nature.

37. Therefore, such payments by a participating employer to BEWT will be an allowable deduction under section 8-1 of the ITAA 1997, as long as it does not relate to the earning of exempt income.

Detailed contents list

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

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Arrangement	9
Ruling	20
Explanation	22
Fringe benefits tax	22
Income tax	31
Detailed contents list	38

CR 2004/76

Commissioner of Taxation

21 July 2004

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16;
TR 1999/5

Subject references:

- Deductions
- Fringe benefits tax
- Income tax

Legislative references:

- Copyright Act 1968
- TAA 1953 Part IVAAA
- FBTAA 1986 136(1)
- FBTAA 1986 40
- ITAA 1936 26AAB
- ITAA 1936 26AAB(14)
- ITAA 1997 8-1
- ITAA 1997 8-1(1)
- ITAA 1997 8-1(2)

Case references:

- G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22
- Ronpibon Tin & Tongkah Compound NL v. FC of T (1949) 78 CLR 47
- Walstern v. Federal Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 4 ATR 423

ATO references

NO: 2004/9849

ISSN: 1445-2014