

CR 2009/27 - Income tax: payments under the Western Hardwoods Displaced Workers Assistance Scheme

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Class Ruling

Income tax: payments under the Western Hardwoods Displaced Workers Assistance Scheme

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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:

- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27B of the ITAA 1936;
- section 27F of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 82 of the ITAA 1997;
- section 83-175 of the ITAA 1997;
- section 103-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;

- section 110-40 of the ITAA 1997;
- section 110-45 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 115-25 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-37 of the ITAA 1997;
- Subdivision 118-B of the ITAA 1997;
- Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

All subsequent legislative references in this Ruling are to the ITAA 1997, unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is displaced timber workers who receive assistance under the Queensland Government's Western Hardwoods Displaced Workers Assistance Scheme (the Plan) described in the Scheme section at paragraphs 9 to 30 of this Ruling.
4. In this Ruling, a person belonging to this class of entities is referred to as an eligible worker.

Qualifications

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 30 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 24 November 2005 to 30 June 2009. The Ruling continues to apply after 30 June 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on the information provided by the applicant. The following document, or relevant parts of it form part of and are to be read with the description:

- The Queensland Government Western Hardwoods Displaced Workers Assistance Scheme – Operational Guidelines (the guidelines).

10. The Queensland government established the Plan to assist eligible workers who are displaced as the result of the impact of a reduction in Crown timber allocation on the viability of sawmills in the Western Hardwoods region.

11. The Plan was previously administered by the Queensland Department of State Development, Trade and Innovation and the Queensland Department of Tourism Regional Development and Industry. It is now administered by the Department of Employment, Economic Development and Innovation (the Department). The Plan is designed to help eligible workers resettle in new careers and jobs.

12. Assistance under the Plan is available to an eligible worker for a three year period from the date of dislocation/redundancy consistent with the business buy-back agreement between the Queensland government and the owner of the sawmill from which the eligible worker is displaced.

13. Applications for assistance are submitted through the employment services manager to the Department for determination.

14. Eligible workers are displaced timber workers in the Western Hardwoods region who were:

- permanent workers, and
- casual workers who have been notified by the manager of their eligibility for certain payments under the Plan.

15. The guidelines explain the types of assistance available to eligible workers under the Plan. These are:

- dislocation assistance;
- training assistance;
- job placement assistance;
- relocation assistance;
- mortgage or rental assistance;
- house sale and purchase transaction costs reimbursement;
- income supplementation; and
- incentive to transfer to the fibre composites industry.

Dislocation assistance

16. Eligible workers are entitled to dislocation assistance under the Plan as a once only lump sum payment.

17. The payment is based on the 2000 Queensland Forest Industry Development and Adjustment Program Employee Support Scheme Model, adjusted by the Consumer Price Index, and calculated based on the average number of full-time equivalent weeks the eligible worker has worked per annum.

Training assistance

18. Vocational training assistance to a maximum of \$3,500 is available for eligible workers to undertake training linked to skills in demand and skills that will help in securing employment. For instance, the training can be undertaken to meet a demand in the immediate locality or in an area to which the eligible worker intends to relocate, or may arise from a verifiable offer of employment with the condition that training is successfully completed. The payments are made on behalf of the eligible worker to suppliers of the training, including departments of technical and further education (TAFEs) or training academies.

Job placement assistance

19. Job placement assistance is available up to a maximum of \$1,200 to assist an eligible worker obtain alternative employment through either job search training or active job search assistance. The assistance may be provided for resume preparation, skills recognition or assessment, licensing, and financial and professional counselling. The assistance is provided in the same way as training assistance and is paid directly to the supplier of the services to the eligible worker.

Relocation assistance

20. Relocation assistance is available to an eligible worker who obtains new employment more than 100km from their current residence.

21. The costs for approved expenses incurred in relocating are payable to a maximum value of \$2,300 per eligible worker. Approved expenses include the cost of relocating furniture and other chattels, including insurance, and travel costs. Travel costs include those incurred using the eligible worker's own vehicle, or by rail or bus. The payment is available either as a direct payment to a supplier on behalf of the eligible worker (such as a furniture removalist), or to the eligible worker as a reimbursement of costs incurred.

Mortgage or rental assistance

22. Where eligible workers who were employed on a permanent basis relocate to take up new employment, they are eligible to receive payments as reimbursement for mortgage or rental payments they incur up to the value of \$17,300.

23. This assistance is paid to an eligible worker usually on a monthly or fortnightly basis, and is available for up to 3 years.

24. The objective of mortgage or rental assistance payments under the Plan is to ensure that either mortgage or rent payments are not greater than 30% of the eligible worker's gross household income after relocation has occurred.

House sale and purchase transaction costs reimbursement

25. An eligible worker who sells an existing house because they are relocating to obtain a new job is entitled to receive a maximum of \$5,800 for reimbursement of costs associated with the sale of their existing home, such as advertising, conveyancing and agent's commission.

26. An eligible worker who buys a new house in order to relocate to obtain a new job is entitled to receive a maximum of \$11,500 towards the costs of purchasing a new home, such as stamp duty, search fees and legal costs.

Income supplementation

27. Income supplementation is available for up to the equivalent of 52 weeks ordinary time wages to eligible workers who were permanent workers, and who:

- are enrolled in approved training, or
- take up employment that is paid at a lesser level than the final ordinary time wages applicable in the job they held prior to the displacement, or
- are actively seeking a job and are temporarily unable to be placed in alternative employment or approved training.

Incentive to transfer to the fibre composites industry

28. A one-off incentive payment of up to \$3,400 is offered to eligible workers transferring to available positions within the fibre composites industry, where no assistance is otherwise provided under the Plan by way of training, employer wage subsidy (see paragraph 29 of this Ruling) or job placement.

Payments to third party providers

29. Payments may be made by the Queensland government under the Plan to third party providers of benefits to eligible workers including:

- job placement assistance;
- training assistance;
- relocation assistance paid to suppliers; and
- employer wage subsidies (a new employer of an eligible worker may apply directly to the Department for this subsidy).

30. This Ruling deals with the taxation treatment for eligible workers who may be deemed to have received such third party payments under the Plan. This Ruling does not consider the taxation treatment for direct recipients (third party providers) of such payments under the Plan.

Ruling

Dislocation assistance

Eligible termination payment and employment termination payment

31. Dislocation assistance paid prior to 1 July 2007 satisfies the definition of an eligible termination payment (ETP) in subsection 27A(1) of the ITAA 1936. This payment is assessable to eligible workers under section 27B of the ITAA 1936, but only to the extent that it is not a tax-free bona fide redundancy payment, in accordance with paragraph 27A(1)(ja) of the definition of ETP.

32. Dislocation assistance paid on or after 1 July 2007 satisfies the definition of an employment termination payment in Division 82. This payment is assessable to eligible workers under subsection 82-10(2) to the extent that it comprises a taxable component and that it is not a tax-free genuine redundancy payment, in accordance with paragraph 82-135(e).

Ordinary income

33. Dislocation assistance received by an eligible worker is not included in assessable income as ordinary income under section 6-5.

Capital gains tax

34. Any capital gain made when an eligible worker receives a payment for dislocation assistance is reduced to nil under section 118-20.

Relocation assistance paid directly to eligible workers

ETP and employment termination payment

35. A payment made to an eligible worker under the Plan as relocation assistance is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

36. A payment made to an eligible worker under the Plan as relocation assistance is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

37. CGT event C2 under section 104-25 happens when an eligible worker's entitlement to receive relocation assistance is satisfied.

38. However, any capital gain or capital loss made by an eligible worker as a result of receiving relocation assistance is disregarded under paragraph 118-37(2)(a).

Mortgage or rental assistance

ETP and employment termination payment

39. A payment made to an eligible worker under the Plan for mortgage or rental assistance is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

40. A payment made to an eligible worker under the Plan for mortgage or rental assistance is income according to ordinary concepts and is included in assessable income under section 6-5 in the income year in which it is received by the eligible worker.

Capital gains tax

41. Any capital gain made as a result of receiving mortgage or rental assistance is reduced to nil under section 118-20 as the amount is included in the eligible worker's assessable income.

42. The receipt of mortgage assistance has no capital gains tax (CGT) consequences for the cost base or reduced cost base of the house as the payment is included in the eligible worker's assessable income (subsections 110-40(3), 110-45(3) or 110-55(6)).

House sale and purchase transaction costs reimbursement

ETP and employment termination payment

43. A payment made to an eligible worker under the Plan as reimbursement for costs associated with the sale or purchase of a house is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

44. A payment made to an eligible worker under the Plan as reimbursement for costs associated with the sale or purchase of a house is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

45. Where the reimbursement relates to costs that would be included in the cost base of the house (a CGT asset), it is a recoupment of those costs. Therefore, those costs will not form part of the cost base of either the existing house that is sold or the new house that is purchased.

46. However, any capital gain or capital loss made on disposal of the existing house may be disregarded if the main residence exemption in Subdivision 118-B is satisfied.

47. If any part of the reimbursement relates to costs that would not be included in the cost base or reduced cost base of the house, CGT event C2 happens under section 104-25 with respect to the right to receive this part of the payment. However, any capital gain or loss made as a result of receiving the reimbursement is disregarded under paragraph 118-37(2)(a).

Income supplementation***ETP and employment termination payment***

48. A payment made to an eligible worker under the Plan as income supplementation is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

49. A payment made to an eligible worker under the Plan as income supplementation is income according to ordinary concepts and is included in assessable income under section 6-5 in the income year in which it is received by the eligible worker.

Capital gains tax

50. Any capital gain made when an eligible worker receives a payment for income supplementation is reduced to nil under section 118-20.

Incentive to transfer to the fibre composites industry***ETP and employment termination payment***

51. A payment made to an eligible worker under the Plan as an incentive to transfer to the fibre composites industry is not an ETP under subsection 27A(1) of the ITAA 1936 or an employment termination payment under Division 82 of the ITAA 1997.

Ordinary income

52. A payment made to an eligible worker under the Plan as an incentive to transfer to the fibre composites industry is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

53. CGT event C2 under section 104-25 happens when an eligible worker's entitlement to receive the payment is satisfied.

54. The amount of the incentive received by the eligible worker is the capital proceeds from the event. The eligible worker will make a capital gain if the capital proceeds are more than the cost base of the right to receive the payment (subsection 104-25(3)). Although the eligible worker did not incur expenditure to acquire the right to receive the incentive, there is no market value substitution for the first element of its cost base (subparagraph 112-20(1)(a)(i)).

55. The capital gain is not a discount capital gain where the eligible worker received the incentive payment within 12 months of acquiring the entitlement to the payment on approval of their application (subsection 115-25(1)).

Payments to third party providers

ETP and employment termination payment

56. Payments made to third party providers of benefits to eligible workers under the Plan (which includes job placement and training assistance payments, relocation assistance paid directly to suppliers and employer wage subsidies) are prima facie capable of being considered to be either bona fide redundancy payments under section 27F of the ITAA 1936 or genuine redundancy payments under section 83-175 of the ITAA 1997 in respect of an eligible worker.

57. However, the causal connection between the termination of an eligible worker's former employment and the payment to a third party provider of benefits under the Plan is considered too weak for the payment to be characterised as a payment made in consequence of termination of employment of an eligible worker.

Fringe benefits tax

58. Payments made to third party providers of benefits to eligible workers under the Plan (which includes job placement and training assistance payments, relocation assistance paid directly to suppliers and employer wage subsidies) and the provision of such benefits by the third party providers will not result in an eligible worker having a reportable fringe benefit amount for the purposes of Part XIB of the FBTAA.

Ordinary income*Training, job placement and relocation assistance*

59. When a payment is made to a third party supplier on behalf of an eligible worker for the provision of training, job placement or relocation assistance, the payment is not income of the eligible worker according to ordinary concepts and is not included in the eligible worker's assessable income under section 6-5.

Capital gains tax*Training, job placement and relocation assistance*

60. CGT event C2 happens under section 104-25 when an eligible worker's entitlement to receive training, job placement or relocation assistance is satisfied.

61. When a payment is made to a third party supplier on behalf of the eligible worker, the CGT provisions apply as if the eligible worker has received the amount (subsection 103-10(1)). However, as the payment is made as a payment for the eligible worker's expenses, any capital gain made as a result of receiving the payment is disregarded under paragraph 118-37(2)(a).

Commissioner of Taxation27 May 2009

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.***

Background

62. In arriving at the decisions in this Ruling the Commissioner has considered whether the payments made to eligible workers under the Plan are:

- reportable fringe benefit amounts;
- ETPs or employment termination payments
- assessable as ordinary income;
- subject to the capital gains tax provisions.

Fringe benefits tax

63. The definition of ‘benefit’ in subsection 136(1) of the FBTA includes any right, privilege, service or facility. Therefore, payments made to third party providers of benefits to eligible workers under the Plan (which includes job placement, training assistance and relocation assistance payments and employer wage subsidies) and the provision of such benefits by the third party providers comes within the definition of a benefit for the purposes of the FBTA.

64. The definition of a fringe benefit is also contained in subsection 136(1) of the FBTA and requires, amongst other things, that in order for a benefit to be a fringe benefit, the benefit is provided in respect of the employment of the employee (the employment connection test).

Payments to third party providers

65. For payments made to third party providers of benefits to eligible workers under the Plan and the provision of such benefits by the third party providers, to come within the definition of a fringe benefit, the primary criterion that must be satisfied is the employment connection test.

66. The term ‘in respect of employment’ has been considered by the courts on numerous occasions. In *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation*¹ the full Federal Court examined the definition of fringe benefit and noted that:

...Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment...

¹ [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22.

67. The following are considered to be material reasons that explain the benefits provided to eligible workers under the Plan, namely:

- they are a result of personal (that is, non-employment) contractual relationships between the Queensland government and the eligible workers;
- they do not have a connection with any previous employment, but rather are provided in respect of their circumstances following the loss of employment; and
- they are made to assist eligible (displaced) workers obtain other employment.

68. Therefore, the Commissioner considers that the benefits provided to an eligible worker under the Plan do not have a sufficient or material connection with any employment of the eligible worker to fall within the definition of a fringe benefit for the purposes of the FBTA.

69. Consequently, an eligible worker will not have a reportable fringe benefit amount in relation to such benefits provided under the Plan for the purposes of Part XIB of the FBTA.

ETP and employment termination payment

70. Before 1 July 2007 payments made in consequence of termination were a particular kind of ETP unless there was a specific taxing provision, such as for unused leave.

71. From 1 July 2007 payments made in consequence of termination are either employment termination payments or genuine redundancy payments, unless there is a specific taxing provision. To the extent that a genuine redundancy payment is not tax-free it is also an employment termination payment.

72. At paragraph 5 of Taxation Ruling TR 2003/13 the Commissioner took the following view in relation to whether a payment was made in consequence of termination and was therefore an ETP:

The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. Whilst there are divergent views as to the correct interpretation of the phrase, the Commissioner considers that a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer.

73. This is the initial test to be applied to any particular facts. Would the payment have been made but for the termination of employment?

74. However, there remains a question as to the degree of connection between the termination and the payment in determining whether a payment is made 'in consequence' of termination, as stated at paragraph 6 of TR 2003/13:

The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

75. While the connection need not be dominant it can still be too weak for the payment to qualify as an ETP. As stated at paragraph 6 of TR 2003/13, a determination as to the degree of connection between a payment and a termination is a question of fact in each case.

76. The Commissioner goes on to state at paragraph 7 of TR 2003/13 that a payment made a long time after a termination may be 'too remote' to be considered to be made in consequence of termination. Another circumstance where a payment would not be in consequence of termination is where there is an 'intervening event', such as the obtaining of a right to commute a pension after the termination of employment.

77. While TR 2003/13 applies to ETPs it is substantially about the concept of 'in consequence of termination'. This terminology has carried over into Division 82 which deals with employment termination payments and Division 83, which deals with, among other payments, genuine redundancy payments.

All payments other than dislocation assistance

Payments to third party providers

78. In the case of all the other payments they would not have been made but for the termination. However, each payment is primarily contingent on satisfying certain conditions. The satisfying of these conditions constitutes the substantial reason for the payment and the termination is too weak a cause of the payment for the payment to be considered to be made in consequence of termination.

79. All of the payments require undertaking something, such as purchasing a house or engaging in new employment, for the relevant payment to be triggered. It is not until after the termination that this occurs and the various decisions involved, to relocate, to be retrained, to purchase a house, are effectively intervening events between the termination and the relevant payments, that makes the termination too remote from the payment for the payment to be in consequence of the termination.

80. In the case of training assistance, the eligible worker is required to have undertaken training assistance with approved training providers before the training assistance becomes payable.

81. With the job placement assistance, the eligible worker must access the relevant services before the job placement assistance becomes payable.

82. The employer wage subsidy is paid to the new employer for employing an eligible worker. Thus, the eligible worker must obtain new employment before the subsidy is paid.

83. In order for the relocation assistance to be paid, the eligible worker must obtain new employment more than 100km from the worker's current residence.

Payments to eligible workers

84. In order to receive the mortgage or rental assistance, the eligible worker must relocate to engage in new employment. The rent or mortgage payments then required must be greater than 30% of the gross household income for the worker to be entitled.

85. In order to receive the house sale and purchase transaction cost reimbursement, the eligible worker must incur the cost of selling or purchasing a house.

86. An eligible worker is entitled to income supplementation for 52 weeks if the eligible worker takes up employment that is paid at a lower level than the final ordinary time wages applicable in the job they held prior to their dislocation.

87. An eligible worker must choose to work in the fibre composites industry to become entitled to a payment for working in that industry.

Dislocation assistance

ETP and employment termination payment

88. In the case of dislocation assistance, the payment is not or will not have been made but for the termination. The right to receive the payment arises on termination and there are no other conditions for the payment to be made other than termination from the particular employment covered by the Plan. Therefore, such payments are ETPs unless and to the extent that they are tax-free bona fide redundancy payments.

89. They may also be employment termination payments, unless and to the extent that they are tax-free genuine redundancy payments, if the payments are made after 1 July 2007.

90. Whether the payments are either bona fide redundancy payments or genuine redundancy payments depends on the circumstances for each individual payee.

91. The fundamental requirement for redundancy is that there should be a dismissal from employment and that the position of the employee is redundant.

92. The qualifying conditions for both bona fide and genuine redundancy payments are:

- The employee is dismissed before the earlier of the day he or she turned 65, or
- If the employee's employment would have terminated before he or she reached a particular age or completed a particular period of service, the day he or she would have reached that age or completed that period of service.
- If the dismissal was not at arm's length – the payment does not exceed an amount reasonably expected if it were at arm's length.
- At the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the dismissal.

93. Also, to the extent that the payment includes a part in lieu of superannuation benefits that part is not a redundancy payment.

94. If the qualifying conditions and the fundamental requirements are met then it remains for the amount that could reasonably be expected on voluntary termination to be excluded.

95. As the tax treatment of these payments depends on the individual circumstances, clarification should be sought by way of a private ruling.

Ordinary income

96. To the extent that a payment received is a tax-free bona fide redundancy payment or a tax-free genuine redundancy payment it cannot be included in assessable income.

97. To the extent that the dislocation assistance is an ETP or employment termination payment and not a tax-free bona fide redundancy payment or genuine redundancy payment it is included in assessable income under either section 27B of the ITAA 1936 or subsection 82-10(2) of the ITAA 1997 (as set out in paragraphs 31 and 32 of this Ruling).

98. The Commissioner considers that such payments received by an eligible worker will not be included in assessable income under section 6-5 by virtue of the operation of section 6-25.

Capital gains tax

99. An eligible worker's entitlement to receive dislocation assistance is a CGT asset under subsection 108-5(1) that is acquired when the application for the assistance is approved.

100. CGT event C2 happens under section 104-25 when an eligible worker's entitlement to receive dislocation assistance is satisfied. The time of the CGT event under subsection 104-25(2) is when the assistance is paid.

101. However, any capital gain made from the CGT event is reduced under section 118-20. Subsection 118-20(1) reduces a capital gain by an amount that is included in assessable or exempt income. Subsection 118-20(4) reduces a capital gain by an amount of ordinary or statutory income that is treated as non-assessable non-exempt income.

102. The dislocation allowance is either assessable income, or exempt income or non-assessable non-exempt income, depending on whether or not it was paid before 1 July 2007. Therefore, any capital gain is reduced to zero under section 118-20.

Relocation assistance paid directly to eligible workers

Ordinary income

103. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). The legislation does not provide specific guidance on the meaning of ordinary income. However, a substantial body of case law exists which identifies likely characteristics.

104. Whether or not a particular receipt is ordinary income, depends on its character in the hands of the recipient (refer *Scott v. Federal Commissioner of Taxation*,² *Hayes v. Federal Commissioner of Taxation*,³ *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation*).⁴

105. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,⁵ the Full High Court stated:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

106. In the circumstance where an eligible employee receives the relocation assistance directly, it is accepted that whilst in each instance the recipients are former employees of a particular entity, the payments received under the Plan are not considered to be a product of employment, services or business.

² (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293.

³ (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73.

⁴ (1977) 34 FLR 375 at 402; (1977) 7 ATR 519 at 539.

⁵ (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1.

107. Therefore, it is also appropriate to consider the following points made in various High Court cases in relation to the types of payment that can generally be characterised as voluntary payments.

*Federal Commissioner of Taxation v. Dixon*⁶

108. In this case the court considered the form of the receipt, that is, whether it is received as a lump sum or periodically, to be a relevant factor for consideration. The court found that the fact that the patriotic top-up payments were regular and periodic was important, though not decisive, in concluding that those payments were assessable income. An important factor in determining that the receipts were ordinary income was that the taxpayer relied to some extent on the amount he received from his previous employer and that he had confidence that the payments would continue on a periodic basis to supplement his income as a soldier. The court also held that the payments were made in substitution for the salary and wages the taxpayer would have earned had he not enlisted. The payment accordingly acquired the characteristics of the payment for which it was substituted.

*Scott v. Federal Commissioner of Taxation*⁷

109. In this case, the court said that while the motives of the donor do not determine the answer, they are a relevant circumstance for consideration. The court held that the payment was given to the taxpayer by the donor as a gift and was not assessable income of the taxpayer.

*Hayes v. Federal Commissioner of Taxation*⁸

110. In this case, the court held that shares given to an accountant by a former employer were not assessable as income because 'it was impossible to point to any employment or personal exertion of which the receipt of the shares was in any real sense an incident, or which can fairly be said to have produced the receipt'.

111. Where relocation assistance is received by an eligible worker under the Plan, the concepts of ordinary income developed by the courts over time can be applied:

- relocation assistance is not paid as any form of substitution for what would be income of the eligible worker;
- payments are made to reimburse the eligible worker for approved (capital) relocation expenses they incur and are not paid on a periodic or recurring basis; and

⁶ (1952) 86 CLR 540; (1952) 10 ATD 82.

⁷ (1966) 117 CLR 514; (1966) 14 ATD 286.

⁸ (1956) 96 CLR 47; (1956) 11 ATD 68.

- payments are made to the eligible worker by the Queensland government and are not connected with any employment relationship or the provision of services by the eligible worker.

112. Therefore, the Commissioner considers that any relocation assistance payment received by an eligible worker does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

113. An eligible worker's entitlement to receive relocation assistance is a CGT asset under subsection 108-5(1). The entitlement is acquired when the eligible worker's application is approved.

114. CGT event C2 happens under section 104-25 when an eligible worker's entitlement to receive relocation assistance is satisfied.

115. However, any capital gain or capital loss resulting from CGT event C2 is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The Western Hardwoods Displaced Workers Assistance Scheme is such a scheme.

Mortgage or rental assistance

Ordinary income

116. Applying the characteristics of ordinary income, discussed in paragraphs 104 to 110 of this Ruling, to mortgage or rental assistance payments received by an eligible worker under the Plan:

- the payments are designed to provide financial support in the form of periodical, regular and recurrent payments. The payments provide financial support for regular living expenses and may be paid to an eligible worker on a monthly or fortnightly basis for up to a maximum of 3 years;
- the payments supplement the income of the eligible worker in that they are designed to ensure that mortgage or rental expenses are not greater than 30% of the eligible worker's gross household income. In addition, they are directly related to current and former income levels; and
- it is considered that an eligible worker would rely on these payments in meeting their regular household expenditure for as long as they are eligible to receive them.

117. Therefore, the Commissioner considers that the mortgage or rental assistance payments received by an eligible worker under the Plan possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

118. The eligible worker's entitlement to receive mortgage or rental assistance is a CGT asset under subsection 108-5(1). When that entitlement is satisfied by receipt of the assistance, CGT event C2 happens under section 104-25.

119. However, any gain that arises from the CGT event is reduced to nil under section 118-20 because the payment is included in the assessable income of the eligible worker.

120. To the extent that the mortgage assistance relates to expenditure that is included in the cost base or reduced cost base of the house, it is recoupment of that expenditure.

121. Although expenditure that is recouped is excluded from the cost base of a CGT asset under subsections 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), an exception applies where the recoupment is included in assessable income. Consequently, there are no consequences for the cost base or reduced cost base of the house.

House sale and purchase transaction costs reimbursement

Ordinary income

122. Applying the characteristics of ordinary income, discussed in paragraphs 104 to 110 of this Ruling, to house sale and purchase costs reimbursement received by an eligible worker under the Plan:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- the payments are made as a reimbursement for approved house sale and purchase transaction costs (capital expenditure) and are not made on a periodic or recurring basis; and
- the payments are made to the eligible worker by the Queensland government and are not connected with any employment relationship or the provision of services by the eligible worker.

123. Therefore, the Commissioner considers that any house sale and purchase costs reimbursement received by an eligible worker under the Plan does not possess the characteristics of ordinary income and is not assessable to the worker under section 6-5.

Capital gains tax

124. Costs incurred in selling a house may be included in the second element of cost base of the house under subsection 110-25(3). Similarly, costs incurred in purchasing a new house may be included in the second element of the cost base of that house under that provision. The types of incidental costs that may be included are set out in section 110-35.

125. However, to the extent that an eligible worker receives a payment as a reimbursement of those costs, the amount received is a recoupment of the expenditure incurred.

126. Expenditure that is recouped is excluded from the cost base of a CGT asset under subsections 110-40(3) or 110-45(3), or its reduced cost base under subsection 110-55(6), except where the recoupment is included in assessable income.

127. In this case, the reimbursement is not included in assessable income, and therefore the expenditure incurred is excluded from the cost base of the house.

128. However, depending on the individual circumstances of each eligible worker, the CGT exemption for main residence in Subdivision 118-B may apply to disregard any capital gain or loss made on disposal of the house.

Income supplementation***Ordinary income***

129. Applying the characteristics of ordinary income, discussed in paragraphs 104 to 110 of this Ruling, to the income supplementation payments received by eligible workers under the Plan:

- the character of the payments in the hands of the eligible worker is periodic and recurrent;
- the eligible worker can rely on the payments for a maximum period of 52 weeks; and
- the payments are a substitution for income the eligible worker received prior to being displaced.

130. Therefore, the Commissioner considers that the income supplementation payments received by an eligible worker under the Plan possess the characteristics of ordinary income and, as such, are assessable to the eligible worker under section 6-5.

Capital gains tax

131. An eligible worker's entitlement to receive an income support payment is a CGT asset under subsection 108-5(1). CGT event C2 happens under section 104-25 when the entitlement to receive the income support payment is satisfied.

132. As the payment is included in assessable income under section 6-5, any capital gain made from CGT event C2 is reduced to nil under section 118-20. This provision reduces any capital gain to the extent that the amount received is otherwise included in assessable income.

Incentive to transfer to the fibre composites industry

Ordinary income

133. Applying the characteristics of ordinary income, discussed in paragraphs 104 to 110 of this Ruling, to the incentive payment received by eligible workers under the Plan:

- the incentive payment is not paid on a periodic or recurring basis. It is a one-off payment;
- the incentive payment is not paid as any form of substitution for what would be income of the eligible worker;
- the incentive payment is made to the eligible worker by the Queensland government and is not connected with any employment relationship or the provision of services by the worker.

134. Therefore, the Commissioner considers that an incentive payment received by an eligible worker under the Plan does not possess the characteristics of ordinary income and is not assessable to the eligible worker under section 6-5.

Capital gains tax

135. An eligible worker's entitlement to receive an incentive payment is a CGT asset under subsection 108-5(1). The entitlement is acquired when the eligible worker's application is approved.

136. CGT event C2 happens under section 104-25 when an eligible worker's entitlement to receive the incentive payment under the Plan is satisfied. The time of the CGT event under subsection 104-25(2) is when the payment is made.

137. A capital gain is made if the capital proceeds exceed the cost base of the entitlement, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).⁹

138. The capital proceeds from CGT event C2 is the amount received by the eligible worker as an incentive payment (paragraph 116-20(1)(a)).

⁹ As the incentive payment is not received by the eligible worker as a reimbursement or payment of expenses, the exemption under paragraph 118-37(2)(a) does not apply.

139. The cost base of the entitlement is calculated under Divisions 110 and 112. Although the eligible worker did not incur expenditure to acquire the entitlement to assistance, there is no market value substitution for the first element of the cost base under subsection 112-20(1). This is because the entitlement was created in the eligible worker by the Department. Therefore, the eligible worker acquired the entitlement as a result of CGT event D1 happening, and the exclusion in subparagraph 112-20(1)(a)(i) applies.

140. The second element of the cost base includes any costs of applying for the assistance.

141. The cost base is reduced by any amount that is a deductible expense (for example subsection 110-45(1B)).

142. Where the entitlement to receive the incentive was not acquired by the eligible worker at least 12 months before CGT event C2 happened, the capital gain cannot be a discount capital gain (subsection 115-25(1)).

Training, job placement and relocation assistance

Ordinary income

143. Applying the characteristics of ordinary income, discussed in paragraphs 104 to 110 of this Ruling, to payments to a third party supplier for the provision of training, job placement or relocation assistance to an eligible worker under the Plan:

- the payments are not made as any form of substitution for what would be income of the eligible worker;
- the payments are not made on a periodic or recurring basis; and
- the payments made to a third party supplier by the Queensland government are not connected with any employment relationship or the provision of services by the eligible worker.

Therefore, the Commissioner considers that any payments to a third party supplier for the provision of training, job placement or relocation assistance to an eligible worker under the Plan do not possess the characteristics of ordinary income and are not assessable to the worker under section 6-5.

Capital gains tax

144. An eligible worker's entitlement to receive training, job placement or relocation assistance is a CGT asset under subsection 108-5(1) that is acquired when their application is approved.

145. When the assistance is paid to a supplier, CGT event C2 happens under section 104-25. At that time, the eligible worker's entitlement to have the assistance paid is satisfied.

146. The amount paid to a supplier on behalf of the eligible worker for training, job placement services or relocation expenses represents the capital proceeds for CGT event C2. Under subsection 103-10(1), the CGT provisions apply as if the eligible worker received this amount.

147. However, as the payment is made for the eligible worker's expenses, any capital gain resulting from CGT event C2 is disregarded under paragraph 118-37(2)(a). This provision provides a CGT exemption for a capital gain or capital loss that results from the receipt of a payment as reimbursement or payment of expenses under a scheme established by an Australian government agency under an enactment. The Western Hardwoods Displaced Workers Assistance Scheme is such a scheme.

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Previous draft:

Not previously issued as a draft

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TR 2003/13; TR 2006/10

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- eligible termination payments
- employment relationship
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- genuine redundancy payment
- ordinary income

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