

CR 2007/68 - Income tax: Early Retirement Scheme - Hydro Aluminium Kurri Kurri Pty Ltd



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Class Ruling

Income tax: Early Retirement Scheme – Hydro Aluminium Kurri Kurri Pty Ltd

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ⓘ 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 (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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.

2. This Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for entities receiving payment under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met before relying on this Ruling.

Relevant provision(s)

3. The relevant provisions dealt with in this Ruling are:
- section 83-170 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 82-135 of the ITAA 1997; and
 - section 83-180 of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

4. The class of entities to which this Ruling applies is those employees of the Hydro Aluminium Kurri Kurri Pty Ltd who receive a payment under the scheme described in paragraphs 14 to 35 of this Ruling.

Qualifications

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

6. 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 14 to 35 of this Ruling.

7. 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

9. This Ruling applies from 25 July 2007 to 31 March 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

10. 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.

11. If this 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)).

12. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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.

13. 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

14. The following description of the scheme is based on information provided by the applicant.

15. Hydro Aluminium Kurri Kurri Pty Ltd (Hydro) is seeking approval for an early retirement scheme applying to employees of Hydro.

16. The scheme is known as Optional Retirement Payment Scheme Hydro Aluminium Kurri Kurri Smelter (the scheme).

17. The Hydro Smelter produces aluminium ingot, extrusion billets, and foundry alloy for customers predominantly in Australia, New Zealand, Asia and the United State of America. The product is mainly used for extrusion products (for example, car and component manufacturing, building products and light fittings) and foundry products.

18. Norske Hydro purchased the Smelter in 2002.

19. The purchase of the Smelter by Norsk Hydro resulted in a review of the business and identification of the key issues confronting the Smelter's future performance and position within the Hydro organisation.

20. The major challenge facing the Smelter is to maximise the production from the existing plant whilst improving the cost competitiveness of the business relative to competition in the major market segments, particularly in the Asian markets.

21. Hydro has developed a detailed strategy for improving efficiency and performance at Kurri Kurri in order to achieve the targets sought by the parent company. The strategy included capital improvements as well as efficiencies to be achieved through a consultative process involving the Kurri Kurri workforce and their union representatives.

22. These changes/improvements through the introduction of new equipment and technology, and the changing of work practices and work structures within its three main production units (Carbon Plant, Potrooms and Casting Plant) will enhance the ability of the Smelter to attract major capital investment from the parent company, thus potentially placing it in a better position to take advantage of future development opportunities.

23. The scheme has been established to facilitate workforce and organisation changes that will support productivity improvements at its Smelter and to further assist the competitive position of Hydro in both domestic and international markets.

24. Many of the older Operators are having difficulty in adapting to the newer technology and equipment, and the added pressure of work created by the continuing improvement in performance and production across the Smelter. It is proposed to replace a number of older employees with employees who can adapt to the new technology and equipment and the increasing pressure of work in a growing business.

25. All Production Operators who will turn 60 years of age in the 2007 Calendar year will be offered early retirement following approval of the scheme.

26. Employees will have three months to accept the offer.

27. An employee who accepts the offer would be paid an amount made up by the aggregate of:

- five (5) weeks pay at the employee's relevant annualised rate of pay under the Hydro Aluminium Enterprises Agreement (EBA), inclusive of any period of notice required under the EBA; plus
- an amount that is equivalent to the approved leave accrued (which replaces sick leave under the relevant award) as at the employee's date of termination, paid at the employee's base rate under the EBA.

28. All employees who retire under the scheme will receive the lump sum payment and terminate employment by no later than 31 March 2008.

Payments made under the Scheme

29. For a payment made under the above mentioned scheme to qualify as an early retirement scheme payment, the conditions set out in paragraphs 30 to 35 of this Ruling must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

30. The payment must be received by an employee because of their retirement under an early retirement scheme. The early retirement scheme payment will be so much of the payment that exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the retirement.

31. The payment must not be a payment mentioned in subsection 82-135 (apart from paragraph 82-135(e)).

32. The payment must not be made in lieu of superannuation benefits.

33. Where the employee and the employer are not dealing with each other at arm's length (for example, because they are related in some way) the payment does not exceed what would have been paid to the employee had they been dealing with each other at arm's length.

34. The employee must retire before the earlier of:

- age 65; or
- the date on which the employee's employment would have terminated under the terms of employment because of the employee attaining a certain age or completing a certain period of service (as the case may be).

35. At the time of the retirement, there is no arrangement in force between the employee and the employer, or between the employer and another person, to employ the employee after the retirement.

Ruling

36. The early retirement scheme to be implemented by Hydro is an early retirement scheme for the purposes of section 83-180.

37. Accordingly, so much of the payment received by an employee that exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the retirement will be an early retirement scheme payment.

38. In addition, so much of the early retirement scheme payment as falls within the threshold calculated in accordance with section 83-170 is not assessable income and is not exempt income.

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.*

39. Where a scheme satisfies the requirements of subsection 83-180(3) that scheme will be an 'early retirement scheme'.

40. 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 the former section 27E of the *Income Tax Assessment Act 1936*, which subsection 83-180(3) of the ITAA 1997 replaced from 1 July 2007.

41. Subsection 83-180(3) states that:

A scheme is an **early retirement scheme** if:

- (a) all the employer's employees who comprise such a class of employees as the Commissioner approves may participate in the scheme; and
- (b) the employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations by making any change to the employer's operations, or the nature of the work force, that the Commissioner approves; and
- (c) before the scheme is implemented, the Commissioner, by written instrument, approves the scheme as an early retirement scheme for the purposes of this section.

These three conditions are discussed below.

All employees within a class approved by the Commissioner may participate in the scheme

42. In order to satisfy the first condition, the scheme must be offered to all employees in a class approved by the Commissioner under paragraph 83-180(3)(a).

43. The class of employees to whom early retirement will be offered is set out in paragraph 25 of this Ruling.

44. The Commissioner considers that this is an appropriate class of persons for the scheme to be offered to. In approving this class of employees the Commissioner has considered the nature of the rationalisation or re-organisation of the operations of the employer. These employees meet the requirements of an approved class of employees for the purposes of paragraph 83-180(3)(a).

The employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations in a way approved by the Commissioner

45. The proposed scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer by making any change to the employer's operations, or the nature of the work-force, that the Commissioner approves.

46. Paragraphs 19 to 22 of this Ruling describe the nature of the rationalisation or re-organisation of Hydro's operations. The scheme is to be implemented with a view to rationalising or re-organising the operations or work-force of the employer by making the changes approved by the Commissioner.

The scheme must be approved by the Commissioner prior to its implementation

47. The scheme will operate from 25 July 2007 to 31 March 2008. Approval was granted prior to implementation therefore the third condition is satisfied.

48. The scheme will be in operation for approximately 9 months which is within the period recommended in TR 94/12.

Other relevant information

49. Under subsection 83-180(1) so much of the payment received by an employee because the employee retires under an early retirement scheme as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of termination is an early retirement scheme payment.

50. It should be noted that, in order for a payment to qualify as an early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 83-180(2), 83-180(5) and 83-180(6)):

- the retirement occurred before the employee turned age 65 or such earlier date on which the employee's employment would have terminated under the terms of employment because of the employee attaining a certain age or completing a particular period of service (as the case may be);
- if the employee and the employer are not dealing with each other at arm's length (for example because they are related in some way) the payment does not exceed the amount that could reasonably be expected to be made if the retirement was made at arm's length;

- at the time of retirement there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the retirement;
- the payment must not be made in lieu of superannuation benefits; and
- it is not a payment mentioned in section 82-135 (apart from paragraph 82-135(e)).

51. The term 'arrangement' is defined in subsection 995-1(1) as meaning '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'.

52. An early retirement scheme payment made on or after 1 July 2007 that falls within the specified limit is referred to as the 'tax-free' amount and will not be assessable income and will not be exempt income.

53. For the year ending 30 June 2008, this amount is limited to \$7,020 (base amount) plus \$3,511 (service amount) for each whole year of completed employment service to which the early retirement scheme payment relates. Please note that six months, eight months or even eleven months do not count as a whole year for the purposes of this calculation.

54. The total of the amount received on the termination of employment calculated in accordance with paragraph 27 of this Ruling may qualify as an early retirement scheme payment.

55. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 53 of this Ruling to determine the 'tax-free' amount of the early retirement scheme payment.

56. The 'tax-free' amount will:

- not be an employment termination payment; and
- not be able to be rolled-over into a superannuation fund.

57. Any payment in excess of this limit will be an employment termination payment and split up into tax free and taxable components. The tax free component of an employment termination payment includes the pre-July 83 segment of the payment. The tax free component is not assessable income and is not exempt income.

58. Employment termination payments cannot be rolled-over into a superannuation fund.

Appendix 2 – Detailed contents list

59. 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

Subject references:

- early retirement scheme payment
- employment termination payment

Legislative references:

- ITAA 1936 27E
- ITAA 1997 82-135
- ITAA 1997 82-135(e)

- ITAA 1997 83-170
- ITAA 1997 83-180
- ITAA 1997 83-180(1)
- ITAA 1997 83-180(2)
- ITAA 1997 83-180(3)
- ITAA 1997 83-180(3)(a)
- ITAA 1997 83-180(3)(b)
- ITAA 1997 83-180(3)(c)
- ITAA 1997 83-180(5)
- ITAA 1997 83-180(6)
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

ATO references

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