



CR 2004/97 - Fringe benefits tax: payments by employers of apprentice levies to Redundancy Payment Central Funds

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2004*



Class Ruling

Fringe benefits tax: payments by employers of apprentice levies to Redundancy Payment Central Funds

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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**, **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' identified below applies to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law

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; and
- subsection 26AAB(14) of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

3. The class of persons to which this Ruling applies is employers who are required to make payments to Redundancy Payment Central Fund (Existing Fund No. 1) and Redundancy Payment Central Fund No 2 (Existing Fund No. 2) under the terms of the funds' respective trust deeds. Such payments, which are described as an apprentice levy, are used to provide benefits for apprentices and former apprentices.

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 26.
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 - this Ruling may be withdrawn or modified.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 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 law is 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:

- Class Ruling application made by Deacons on behalf of Redundancy Payment Central Fund Ltd (Incolink);
- The trust deed of Existing Fund No. 1;
- Determination by Incolink pursuant to the trust deed for Existing Fund No. 1;
- The trust deed of Existing Fund No. 2;
- Determination by Incolink pursuant to of the trust deed for Existing Fund No. 2;
- The trust deed of Redundancy Payment Approved Worker Entitlement Fund 1 (Approved Fund No. 1); and
- The trust deed of Redundancy Payment Approved Worker Entitlement Fund 2 (Approved Fund No. 2).

Existing Fund No. 1

10. Existing Fund No. 1 was established pursuant to an industry agreement for the purpose of making redundancy payments to workers (employees) and apprentices in the building and construction industry. Funds to achieve the above purpose are provided by employer members (employers).

11. For the purposes of the trust deed of the fund, an apprentice is an employee (other than a trainee) who is registered as an apprentice with the Victorian Learning and Employment Skills Commission and undertaking a course of training approved by that Commission.

12. The trust deed requires each employer to contribute to the fund, a Consumer Price Index (CPI) adjusted amount per week in respect of each employee.

13. The trust deed also provides that for each weekly amount contributed per employee, a portion of that amount (currently 50 cents) is applied as an industrial levy to provide benefits to apprentices in the industry. Employers are required to pay the levy whether or not the employer employs apprentices at the time of the payment.

14. The apprentice levy amounts are to be credited to a nominated account holding pooled funds for the benefit of apprentices and former apprentices. The balance of employer payments (that is, excluding the apprentice component) are credited to each employee's respective account with the fund.

15. The arrangements described above in paragraphs 13 and 14 are subject to the arrangements described in paragraph 22 in relation to the operation of Approved Fund No 1.

16. No benefit is payable to an apprentice who does not complete their training agreement and work in the industry for a further 12 months (or lesser period determined by the trustee) except where:

- the training agreement is cancelled because of a work shortage where an entitlement to a percentage of the redundancy benefit accrues; or
- a training agreement is terminated for any other reason where the trustee has a discretion to pay a benefit if a claim is made by an apprentice because of extenuating circumstances.

17. At the end of 12 months (or lesser period) and after an apprentice becomes an employee, benefits or entitlements notionally accumulated during the apprenticeship period are credited to an account in the name of that apprentice (now an employee).

Approved Fund No. 1

18. Approved Fund No. 1 was also established for the purpose of making redundancy payments to workers (employees) and apprentices in the building and construction industry. It is an approved worker entitlement fund within the meaning of section 58PB of the FBTA and was prescribed by regulation and gazetted on 26 February 2004.

19. It is intended that members (employers) of Existing Fund No. 1 will become members (employers) of Approved Fund No. 1 and the two funds will co-exist.

20. The trust deed of the fund requires each employer to contribute a CPI adjusted amount per week in respect of each employee.

21. Unlike Existing Fund No. 1, there is no obligation on employers under this trust deed, to make any payment in respect of apprentices (whether directly or by way of industrial levy) and no part of employer payments is to be applied to or for apprentices by the Approved Fund No. 1.

22. When an employer pays an amount in accordance with the trust deed of Approved Fund No. 1, their obligation to contribute to Existing Fund No. 1 (refer paragraph 12) will be reduced to that extent. The outstanding payment obligation to be made to Existing Fund No. 1 (currently 50 cents per employee per week) will be applied towards the apprentice levy in accordance with the Existing Fund No. 1 trust deed and credited to a nominated account holding pooled funds for the benefit of apprentices (as outlined in paragraph 14).

Existing Fund No. 2

23. Existing Fund No. 2 was established pursuant to an industry agreement for the purpose of making redundancy payments to workers (employees) in the metal and engineering construction industries and the metal and engineering contracting industries. The trust deed of Existing Fund No. 2 replicates the provisions of Existing Fund No. 1 except for the industry that it covers. Funds to achieve the above purpose are provided by employer members (employers).

24. The details as described in paragraphs 11 to 17 of the Arrangement also apply to Existing Fund No. 2.

Approved Fund No. 2

25. Approved Fund No. 2 was also established for the purpose of making redundancy payments to workers (employees) and apprentices in the metal and engineering construction industries and the metal and engineering contracting industries. It is an approved worker entitlement fund within the meaning of section 58PB of the FBTA and was prescribed by regulation and gazetted on 26 February 2004.

26. The details as described in paragraphs 19 to 22 of the Arrangement also apply to Approved Fund No. 2.

Ruling

27. A payment by an employer to Existing Fund No. 1 or Existing Fund No. 2, in the form of an apprentice levy as described in the Arrangement, will not be a fringe benefit as defined in subsection 136(1) of the FBTA.

Explanation

28. 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.

29. As described in the Arrangement, payments for the benefit of apprentices will be made by an employer to Existing Fund No. 1 or Existing Fund No. 2, which in accordance with Taxation Ruling TR 1999/5 may give rise to a property benefit.

30. TR 1999/5 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; and
- 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.

31. 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.

32. The definition of associate in the FBTA has the same meaning as that contained in section 26AAB of the ITAA 1936. In reference to a trustee, subparagraph 26AAB(14)(1)(iv) of the ITAA 1936 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...'

33. Paragraph 5 of TR 1999/5 says that the trustee of a trust that is constituted to provide benefits to employees can be an associate of an employee of the employer whose employees will benefit under the trust, notwithstanding that the employee is not a beneficiary of the trust at the time the benefit (the payment) is provided.

34. Paragraph 14 of TR 1999/5 provides guidelines that indicate when a particular employee is capable of benefiting under a trust. The first indicia is that the potential beneficiaries, in respect of which the contribution has been made to the trustee, are employees and have sufficient connection with the income producing activities of the business to give rise to a deduction to the employer.

35. The payments made by employers to Existing Fund No. 1 or Existing Fund No. 2 that are for the benefit of apprentices, is an industrial levy intended to benefit all apprentices of all employers in the relevant industry. The amount of the levy that an employer pays is not calculated by reference to the number of apprentices engaged by that employer and is payable regardless of whether that employer has any apprentices. The levy is held in a pool of funds for the benefit of all apprentices of all employers in the relevant industries who become eligible in the future.

36. It is possible that an apprentice of a particular employer may ultimately receive some benefit from funds contributed by their employer when they become eligible (as an employee), but at the time that payments are made by the employer, such an apprentice is not a beneficiary of those funds and may never become a beneficiary.

37. However, whether or not an employee of an employer who makes a payment to Existing Fund No. 1 or Existing Fund No. 2 is capable of benefiting under a trust (Existing Fund No. 1 or Existing Fund No. 2) 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 by the employer of that employee.

38. In order to find that a benefit is provided in respect of employment of an employee, there needs to be a sufficient or material, rather than a causal connection or relationship to employment (*J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22).

39. An employer makes a payment for the benefit of apprentices to Existing Fund No. 1 or Existing Fund No. 2 because it has an obligation under an industrial instrument which arises from the employer's participation in that industry. Any particular payment of that type to a fund by an employer has no specific connection with apprentices (if there are any) of that employer other than that such apprentices are part of a class of persons in the industry that may ultimately benefit (if they become eligible) from the pool of funds held by the fund. That pool of funds being provided by all members (employers) of the fund.

40. The meaning of the term workers (employees) for the purposes of each particular fund specifically excludes apprentices, so the amount of the employer payment is not calculated by reference to the number (if any) of apprentices engaged by the employer at that time.

41. An apprentice may ultimately become a recipient or beneficiary of some funds (or a portion thereof) that were contributed by a fund member that is their employer or becomes their employer. However, the reason for the contribution at the time of payment to the fund is not connected with the employment of that apprentice by that employer at that time or in the future.

42. If there is a connection between the payment of an apprentice levy by an employer and the employment of an apprentice, that connection is with future employment in the industry rather than having any connection with employment by the employer making the payment.

43. It is therefore considered that in these circumstances, the benefit provided by an employer in the form of a payment to Existing Fund No. 1 or Existing Fund No. 2 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 the employment of an employee of that employer.

44. As a payment made by an employer to Existing Fund No. 1 or Existing Fund No. 2 in the form of an apprentice levy, 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 payment.

Detailed contents list

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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:

- fringe benefits tax

Legislative references:

- Copyright Act 1968
- TAA 1953 Pt IVA

- FBTA 1986 40
- FBTA 1986 58PB
- FBTA 1986 136(1)
- ITAA 1936 26AAB
- ITAA 1936 26AAB(14)

Case references:

- J & G Knowles & Associates Pty
Ltd v. Federal Commissioner of
Taxation (2000) 96 FCR 402; 2000
ATC 4151; (2000) 44 ATR 22

ATO references

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