

# ***CR 2010/12 - Income tax: Department for Families and Communities Self-Managed Funding Scheme***



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## Class Ruling

### Income tax: Department for Families and Communities Self-Managed Funding Scheme

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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

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

#### **Relevant provision(s)**

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

- section 159P of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 6-5 of 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 comprises:
- disabled persons receiving disability services from the South Australian Department for Families and Communities (DFC), and
  - legally nominated or recognised carers, guardians, administrators or attorneys of disabled persons,

who enter into an agreement with the DFC to receive payments for the purpose of purchasing disability services under the self-managed funding scheme. In this Ruling, these persons are referred to as 'recipients'.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 24 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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8. This Ruling applies from 1 October 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).

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## Scheme

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9. The following description of the scheme is based on information provided by the applicant. 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 parts of documents incorporated into this description of the scheme are:

- Class Ruling application dated 16 September 2009;
- Disability SA Self Managed Funding – Phase One Information Package;
- Draft Self Funding Agreement; and
- Phase One: Self-managed Funding Initiative Participant Guidelines (interim).

10. The *Disability Services Act 1993* (SA) (DSASA) provides the legislative basis for the funding of disability services.

11. The Principles in Schedule 1 of the DSASA have the purpose of ensuring that persons with disabilities are treated with dignity and have the same fundamental human rights as other members of the community.

12. The objectives of the DSASA are set out at Schedule 2. They include ensuring that disability services are designed and administered so as to ‘achieve positive outcomes for persons with disabilities’, such as ‘increased independence, increased education, training and employment opportunities and integration into, and participation in the life of, the community’.

13. Section 4 of the DSASA provides that the Minister (that is, the Minister for Disability) is responsible for approving funding for the purposes of disability services. The Minister may grant money to any person, body or authority, or to any person with a disability or a carer of such a person, for the purpose of obtaining the care, support or assistance the person with the disability or the carer may need. In performing his or her functions under this section, the Minister must seek to further the objects of the DSASA.

14. The Department for Families and Communities (DFC) Strategic Plan 2009-2013 sets out the background for self-managed funding arrangements.

15. Persons who wish to participate in the self-managed funding scheme trial are required to register their interest with DFC. A panel from Disability SA, a division of DFC, then selects persons who will be eligible to participate.

16. Once a person has approval to participate in the self-managed funding scheme, the DFC will work with the recipient to formulate a Personal Support and Expenditure Plan (Personal Plan).

17. The Personal Plan will detail:

- the funding administration arrangement the recipient will use to self-manage the funding;
- the specific services or items the recipient will be purchasing;
- the cost of the services or items; and
- other information that is critical to the recipient's support arrangements.

18. In some circumstances, the person with a disability may be supported by a recognised carer or guardian, administrator, attorney, financial intermediary, or a Host Organisation (which is a Disability Service Provider registered on the Disability Services Provider Panel to host self-management arrangements). [Note: financial intermediaries and Host Organisations are not included in the class of entities to which this Ruling applies.]

19. The recipient must enter into a Self-Managed Funding Agreement with the DFC. The Agreement details the amount of funding the recipient will receive, which is determined by DFC.

20. A separate bank account must be established for the purposes of receiving the funds. The bank account must not have a credit or overdraft facility, nor be linked to any other bank account.

21. Any interest earned on the account becomes part of the self-managed funds and can only be spent in accordance with the recipient's Personal Plan.

22. The recipient is required to keep records for seven years, including the approved Personal Plan, receipts, invoices, contracts with service providers, and bank statements.

23. The recipient (or Host Organisation, if applicable) is required to fill out an Acquittal Form every three months and provide it to a Self-management Facilitator along with copies of the records mentioned in paragraph 22 of this Ruling.

24. At the end of a 12 month period, the recipient is required to repay to DFC any unspent funds, or funds that were spent on things not detailed in their Personal Plan, unless DFC has given written approval for the recipient to retain them.

## **Ruling**

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25. The funds received from the DFC do not form part of the recipient's assessable income under section 6-5.

26. The funds received from the DFC are:

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

27. The interest earned on funds deposited into an account specially maintained for the purposes of receiving the self-management scheme funds does not form part of the recipient's assessable income.

28. Any losses or outgoings incurred in managing or obtaining the disability services under the Self-Managed Funding Agreement are not deductible under section 8-1 or any other provision of the ITAA 1997.

29. None of the amounts paid by the recipients for 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.

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**Commissioner of Taxation**

5 May 2010

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## Appendix 1 – Explanation

**①** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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

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

### Ordinary income

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

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

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

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

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

34. When considering the first and last factors of paragraph 33 of this Ruling it is appropriate to look at the nature of the relationship between the DFC and the recipient.

**The nature of the relationship between the DFC and the recipient**

35. The DFC is responsible for the administration of the self-managed funding scheme which enables the recipients to use the funds to arrange and purchase the services that they require to meet their needs (in accordance with their Personal Plan).

36. The recipients in receipt of payments under the self-managed funding scheme are required to utilise the funds to directly purchase services and goods previously provided to a person with a disability by the DFC.

37. Certain features of the arrangement point to the existence of a fiduciary relationship between the recipient and the DFC. 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.

38. By entering into the Agreement, the recipient agrees to apply the funds to purchase services which would otherwise be provided by the DFC. Therefore, the recipient can be said to be acting on behalf of the DFC in discharging its duty to provide these services.

39. The arrangement clearly guards against abuse by the recipient. The terms of the Agreement confine the use of the payments to approved purposes, that is, uses permitted by the approved Personal Plan, protecting the DFC and ensuring that public funds are used only in a way that discharges the Minister's statutory duty. The fact that this protection is expressed in a contract is not inconsistent with the existence of a fiduciary relationship.<sup>1</sup>

40. 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 DFC. The fiduciary must account for any profit made without the knowledge and consent of the principal. These elements are clearly present.

41. The recipient 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. Any unspent funds must be repaid to DFC.

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<sup>1</sup> *Quistclose Investments Ltd v. Rolls Razor Ltd* [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097.



42. Further, to say that the recipient holds the funds for his or her own benefit fails to give proper significance to the totality of the arrangement. The recipient holds the funds for the approved purposes and applies them on behalf of the DFC.

43. Therefore, the fact that the funds may be used to obtain the goods and services for the recipient personally does not mean that the recipient 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 self-managed funding scheme.

44. In addition, an express obligation to keep funds separate from the recipient's own money points to the existence of a trust – that is, a fiduciary obligation.<sup>2</sup>

45. This obligation is clearly present. The Participant Guidelines state that the recipient must open a separate bank account to receive the funds. The bank account must not be linked to a credit or overdraft facility or any other bank account.

46. These characteristics of the arrangement strongly point to the recipient being in a fiduciary relationship with the DFC.

## **The scope of the fiduciary relationship**

47. The subject matter of the self-managed funding scheme is the provision of funds to the recipient to purchase approved services. Apart from holding and applying the funds for the approved purposes, the recipient has no other obligations to the DFC under the arrangement. It is clear, then, that the scope of the recipient's fiduciary obligations to the DFC under the self-managed funding scheme relates to the recipient's holding and application of the funds.

48. The discretionary powers the recipient has as to the use of the funds are authorised under the Personal Plan and fall within the purposes for which direct funding may be provided under the DSASA. These powers do not conflict with the fiduciary obligations that the recipient owes to the DFC. On the contrary, they are designed to further the objects and principles of the DSASA.

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

50. The recipient under the funding agreement is neither an employee of the DFC nor in receipt of the payments in relation to the carrying on of a business.

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<sup>2</sup> *Cohen v. Cohen* (1929) 42 CLR 91, referred to by the majority of the High Court in *Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd (in liquidation) (formerly Metropolitan Engineering and Fabrications Pty Ltd)* [2000] HCA 25 at [34].

51. 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.

52. Under the terms of the Self-Managed Funding Agreement, while the recipient obtains and manages the goods and services, they do not receive any amount as a reward for taking on this role, and must use the funds only for approved purposes. The approved support and expenditure plan permits the funds to be used only for paying for the disability services and meeting the direct costs of managing these services. The recipient must account for the use of the funds and must repay any money not spent for an approved purpose.

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

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

55. A primary motive of the DFC 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 DSASA.

56. For the reasons given above, it is concluded that the self-managed funding scheme payments are not ordinary income in the hands of a recipient under the deed for the purposes of section 6-5.

### **Statutory income**

57. 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***

58. 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 ...

59. As discussed in paragraphs 50 to 53 of this Ruling, the recipients do not receive the funds for any employment or services rendered. Therefore the payments to the recipients are not statutory income under section 15-2.

## ***Assessable recoupment***

60. 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.

61. As no deduction is allowable or would be allowable to the recipient in respect of the expenditure incurred for the disability services (see paragraph 65 of this Ruling), the payments received by them from the DFC are not assessable recoupments and therefore no amounts are included in their assessable income under Subdivision 20-A.

## **Interest earned**

62. Interest earned on money held in a bank account is ordinarily income from property and assessable to the owner of the bank account.

63. In the present case, however, any interest accrued in the separate bank account into which the payments are deposited forms part of the funding and is therefore subject to the same fiduciary obligations owed by the recipients to the DFC.

64. Interest accruing to the account is therefore not ordinary or statutory income of the recipients.

## **General deductions**

65. As the payments received by the recipients are not assessable as either ordinary or statutory income, the losses and outgoings that are incurred in connection with those payments are not allowable as deductions under section 8-1 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 Personal Plan are not deductible.

**Medical expenses tax offset**

66. 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.

67. 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.

68. The payments made by the recipients may qualify as medical expenses. However those expenses must be reduced by any payment received or receivable in respect of the expenses to determine the rebatable amount. As the recipient will receive funds from the DFC under the self-managed funding scheme 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.

## **Appendix 2 – Detailed contents list**

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

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- assessable income
- assessable recoupments
- deductions and 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
- ITAA 1997 20-20(3)

- ITAA 1997 20-30
- TAA 1953
- Copyright Act 1968
- Disability Services Act 1993 (SA)

### *Case references:*

- Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd (in liquidation) (formerly Metropolitan Engineering and Fabrications Pty Ltd) [2000] HCA 25
- Boardman v. Phipps [1967] 2 AC 46; [1966] 3 All ER 721; [1966] 3 WLR 1009
- Cohen v. Cohen [1929] 42 CLR 91
- Hospital Products Ltd v. United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41
- Pavan v. Ratnam (1996) 23 ACSR 214
- Quistclose Investments Ltd v. Rolls Razor Ltd [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097

### ATO references

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