

CR 2009/50 - Income tax: Department of Human Services (Vic) Disability Support Direct Payments Project

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Class Ruling

Income tax: Department of Human Services (Vic) Disability Support Direct Payments Project

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1 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, 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 159P of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 15-2 of the ITAA 1997; and
- Subdivision 20-A of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is:
- disabled persons receiving disability care services funded by the Department of Human Services (Vic) (the Department); and
 - nominated persons as defined in the Individual Support Package Handbook (Interim) Direct Payments Supplement,

who enter into an agreement with the Department to receive payments for the purpose of purchasing disability services under the Direct Payments Project. In this Ruling these persons are referred to as 'direct payments users'.

4. However, this Ruling does **not** apply to direct payments users who establish or use a legal entity to employ support workers to deliver the disability care services.

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 11 to 31 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 1 January 2009. 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).

Previous Rulings

10. This Ruling replaces Class Ruling CR 2006/84 Income tax: Department of Human Services (Vic) Disability Support Direct Payment Plan. CR 2006/84 is withdrawn with effect from 16 September 2009.

Scheme

11. 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 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:

- Class Ruling application dated 23 January 2009, and the Direct Payments and Direct Employment information sheet;
- Disability Services Individual Support Package Handbook (Interim) December 2008;
- Individual Support Package Handbook (Interim) Direct Payments Supplement dated 8 January 2009;
- Individual Support Package Handbook (Interim) Direct Payments Supplement (Direct Employment Project) Draft dated 16 February 2009;
- Pro forma Direct Payments Deed of Agreement;
- Victorian State Disability Plan 2002-2012;
- Class Ruling CR 2006/84 Income tax: Department of Human Services (Vic) Disability Support Direct Payment Plan; and
- *Disability Act 2006* (Vic) (Disability Act).

12. The Disability Act provides the legislative basis for the funding of Individual Support Packages for persons with a disability.

13. Section 4 of the Disability Act sets out the objectives. They include:

- advancing the inclusion and participation in the community of persons with a disability;
- facilitating the planning, funding and provision of services;
- programs and initiatives for persons with a disability; and
- supporting the provision of high quality disability services.

14. As relevant, subsection 8(1) of the Disability Act provides that the Secretary of the Department of Human Services is responsible for:

- planning, developing, providing and funding or purchasing comprehensive services, programs and initiatives for persons with a disability; and
- providing and funding programs and initiatives that facilitate persons with a disability exercising their rights and meeting their responsibilities in the community.

15. Section 52 of the Disability Act provides guiding principles for planning. These include recognising the right of the person with a disability to exercise control over their own life, and facilitating tailored and flexible responses to the individual goals and needs of the disabled person.

16. Section 54 of the Disability Act specifies that if a person is receiving on-going disability services, a support plan identifying the disability services being provided to that person must be prepared within 60 days of the person commencing to regularly access the disability services.

17. The Department is primarily responsible for administering the support plans and providing individual support packages to persons with a disability.

18. In 2006 and 2007, the Department trialled the Direct Payments Project (DPP) as one way of administering the support packages. DPP enables a person with a disability or a nominated person (the direct payments user) to use their support package to choose, arrange and buy the supports and services that the disabled person requires to meet their needs (in accordance with their approved funding plan).

19. The Department is now extending the DPP to allow an approved direct payments user to use the support package to employ his or her own support workers directly. The direct payments users who do this will have to undertake all legal, financial and human resource management responsibilities associated with being an employer.

20. The direct payments user may also establish a company or other legal entity to employ support workers. The legal entity will undertake all legal, financial and human resource management responsibilities associated with being an employer. The legal entity must invoice the direct payments user for the services provided. These invoices form the evidence of expenditure of direct payments funding. (Note: direct payments users who establish a company or other legal entity to employ support workers are not included in the class of entities to which this Ruling applies.)
21. The direct payments user cannot employ a family member who resides in the same household unless they meet one of the exceptions outlined in the Individual Support Package Handbook (Interim) Direct Payments Supplement (Direct Employment Project) Draft. The direct payments user must obtain agreement from the Department before they can employ a family member in this way.
22. The direct payments user must have an up to date funding plan which outlines the goals of the person with a disability and details what funding will be provided and how the funding will be used to meet those goals.
23. The direct payments user must enter into a Direct Payments Deed of Agreement with the Department.
24. A separate bank account must be established for the purposes of receiving direct payments. The bank account must not have a credit card or overdraft facility, nor be linked to any other bank account. The direct payments user must grant the Department viewing access to the bank account.
25. The direct payments user is responsible for paying any bank fees that may apply to the direct payments account.
26. Any interest earned on the direct payments account will become part of the funds which are to be used for the purpose of meeting the disabled person's goals under their funding plan and becomes part of the funds dealt with as part of the acquittal process referred to in paragraph 31 of this Ruling.
27. Funds are transferred into the direct payments account each month by the Department. At the start of the first month, funding is provided for that month together with one month's funding in advance.
28. All expenditure from the bank account must be for an approved purpose in accordance with the disabled person's funding plan, which will be endorsed by the Department. Where the direct payments user is not the disabled person they must consult with the disabled person as to the use and management of the funds.
29. The expenditure can be for a variety of support needs and for example may include specific items of equipment, professional services by a therapist, or for an attendant carer.
30. The direct payments user is required to keep records of how the funds are used and will have their spending regularly reviewed.

31. Under an acquittal process, the direct payments user is required to account for the spending of the funds on the goals in the funding plan. Surplus funds up to a maximum of 5% of the total funds can be carried forward for 3 months to be spent under the funding plan. At the end of the acquittal process, or on termination of the DPP, any unspent and uncommitted funds will be returned to the Department within 14 days by the direct payments user. Alternatively, if funding support is on-going, the Department may adjust future payment schedules to recoup the funds.

Ruling

32. The direct payments received from the Department do not form part of the direct payments user's assessable income under section 6-5.

33. The direct payments received from the Department are:

- not given or granted to the direct payments user in relation to employment or services rendered under section 15-2; and
- not assessable recoupments of the direct payments user under Subdivision 20-A.

34. The interest earned on funds deposited into an account specially maintained for the purposes of receiving the direct payment does not form part of the direct payments user's assessable income.

35. Any losses or outgoings incurred in managing or obtaining the direct payments user's attendant care under the funding agreement are not deductible under section 8-1 or any other provision of the ITAA 1997.

36. None of the amounts paid by the direct payments user on disability services and in respect of which direct payments have been received are treated as rebatable amounts for the purposes of the medical expenses tax offset under section 159P of the ITAA 1936.

Commissioner of Taxation

16 September 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.*

37. 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

38. Under subsection 6-5(1) an amount is assessable income if it is income according to ordinary concepts (ordinary income).

39. 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.

40. 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.

41. When considering the first and last factors of paragraph 40 of this Ruling it is appropriate to look at the nature of the relationship between the direct payments users and the Department.

The nature of the relationship between the Department and the direct payments user

42. The Department is responsible for the administration of the DPP which enables the direct payments users to use the funds to choose, arrange and buy the supports and services that they require to meet their needs (in accordance with their approved funding plan).

43. The direct payments users in receipt of payments under the DPP are required to utilise the funds to directly purchase services and goods previously provided through a service provider.

44. Certain features of the arrangement point to the existence of a fiduciary relationship between the recipient and the Department. In *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 Mason J made the following observations about fiduciary relationships (at 97):

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

45. By entering into the agreement the direct payments user agrees to apply the funds to obtain approved goods and services, which would otherwise be provided by the Department. Therefore, the direct payments user can be said to be acting on behalf of the Department in discharging its duty to provide these services.

46. The arrangement clearly guards against abuse by the direct payments user. The terms of the funding agreement confine the use of the direct funding payments to approved purposes, that is, uses permitted by the approved funding plan, protecting the Department and ensuring that public funds are used only in a way that discharges the Secretary's statutory duty. The fact that this protection is expressed in a contract is not inconsistent with the existence of a fiduciary relationship.¹

47. A second critical feature is that the fiduciary may not profit from the position in which he or she is placed: see *Boardman v. Phipps* [1967] 2 AC 46 and cases referred to there by Lord Guest at 115-116; also *Pavan v. Ratnam* (1996) 23 ACSR 214 per Mahoney ACJ at 217. The fiduciary must treat his or her own interests as subservient to the interests of the principal, in this case the Department. The fiduciary must account for any profit made without the knowledge and consent of the principal. These elements are clearly present.

48. The direct payments user can only use the funds for approved purposes. In addition, any interest accruing becomes part of the funds and can only be used for approved purposes.

¹ *Quistclose Investments Ltd v. Rolls Razor Ltd* [1970] AC 567.

49. Further, to say that the direct payments user holds the funds for his or her own benefit fails to give proper significance to the totality of the arrangement. The direct payments user holds the funds for the approved purposes and applies them on behalf of the Department.

50. Therefore, the fact that the funds may be used to obtain the goods and services for the direct payments user personally does not mean that the direct payments user profits from the arrangement in the sense referred to in the authorities. The disabled person would receive the same level of services if he or she were not participating in the DPP.

51. In addition, an express obligation to keep funds separate from the direct payments user's own money points to the existence of a trust – that is, a fiduciary obligation: *Cohen v. Cohen* (1929) 42 CLR 91, referred to by the majority of the High Court in *Associated Alloys Pty Limited v. ACN 001 452 106 Pty Limited (in liquidation) (formerly Metropolitan Engineering and Fabrications Pty Limited)* [2000] HCA 25 at [34].

52. This obligation is clearly present. The Direct Payments Deed of Agreement states that the direct payments user agrees to comply with the terms and conditions set out in the handbook, and in particular to 'establish a new bank account for the purpose of receiving direct payments... The bank account must not have a credit card, an overdraft facility or be linked to any other bank account...'.

53. These characteristics of the arrangement strongly point to the direct payments user being in a fiduciary relationship with the Department.

The scope of the fiduciary relationship

54. The subject matter of the DPP is the provision of funds to the direct payments user to obtain approved goods and services. Apart from holding and applying the funds for the approved purposes, the direct payments user has no other obligations to the Department under the arrangement. It is clear, then, that the scope of the direct payments user's fiduciary obligations to the Department under the DPP relates to the direct payments user's holding and application of the funds.

55. The discretionary powers the direct payments user has as to the use of the funds are authorised under the funding agreement and fall within the purposes for which direct funding may be provided under the Disability Act. These powers do not conflict with the fiduciary obligations that the direct payments user owes to the Department. On the contrary, they are designed to further the objects and principles of the Disability Act.

56. The fiduciary duties owed by the direct payments user to the Department indicate that the direct payments are not beneficially held and used by the recipient for private purposes but are held and used on behalf of the Department.

57. The direct payments user under the funding agreement is neither an employee of the Department nor in receipt of the payments in relation to the carrying on of a business.

58. However whether the payments have been received for services rendered must be examined, as 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.

59. Under the terms of the deed of agreement, while the direct payments user obtains and manages the goods and services, they do not receive any amount as a reward for taking on this role. The direct payments user is precluded from gaining any financial benefit, may not employ himself or herself or a close relative unless approval has been given by the Department, and must use the funds only for approved purposes. The approved funding plan permits the funds to be used only for paying for the disability services and meeting the direct costs of managing these services. The direct payments user must account for the use of the funds and must repay any money not spent for an approved purpose.

60. In these circumstances, the funds are not a payment for services rendered.

61. In the present case, it is clear that the direct payments user cannot deal with the money as his or her own. Their obligations in dealing with the funds have the nature of fiduciary obligations.

62. A primary motive of the Department in providing direct financial assistance is to give the person with a disability non-material benefits such as increased dignity, self-determination and capacity to integrate into the life of the community. This motive is apparent in the objects and principles of the Disability Act and the Victorian State Disability Plan 2002–2012. It is also apparent in the decision of the Department to continue with and expand the DPP following the success of its first phase.

63. For the reasons given above, it is concluded that the direct payments are not ordinary income in the hands of a direct payments user under the Deed of Agreement for the purposes of section 6-5.

Statutory income

64. Section 6-10 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. That list includes a reference to section 15-2 and Subdivision 20-A.

Employment or services rendered

65. Section 15-2, provides that assessable income shall include:
- ... the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you ...
66. As discussed in paragraphs 58 to 60 of this Ruling, the direct payments users do not receive the funds for any employment or services rendered. Therefore the payments to the direct payments users are not statutory income under section 15-2.

Assessable recoupment

67. Subdivision 20-A operates to include in assessable income amounts received as recoupments of specified losses or outgoings allowed or allowable as deductions. As the payments are not being made by way of insurance or indemnity, the relevant provision is subsection 20-20(3) 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.

68. As no deduction is allowable or would be allowable to the direct payments user in respect of the expenditure incurred for the disability services (see paragraph 72 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.

Interest earned

69. Interest earned on money held in a bank account is ordinarily income from property and assessable to the owner of the bank account.
70. In the present case, however, any interest accrued in the dedicated account into which the payments are deposited forms part of the funding and is therefore subject to the same fiduciary obligations owed by the direct payments user to the Department.
71. Interest accruing to the account is therefore not ordinary or statutory income of the direct payments users.

General deductions

72. As the payments received by the direct payments users 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 or any other provision of the ITAA 1997. Consequently, expenses incurred by the recipient in acquiring the goods and services in accordance with their approved funding plan are not deductible.

Medical expenses tax offset

73. 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.

74. 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.

75. The payments made by the direct payments user 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 direct payments user will receive funds from the Department under the DPP 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

76. Where the recipient exercises the option to employ a carer or service provider directly, the direct payments user will be required to register as an employer, withhold tax from payments made to the carer or service provider, and meet any superannuation guarantee requirements in force at the time.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Previous Rulings/Determinations:

CR 2006/84

Related Rulings/Determinations:

TR 2006/10

- ITAA 1997 20-20(3)
- ITAA 1997 20-30
- TAA 1953
- Copyright Act 1968
- Disability Act 2006 (Vic)
- Disability Act 2006 (Vic) 4
- Disability Act 2006 (Vic) 8(1)
- Disability Act 2006 (Vic) 52
- Disability Act 2006 (Vic) 54

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 159P
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 15-2
- ITAA 1997 Subdiv 20-A

Case references:

- Associated Alloys Pty Limited v. ACN 000 452 106 Pty Limited (in liquidation) (formerly Metropolitan Engineering and Fabrications Pty Limited) [2000] HCA 25
- Boardman v. Phipps [1967] 2 AC 46
- Cohen v. Cohen [1929] HCA 15 (1929) 42 CLR 91
- Hospital Products Ltd v. United States Surgical Corporation (1984) 156 CLR 41 55 ALR 417
- Pavan v. Ratnam (1996) 23 ACSR 214
- Quistclose Investments Ltd v. Rolls Razor Ltd [1970] AC 567; 3 All ER 651

ATO references

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