



CR 2006/83 - Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Payment Pilot project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2006*



Class Ruling

Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Payment Pilot project

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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.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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:

- paragraph 26(e) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 159P of the ITAA 1936;
- section 6-5 the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 6-10 of the ITAA 1997;
- section 8-1 of the ITAA 1997;
- section 10-5 of the ITAA 1997; and
- Subdivision 20-A of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is those recipients of disability care services funded by the Department of Ageing, Disability and Home Care (NSW) (the Department) who enter an agreement to receive payments for the purpose of purchasing their attendant care services under the Attendant Care Program Direct Payment Pilot Project (pilot project). In this Ruling these entities are referred to as 'recipients'.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this 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 12 to 24 of this Ruling.

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 2006. However, this 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 taxation 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).

Scheme

12. The scheme that is the subject of the Ruling is described below. This description is based on the following documents and telephone records which are attached to the file record maintained by the Tax Office for this Ruling. 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 part of documents incorporated into this description of the scheme are:

- Application for Class Ruling received by letter dated 21 September 2005 which includes ACP Guidelines, draft ACP Pilot Project Guidelines;
- Amended Draft Funding Agreement dated 26 April 2006; and
- Various email and telephone discussions relating to the funding arrangement.

13. The Department administers the Attendant Care Program (ACP). The ACP provides funding for the provision of in-home personal care and support services (attendant care) to assist people with a physical disability with the tasks of daily living. Between 15 and 35 hours per week are approved for the provision of attendant care such as assistance with getting out of bed, showering, dressing and meal preparation.

14. The Department is instituting the pilot project for a limited number of clients. Briefly, the pilot project will provide funding directly to the client for approved hours of attendant care to enable direct purchase by the client of the services previously provided through the eligible service providers.

15. The aim of the pilot project is to determine the extent to which direct payment provides a recipient with choices and increased freedom, and facilitates increased confidence and community participation.

16. The Department will enter into a funding agreement with each recipient that will outline the funding being provided by the Department and what the funds can be used for. The funding will be provided by grants made in monthly instalments paid electronically into a bank account established specifically for that purpose. The level of payments is determined at the beginning of the 12 month period of the Funding Agreement. Any interest earned on the funds in the bank account are to be treated as forming part of the grant and are accounted for to the Department.

17. Payments under the agreement are made monthly in advance on the 1st day of the month. The recipient will provide monthly reports to the Department on expenditure. These reports are for monitoring purposes only. They will also provide the basis of acquittal of any unused funds back to the Department. The reports by the recipients are due by the 7th day of the following month.

18. The grant will be paid into an interest bearing account in the name of the recipient. Interest earned on the grant must be used by the recipient in accordance with the funding plan and is accounted for in the acquittal process of any unused funds.

19. Grants are made on the basis of the approved hours of attendant care and must be used solely for the purpose of the pilot project. Where the grant is:

- not spent for approved purposes – that part of the grant is to be repaid to the Department; or
- not spent if the pilot project is made inactive or terminated – any unspent amounts are to be repaid to the Department.

20. The usual ACP is funded on a fixed hourly rate. This rate is adjusted each financial year. The hourly rate is set having considered award rates for care workers, salary on-costs, training costs, necessary insurance and associated administrative costs (including co-ordinator salaries or part salaries). The rate is intended to cover those costs and expenses and does not include a profit component. The grant paid under the pilot project will be this agreed hourly rate paid to all ACP service providers. The recipient may incur costs in excess of the grant however these will be at the recipient's own expense.

21. Recipients are required to maintain appropriate financial records and reports in respect of the grants. These records are to be maintained and be available for inspection by the Department as required.

22. It is intended that the pilot project will allow the recipients to have the option of obtaining care by either:

- engaging an eligible service organisation to provide the necessary attendant carer; or
- assuming employer responsibilities by engaging their own attendant carer to provide the necessary care. These responsibilities include the recruitment and training of staff and meeting legislative requirements including in respect of tax and superannuation.

23. The recipient is required to have workers compensation insurance where the recipient employs their own attendant carer directly. The recipient is advised to obtain adequate public liability insurance.

24. Nothing in the agreement is intended to create a partnership, joint venture or agency relationship between the Department and the recipient. In addition, the recipient is required not to hold themselves out as an employee, partner, agent or representative of the Department.

Ruling

25. The grants received from the Department do not form part of the recipient's assessable income under section 6-5 of the ITAA 1997.

26. The grants received from the Department are:

- not given or granted to the recipient for employment or services rendered under paragraph 26(e) of the ITAA 1936; and
- not assessable recoupments of the recipient under Subdivision 20-A of the ITAA 1997.

27. The interest earned on funds deposited into the interest bearing account specially maintained for the purposes of receiving the grant do not form part of the recipient's assessable income.

28. Any losses or outgoings incurred on the recipient's attendant care are not deductible under section 8-1 of the ITAA 1997 or any other provision of the ITAA 1997.

29. None of the amounts paid by the recipient on attendant care and in respect of which a grant has been received, are treated as rebatable amounts for the purposes of the medical expenses tax offset under section 159P of the ITAA 1997.

Appendix 1 – Explanation

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.

30. A payment or other benefit received by a taxpayer is assessable income if it is:

- income in the ordinary sense of the word (ordinary income); or
- an amount or benefit that through the operation of the provisions of the tax law is included in assessable income (statutory income).

Ordinary income

31. Under subsection 6-5(1) of the ITAA 1997 an amount is assessable income if it is income according to ordinary concepts (ordinary income).

32. In determining whether an amount is ordinary income, the courts have established the following principles:

- what receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as a statute dictates otherwise;
- whether the payment received is income depends upon a close examination of all relevant circumstances; and
- whether the payment received is income is an objective test.

33. Relevant factors in determining whether an amount is ordinary income include:

- whether the payment is the product of any employment, services rendered, or any business;
- the quality or character of the payment in the hands of the recipient;
- the form of the receipt, that is, whether it is received as a lump sum or periodically; and
- the motive of the person making the payment. Motive however, is rarely decisive as in many cases a mixture of motives may exist.

34. It is necessary to look at these factors in the context of the recipient's circumstances. The recipient is neither an employee of the Department nor receiving the payments in relation to the carrying on of a business. However whether the payments have been received for services rendered must be examined since payments to a taxpayer for services rendered are assessable income even though the taxpayer does not provide those services as an employee or in carrying on a business (*Brent v. Federal Commissioner of Taxation* (1971) 125 CLR 418; 71 ATC 4195; (1971) 2 ATR 563).

35. Although the recipient is arranging their own care, which is a service previously performed by the Department through the ACP, the recipient is not paid any amount for their time or to reward them for any services to the Department or others. The payments are made to the recipient for the sole purpose of allowing the recipients to engage suitable attendant carers and making payments to them.

36. Taxation Ruling TR 92/15 in discussing the difference between an allowance and a reimbursement, provides at paragraphs 3 and 4:

3. A payment is a reimbursement when the recipient is compensated exactly (meaning precisely, as opposed to approximately), whether wholly or partly, for an expense already incurred although not necessarily disbursed. In general, the provider considers the expense to be its own and the recipient incurs the expenditure on behalf of the provider. A requirement that the recipient vouch expenses lends weight to a presumption that a payment is a reimbursement. A requirement that the recipient refunds unexpended amounts to the provider of the funds adds further weight to that presumption.

4. The meaning of the word "reimburse" includes payments made in advance of expenditure as long as those payments possess the characteristics outlined in paragraph 3.

37. The payments to the recipient, based on an agreed hourly rate calculated by reference to expected expenses, are made in anticipation of the expenses expected to be incurred by the recipient. There is no intention to provide a gain or profit to the recipient. Despite the fact that the payments are received before the incurring of the expenses, the quality and character of the payment in the hands of the recipient is, on balance, in the nature of a reimbursement of the expenses.

38. Although the payments made to the recipients are made on a periodic basis, this is insufficient, by itself, to characterise those payments as income.

39. Given the discussion in paragraphs 31 to 38 of this Ruling it is considered that the payments received by the recipients do not possess the characteristics of ordinary income. As such the payments received are not income according to ordinary concepts and therefore are not assessable as ordinary income under section 6-5 of the ITAA 1997.

Statutory income

40. Section 6-10 of the ITAA 1997 includes in assessable income amounts that are not ordinary income. These amounts are called statutory income. A list of the statutory income provisions can be found in section 10-5 of the ITAA 1997. That list includes a reference to paragraph 26(e) of the ITAA 1936 and Subdivision 20-A of the ITAA 1997.

Employment or services rendered

41. Paragraph 26(e) of the ITAA 1936, provides that assessable income shall include:

... the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered ...

42. While the recipients are not employees of the Department, paragraph 26(e) of the ITAA 1936 also includes in assessable income those amounts which are paid in respect of 'services rendered'.

43. However, as discussed at paragraph 35 of this Ruling, the recipients do not receive the grants directly for services rendered either to the Department or to any other party. Likewise, there is no indirect connection between the payments and any services rendered. Therefore the payments to the recipients are not statutory income under paragraph 26(e) of the ITAA 1936.

Assessable recoupment

44. Subdivision 20-A of the ITAA 1997 operates to include in assessable income amounts received as recoupments of specified losses or outgoing allowed or allowable as deductions. As the grants are not being made by way of insurance or indemnity, the relevant provisions is subsection 20-20(3) of the ITAA 1997 which provides that an amount is an assessable recoupment of a loss or outgoing if a taxpayer:

- receives the amount (except by way of insurance or indemnity); and
- can deduct an amount for the loss or outgoing in the current year or has deducted or can deduct an amount for it in an earlier year under a provision listed in the tables at section 20-30 of the ITAA 1997.

45. As no deduction is allowable or would be allowable to the recipient in respect of the expenditure incurred for the attendant care (see paragraph 52 of this Ruling), the payments received by them from the Department are not assessable recoupments and therefore no amounts are included in their assessable income under Subdivision 20-A of the ITAA 1997.

Interest earned

46. In considering who is liable for tax on the interest earned on the interest bearing account maintained specially for receiving the grant, the essential question is: 'Whose money is it?'. It will be the taxpayer who has the beneficial entitlement to the money in the account who will be assessed on any interest earned (Taxation Determination TD 92/182).

47. There is a general presumption that the legal owner of a bank account will also be the beneficial owner, however this is a rebuttable presumption (Taxation Determination TD 92/106). Therefore we need to look at whether there is evidence to indicate that the recipient does not have the beneficial ownership in the money in the account.

48. Beneficial ownership has been held to mean the right to deal with property as one's own, free of any contractual obligations in respect of it (*Woods Preservation Ltd v. Prior (Inspector of Taxes)* [1969] 1 WLR 107). Further in *Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd* [1976] AC 167, Lord Diplock determined that beneficial ownership of property subsists in a person if the person can enjoy the fruits of the property himself or dispose of it for his own benefit.

49. The funding agreement between the Department and the recipient essentially is an agreement governing the spending of the money deposited into the account. Whilst the recipient is the legal owner of the money in the account their use of that money is governed and limited by this contractual arrangement they have with the Department. They can only spend the money for an approved purpose and any funds spent on a prohibited purpose, or remaining unspent, must be repaid by the recipient to the Department.

50. Interest earned on the interest bearing account is subject to the same limitations as the other funds deposited into the account. Any interest earned on the account is accounted for in the acquittal process with the Department.

51. The recipient does not have the right to deal with the money in the account as 'one's own, free of any contractual obligations' and further they are not able to enjoy the interest (the 'fruit' of the property) without similar limitations. Therefore, the interest does not form part of the assessable income of the recipient as they are not the beneficial owner of the money, including the interest, in the account.

General deductions

52. As the payments received by the recipients are not assessable as either ordinary or statutory income, the losses and outgoings that are incurred in connection with those payments are not allowable as deductions under section 8-1 of the ITAA 1997 or any other provisions of the ITAA 1997. Consequently, expenses incurred by the recipient in acquiring their attendant care services in accordance with the funding agreement are not deductible.

Medical expenses tax offset

53. Section 159P of the ITAA 1936 provides that an amount paid by a taxpayer as medical expenses less any amount paid, or entitled to be paid, to the taxpayer or any other person in respect of those medical expenses, is a rebatable amount for the purposes of the medical expenses tax offset.

54. Medical expenses include payments:

- to a legally qualified medical practitioner, nurse or chemist, or a public or private hospital, in respect of an illness or operation;
- for therapeutic treatment administered by direction of a legally qualified medical practitioner; and
- made as remuneration of a person for services rendered by him as an attendant of a person who is blind or permanently confined to a bed or invalid chair.

55. The payments made by the recipient may qualify as medical expenses. However those expenses must be reduced by any payment received or receivable in respect of the expenses to determine the rebatable amount. As the recipient will receive a grant from the Department under the pilot project in respect of these expenses there will be no amount which can be treated as a rebatable amount for the purposes of the medical expenses tax offset.

Employer obligations

56. Where the recipient exercises the option to employ an attendant carer directly, the recipient will be required to register as an employer, withhold tax from payments made to the attendant carer and to meet any superannuation guarantee requirements in force at the time.

Appendix 2 – Detailed contents list

57. 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 92/15; TD 92/106; TD 92/182

Subject references:

- allowances vs. reimbursements
- assessable income
- assessable recoupments
- deductions & expenses
- disabled care expenses
- income
- medical expenses
- medical expenses rebates
- rebates and offsets

Legislative references:

- ITAA 1936 26(e)
- ITAA 1936 159P
- ITAA 1997 6-5
- ITAA 1997 6-5(1)

- ITAA 1997 6-10

- ITAA 1997 8-1

- ITAA 1997 10-5

- ITAA 1997 Subdiv 20-A

- ITAA 1997 20-20(3)

- ITAA 1997 20-30

- TAA 1953

- TAA 1953 Sch 1 357-75(1)

- Copyright Act 1968

Case references:

- Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd [1976] AC 167

- Brent v. Federal Commissioner of Taxation (1971) 125 CLR 418; 71 ATC 4195; (1971) 2 ATR 563

- Woods Preservation Ltd v. Prior (Inspector of Taxes) [1969] 1 WLR 107

ATO references

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Income Tax ~~ Exempt income ~~ government payments
Income Tax ~~ Tax offsets, credits and benefits ~~ medical expenses tax offset ~~ calculation
Income Tax ~~ Deductions ~~ miscellaneous expenses