



CR 2006/46 - Income tax: deductibility of employer contributions to the South Australian Building Industry Redundancy Scheme Trust

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 This document has changed over time. This is a consolidated version of the ruling which was published on *11 July 2007*



Class Ruling

Income tax: deductibility of employer contributions to the South Australian Building Industry Redundancy Scheme Trust

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❶ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27B of the ITAA 1936;
- section 27C of the ITAA 1936; and

- section 27F of the ITAA 1936.

Class of entities

3. The class of entities to which this Ruling applies is all employers who are required by their Deed of Adherence and Industrial Instruments to make contributions, on behalf of employees, to the South Australian Building Industry Redundancy Scheme Trust (BIRST).

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in the Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 23.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme 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 July 2000. 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which

applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Note: The Partial Withdrawal to this Ruling that issued on 11 July 2007 applies on and from 11 July 2007.

Scheme

12. The scheme 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 and are part of and are to be read with the description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- Class Ruling application from Phillips Fox dated 9 November 2004;
- BIRST trust deed including amendments up until 18 February 2004;
- a copy of a typical Agreement of Adherence;
- a copy of a typical Enterprise Bargaining Agreement; and
- Clause 16.2.7 of the National Building and Construction Industry Award.

13. South Australian Building Industry Redundancy Scheme Trust (BIRST) is an Australian resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

14. A board of trustees (Trustee) manages BIRST with equal representation by union and employer representatives. All trustees that comprise the Trustee are natural persons.

15. The Trustee has appointed an administrator of BIRST and an investment manager to manage the investments of BIRST on behalf of the Trustee.

16. BIRST is an approved worker entitlement fund for fringe benefits tax (FBT) purposes.
17. BIRST was established to facilitate employers providing construction industry employees with a secure benefit at the time of retirement, death, permanent disablement or other termination of employment (Employee Entitlements).
18. Employers can fund Employee Entitlements that they are required to make under various industrial awards and enterprise agreements (Industrial Instruments) or Agreements of Adherence for the benefit of employees through the payment of contributions to BIRST.
19. BIRST accepts contributions from employers, to fund each member's employee entitlements in respect of which contributions are legally payable under a Deed of Adherence or Industrial Instrument.
20. The current contribution is \$40 per week per employee. However this may vary due to Industrial Instruments and Agreements of Adherence. Higher rates will usually be agreed by the industrial parties.
21. As outlined in clause 3.2 of the trust deed, all contributions made to BIRST by employers are placed into separate member (employee) accounts identifying contributions for that member.
22. In accordance with clause 19.2 of the trust deed, on termination (including by way of redundancy), an employee is entitled to the balance of his/her member account with BIRST (termination payment). An employee that is made redundant (as defined in the National Building and Construction Industry Award), dies, becomes disabled or retires is immediately entitled to his/her termination payment (redundancy payment). A waiting period may apply where termination is for other reasons.
23. The redundancy payment may be paid by the employer or BIRST. Where the employer pays the member redundancy payment directly, BIRST will reimburse the employer for the amount paid to the particular member accordingly.
24. The trustee has discretion to distribute income of BIRST to individual members in accordance with clause 16 of the trust deed.
25. In accordance with clause 8AA members can transfer the benefits they have accumulated in another redundancy fund into BIRST where permitted by the other fund.
26. In accordance with clause 8A members can transfer benefits to another redundancy fund that is an 'approved worker entitlement fund'.

Ruling

27. An employer who has a legal obligation to make redundancy contributions to BIRST under the BIRST Trust Deed, as an employer who is a building contractor or contractor who is engaged in the Industry, and is required to make payments under an Agreement of

Adherence, can claim a deduction under section 8-1 of the ITAA 1997 for the amount of the contribution which is required to be made.

28. Where an employer pays an amount of redundancy entitlement directly to an employee and then seeks reimbursement from BIRST, the amount of the payment of redundancy entitlement will be an allowable deduction under section 8-1 of the ITAA 1997.

29. A reimbursement received by an employer for an amount of redundancy entitlement paid directly to an employee will be assessable income under section 6-5 of the ITAA 1997 at the time the amount is derived by the employer.

30. Where the employer pays an amount of an entitlement directly to a worker and then seeks reimbursement from BIRST, the payment of the entitlement will be treated in the same manner as if it were paid by BIRST.

31. [Withdrawn]

32. [Withdrawn]

Commissioner of Taxation

31 May 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Application of section 8-1

33. Section 8-1 of the ITAA 1997 provides that you can deduct from your assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income and is not:

- capital, private or domestic in nature;
- incurred in gaining or producing exempt income; or
- prevented from being deductible by a provision of the Act.

Positive limbs

Nexus to gaining and producing assessable income

34. In carrying on business activities an employer is required to fulfil their obligations in respect to the entitlements of their workers. These entitlements may be contained in the governing award, enterprise bargaining agreement or other industrial instrument negotiated between the employer and the relevant union on the employee's behalf.

35. In addition to the employer's legal obligations under their relevant industrial instrument/s the employer is also required to meet the obligations contained in the Administration provisions of BIRST. The administrative provisions require the employer to make monthly contributions to BIRST in respect to worker entitlements.

36. It is accepted that there is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for worker entitlements, such that payment of the employee entitlements is incidental and relevant to the production of the assessable income of the business.

Incurring the amount

37. At the point at which an employer makes the contribution to the Trustee of BIRST the amount is placed into member accounts and the amount/s are no longer owned by the employer. This differs from the situation in *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428 where there were no members of the trust and the contributions were not incurred as they remained funds of the employer.

38. The ability for amounts to be reimbursed and returned to the employer under the trust deed (a factor which must be possible to satisfy paragraph 58PB(4)(c) of the *Fringe Benefits Tax Assessment Act 1986*) does not effect whether the monthly contributions are incurred by the employer.

39. Notwithstanding the ability to be reimbursed in the future, the contributions to BIRST are definite payments which the employer is required to make to meet the legal obligations of carrying on business activities. As such the contributions are incurred when made (for employers accounting on a cash basis) or when the liability to make the payment each month arises (for employers accounting on an accruals basis).

Conclusion

40. The employer's monthly contribution/s to BIRST are outgoings incurred in carrying on a business for the purposes of section 8-1 of the ITAA 1997.

Negative limbs

Is the contribution revenue or capital in nature?

41. Whether the payment of worker entitlements to BIRST is revenue or capital in nature depends on the character of the payment when made by the employer. As stated in *G.P. International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) ATC 4413 at 4419; (1990) 21 ATR 1 at 7:

The character of expenditure is ordinarily determined by reference to the nature of the asset acquired or the liability discharged by the making of the expenditure, for the character of the advantage sought by the making of the expenditure is the chief, if not the critical, factor in determining the character of what is paid: *Sun Newspapers Ltd. v. F.C. of T.* (1938) 61 C.L.R. 337 at p. 363.

42. In making the monthly contribution/s to BIRST, the employer meets their immediate legal obligation under the Industrial Instrument and Agreement of Adherence.

43. The employer discharges their obligation in respect of their employees each month when the monthly payment is made to BIRST as required by clause 3.1 of the BIRST trust deed.

44. The employer is making repetitive monthly contributions to discharge an immediate obligation and the obligation is directly connected to the income earning capacity of the business. Accordingly, the payment of the contribution/s is revenue in nature.

Payments by employer to employee

45. It is accepted that there is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for worker entitlements, such that payment of the employee entitlements to an employee by an employer is incidental and relevant to the production of the assessable income of the business.

46. Accordingly the payment of a redundancy entitlement to a redundant employee would be an allowable deduction under section 8-1 of the ITAA 1997 as an expense incurred in gaining or producing assessable income or carrying on a business.

Reimbursement of payment by employer

47. Where an employer has paid an employee their redundancy entitlement they may apply to BIRST for a reimbursement of this amount. BIRST may reimburse the employer for this amount under clause 16A.1(b) of the BIRST trust deed.

48. Where an employer has claimed or will claim a deduction for a redundancy entitlement paid to a redundant employee under section 8-1 of the ITAA 1997, the reimbursement of this expense must be declared as income. In these cases it is considered that reimbursement is income received in the ordinary course of business and assessable under section 6-5 of the ITAA 1997 in the income year in which it is derived.

49. [Withdrawn]

50. [Withdrawn]

51. [Withdrawn]

52. [Withdrawn]

53. [Withdrawn]

54. [Withdrawn]

55. [Withdrawn]

56. [Withdrawn]

57. [Withdrawn]

58. [Withdrawn]

59. [Withdrawn]

60. [Withdrawn]

61. [Withdrawn]

62. [Withdrawn]

63. [Withdrawn]

64. [Withdrawn]

- 65. [Withdrawn]
- 66. [Withdrawn]
- 67. [Withdrawn]
- 68. [Withdrawn]
- 69. [Withdrawn]
- 70. [Withdrawn]
- 71. [Withdrawn]
- 72. [Withdrawn]
- 73. [Withdrawn]
- 74. [Withdrawn]
- 75. [Withdrawn]

Appendix 2 – Detailed contents list

76. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/12; TR 2003/13

Subject references:

- assessable recoupments
- deductions and expenses
- eligible termination payments
- income

Legislative references:

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- ITAA 1936 26(d)
- ITAA 1936 27A
- ITAA 1936 27A(1)
- ITAA 1936 27B
- ITAA 1936 27C
- ITAA 1936 27F
- ITAA 1936 27F(1)
- 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 1997 6-5
- ITAA 1997 8-1
- FBTAA 1986 58PB(4)(c)
- Copyright Act 1968

Case references:

- AAT Case 4287 (1988) 19 ATR 3443
- Case V67 88 ATC 505
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) ATC 4413; (1990) 21 ATR 1
- McIntosh v. Commissioner of Taxation (1979) 25 ALR 557; 10 ATR 13; 45 FLR 279; 79 ATC 4325
- 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
- Reseck v. Federal Commissioner of Taxation (1975) 49 ALJR 370; (1975) 6 ALR 642; (1975) 5 ATR 538; (1975) 75 ATC 4213; (1975) 133 CLR 45
- Short v. F W Hercus Pty Ltd (1993) 40 FCR 511; (1993) 46 IR 128; (1993) 35 AILR 151
- Sun Newspapers Ltd v. FC of T (1938) 61 CLR 337
- Walstern Pty Ltd v. Federal Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423

Other references:

- Explanatory Memorandum to the Income Tax Assessment Amendment Bill (No. 3) 1984

ATO references

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