



CR 2005/113 - Income tax: redundancy payments - Newmont Yandal Operations Pty Ltd - Employees of Wiluna Gold Mine

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Class Ruling

Income tax: redundancy payments – Newmont Yandal Operations Pty Ltd – Employees of Wiluna Gold Mine

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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(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 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 27F of the ITAA 1936;
 - section 159S of the ITAA 1936; and
 - section 159SA of the ITAA 1936.

Class of persons

3. The class of persons to which this Ruling applies is all employees of Newmont Yandal Operations Pty Ltd (NYO) hereafter referred to as the Employees, whose employment at the Wiluna Gold Mine was terminated on 4 December 2003 and received a payment under the arrangement described in paragraphs 9 to 24. This Class Ruling excludes certain employees as per the definition of 'employee' in sub-clause 1.1 of the agreement between Agincourt Resources Limited (Agincourt) and NYO.

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 was carried out in accordance with the arrangement described in paragraphs 9 to 24.
6. If the arrangement carried out was 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 - this Ruling may be withdrawn or modified.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 to payments made under the arrangement described in paragraphs 9 to 24 that were made during the income year ended 30 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.

Arrangement

9. Newmont Yandal Operations Pty Ltd (NYO) is seeking confirmation as to:

- (i) whether particular payments made to the class of employees ('the Employees') on the termination of employment are bona fide redundancy payments under section 27F of the ITAA 1936; and
- (ii) whether sections 159S and 159SA of the ITAA 1936 apply to unused annual leave and unused long service leave payments made to the class of employees on the termination of employment.

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 NYO, and Newmont Australia Limited (Newmont) to the Australian Taxation Office;
- records of telephone conversations with representatives of Newmont; and
- correspondence from Agincourt Resources Limited (Agincourt).

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.

10. NYO and certain of its related subsidiary companies, which are also subsidiaries of Newmont, owned the Wiluna Gold Mine (the Mine) in Western Australia.

11. The Mine was operated by salaried and contracted workers. In addition to workers at the Mine, NYO had workers based at its Perth office.

12. NYO decided to sell its business and accordingly entered into negotiations with Agincourt. The agreement that followed resulted in a contract on terms including:

- (a) that NYO would terminate the employment of all Employees at the Completion Date;
- (b) Agincourt would be free of any obligation whatsoever in relation to the future employment of those Employees; and

- (c) NYO would pay out all those Employees on the Completion Date their accrued annual and long service leave entitlements and a redundancy payment based on the established practices of the Newmont Australia Group.

13. On 15 October 2003, Newmont's Director of Human Resources held a meeting at the Mine advising employees that a sale was pending. Newmont did not ever discuss the question of Agincourt employing the Employees but when asked the question, Newmont's response was it was a matter for Agincourt's management.

14. On 16 October 2003 the sale agreement was entered into between NYO and Agincourt.

15. On 17 October 2003 Newmont advised the Mine Employees that a sale agreement ('the 2003 Agreement') had been signed and that, subject to some conditions, the sale was expected to be completed in late December 2003.

16. Newmont issued a letter to each Employee advising them that, subject to the sale being completed, they would be retrenched as their positions would be made redundant and that a redundancy package would be offered to those employees.

17. The redundancy package provided by Newmont was as follows:

- three (3) weeks payment at the Employee's cash rate for each year of service; and
- an additional four (4) weeks if the Employee was 45 to 54 years of age or eight (8) weeks if the Employee was 55 years of age or older.

18. In addition to the redundancy package the Employees also received from Newmont:

- the payment of accrued but untaken annual leave and long service leave (if eligible). These being the only payments the employees would have received if they had terminated employment voluntarily.

19. In early November 2003, Agincourt, held an information session at the Mine. The Employees were advised of Agincourt's workforce requirements for the Mine following completion of its purchase.

20. Agincourt advised the Employees that:

- (i) it would advertise all positions available at the Mine in The West Australian newspaper (advertised on 1 November 2003 through an independent employment agency);
- (ii) current Mine Employees had to apply for employment following the advertisement in The West Australian newspaper;

- (iii) it would compile and review all responses, prepare shortlists and interview all potential candidates;
- (iv) select a person for each position on the criteria of best person for that position; and
- (v) arrange for all selected candidates to undergo a medical examination as per normal fitness for work procedures and to obtain a police clearance.

21. The advertisement, which was for 76 positions, closed on 14 November 2003. Applications were received and a short-listing process and interviews commenced shortly afterwards.

22. Upon identification of suitable candidates through the interview process, medical examinations were commenced in mid November 2003 and continued throughout the recruitment process.

23. In an email dated 14 November 2003 it was stated that 6am on 4 December 2003 was the completion date of the sale of assets from NYO to Agincourt. On that date 67 employees with NYO were made redundant and received redundancy packages. Employees were made redundant by NYO on their last rostered day, if that day was before completion, or at the time of completion if the employee was on site at that time. Successful candidates were required to respond to the offer on the day it was presented in order to ensure manning requirements were met for the operation of the mine.

24. The Employees of NYO that were eventually employed by Agincourt numbered 56, of which 32 were present at the Mine on the Completion Date.

Ruling

25. The redundancy payments made by Newmont Yandal Operations Pty Ltd (NYO) on the termination of employment of the class of persons to whom this Ruling applies qualify as bona fide redundancy payments under section 27F the ITAA 1936.

26. Accordingly, so much of the eligible termination payment that exceeds the amount that could reasonably be expected to have been made in relation to an Employee had he or she voluntarily retired from that employment is a bona fide redundancy payment in relation to that employee.

27. In view of the above, the amounts received by an Employee in relation to unused annual leave and unused long service leave represent eligible assessable income for the purposes of section 159S of the ITAA 1936 and accordingly receive concessional tax treatment under section 159SA of the ITAA 1936.

Explanation

28. A payment on the termination of employment will be a bona fide redundancy payment if it satisfies all the requirements of section 27F of the ITAA 1936.

29. The first requirement under paragraph 27F(1)(a) of the ITAA 1936 is that the payment must be an eligible termination payment made in relation to the taxpayer in consequence of the dismissal from his or her employment by reason of bona fide redundancy. The Commissioner has issued Taxation Ruling TR 94/12 Income tax: approved early retirement scheme and bona fide redundancy payments, which sets out guidelines on the application of section 27F.

30. Paragraphs 41 and 42 of TR 94/12 state that:

41. Redundancy can be described as the situation where an employer no longer requires employees to carry out work of a particular kind or to carry out work of a particular kind at the same location. Bray CJ in *R v. The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd & Ors* (1977) 44 SAIR 1202 at page 1205; (1977) 16 SASR 6 at page 8 defined redundancy as follows:

‘... a job becomes redundant when an employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone.’

42. Redundancy refers to a job becoming redundant and not to an employee becoming redundant (*Short v. FW Hercus Pty Ltd* (1993) 40 FCR 511; (1993) 46 IR 128; (1993) 35 AILR 151). An employee’s job is considered to be redundant if:

- an employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by any one;
- that decision is not due to the ordinary and customary turnover of labour;
- that decision led to the termination of the employee’s employment; and
- that termination of employment is not on account of any personal act or default of the employee.

31. In the case of Newmont's sale of its the Mine, through its subsidiary, NYO, it is considered that the payments were made due to the Employees' positions being made redundant. This is supported by the facts that:

- as at the Completion Date (4 December 2003), that is, the date when Agincourt became the owners of the Mine, Newmont no longer had a beneficial interest in the Mine;
- Newmont was unable to find alternative positions for the Employees within its other operations;
- Newmont's decision to provide the Employees with redundancy packages; and
- the payments were made as a consequence of the Employees' termination of employment with NYO.

32. The second requirement under paragraph 27F(1)(aa) of the ITAA 1936 is that the payment must not be made from an eligible superannuation fund. In this case, the payment was made by the employer, not a superannuation fund, therefore this condition is satisfied.

33. Paragraph 27F(1)(b) of the ITAA 1936 requires that the termination time was a date before the taxpayer attained age 65 or such earlier date on which his or her employment would have necessarily terminated under the terms of employment because of the employee attaining a certain age or completing a certain period of service. None of the class of persons covered by this Ruling was aged 65 at the time of termination of employment, that is, their expected age of retirement.

34. Under paragraph 27F(1)(c) of the ITAA 1936 if the employer and the employees were not dealing with each other at arm's length in relation to the termination of employment, the amount of the eligible termination payment must not be greater than the amount that could reasonably be expected to have been paid if the parties had been at arm's length. In this case the employer and the Employees were dealing with each other at arm's length, and there is no evidence that the payment is greater than the amount that could reasonably be expected, therefore this condition is satisfied.

35. The fifth requirement as set out in paragraph 27F(1)(d) of the ITAA 1936 is that:

there was, at the termination time, no agreement between the taxpayer [the Mine Employees] and the employer [NYO], or the employer and another person [Agincourt], to employ the taxpayer after the termination time;...

36. The term 'agreement' is broadly defined in subsection 27A(1) of the ITAA 1936 as:

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.

37. NYO and Agincourt had an express written agreement that NYO terminate all of the employees and pay to those employees their entitlements. NYO acknowledged in that contract that Agincourt had no obligation to offer employment to any of the current employees. There is no evidence of any agreement between the employees and NYO, nor between NYO and Agincourt to employ the employees after termination time.

38. Since all the requirements of section 27F of the ITAA 1936 are satisfied, so much of the eligible termination payment as exceeds the amount of an eligible termination payment that could reasonably be expected to have been made in relation to the Employees had they voluntarily retired from their employment with Newmont is a bona fide redundancy payment.

Other relevant information

39. The amount of a bona fide redundancy payment received by an Employee that falls within the specified limits set under subsection 27A(19) of the ITAA 1936, referred to as the 'tax-free amount', is exempt from income tax.

40. For the year ended 30 June 2004, the tax-free amount is limited to \$5,882 plus \$2,941 for each whole year of completed employment service to which the bona fide redundancy payment relates. It should be noted that 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation. The \$5,882 and \$2,941 limits are indexed to rise in each subsequent year in line with increases in average weekly ordinary time earnings.

41. Furthermore, the tax-free amount will:

- not be an eligible termination payment (ETP);
- not be able to be rolled-over;
- not include any amount from a superannuation fund or an amount paid in lieu of a superannuation benefit; and
- not count towards the recipient's Reasonable Benefit Limits.

42. Any payment in excess of this limit is an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

43. It should be noted that the amount of a bona fide redundancy payment that is over the tax-free amount may be taxed under the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

44. The following amounts qualify as a bona fide redundancy payment and are exempt from tax within the limits described above:

- three (3) weeks payment at the Employee's cash rate for each year of service; and
- an additional four (4) weeks if the Employee was 45 to 54 years of age or eight (8) weeks if the Employee was 55 years of age or older.

45. Payments made in respect of unused annual leave and unused long service leave are, under the definition of an 'eligible termination payment' contained in subsection 27A(1) of the ITAA 1936, specifically excluded from being ETPs (see subparagraph (a)(iv) of the ETP definition).

46. Section 26AC of the ITAA 1936 governs the taxation treatment of lump sum payments received for unused annual leave on retirement or termination of employment. By virtue of subsection 26AC(2), payments made in respect of unused annual leave on termination of employment are included in the taxpayer's assessable income in full.

47. However, section 159SA of the ITAA 1936 operates to ensure that taxpayers will receive concessional tax treatment on that portion of the lump sum payment for unused annual leave which is classified as 'eligible assessable income'. Eligible assessable income is defined pursuant to section 159S of the ITAA 1936 to include certain amounts of unused annual leave paid on or after 18 August 1993 in respect of a bona fide redundancy amount. The concessional basis of tax is achieved by allowing a rebate to ensure the rate of tax on the eligible assessable income does not exceed 30 percent.

48. Section 26AD of the ITAA 1936 governs the taxation treatment of lump sum payments received for unused long service leave on retirement or termination of employment. If the taxpayer commenced employment after 15 August 1978 then, by virtue of subsection 26AD(2), the lump sum for unused long service leave received on termination is fully assessable.

49. Similar to payments received for unused annual leave, section 159SA of the ITAA 1936 ensures taxpayers will receive concessional tax treatment on that component of the lump sum payment for unused long service leave that is eligible assessable income. By virtue of section 159S of the ITAA 1936, eligible assessable income includes payments for unused long service leave received in respect of a bona fide redundancy amount and it ensures that the maximum rate of tax that applies to the payment is 30 percent. A bona fide redundancy amount in respect of sections 26AC and 26AD of the ITAA 1936 is defined in section 159S as meaning a payment made to a person because of the dismissal of the person from any employment where:

- (a) the dismissal was because of the bona fide redundancy of the person; and

- (b) the dismissal took place before the last retirement date (within the meaning of section 27A of the ITAA 1936) in relation to the employment; and
- (c) there was at the time of the dismissal, no agreement in force between the person and the employer, or between the employer and another person after that time.

50. It has been decided that the Employees' positions with NYO were terminated as result of bona fide redundancy. The payment of long service and annual leave meets the definition of a bona fide redundancy amount in section 159S of the ITAA 1936 and therefore it follows that the payments received by the employees in respect of their unused annual leave and unused long service leave satisfy the definition of eligible assessable income in section 159S and therefore attract the concessional treatment provided under section 159SA of the ITAA 1936.

Detailed contents list

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

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Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*CR 2001/1; TR 92/1; TR 92/20;
TR 94/12; TR 97/16; TD 2003/21*Subject references:*

- eligible termination payments
- employment termination
- bona fide redundancy payments
- unused annual leave rebates
- unused long service leave rebates

Legislative references:

- ITAA 1936 26AC
- ITAA 1936 26AC(2)
- ITAA 1936 26AD
- ITAA 1936 26AD(2)
- ITAA 1936 27A
- ITAA 1936 27A(1)
- ITAA 1936 27A(1)(a)(iv)

- ITAA 1936 27A(19)
- ITAA 1936 27F
- ITAA 1936 27F(1)(a)
- ITAA 1936 27F(1)(aa)
- ITAA 1936 27F(1)(b)
- ITAA 1936 27F(1)(c)
- ITAA 1936 27F(1)(d)
- ITAA 1936 159S
- ITAA 1936 159SA
- Copyright Act 1968

Case References:

- Short v. FW Hercus Pty Ltd (1993) 40 FCR 511; (1993) 46 IR 128; (1993) 35 AILR 151
- R v. The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd & Ors (1977) 44 SAIR 1202; (1977) 16 SASR 6

ATO references

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