


CR 2011/44 - Income tax: voluntary separation program: Queensland Government employees

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Class Ruling

Income tax: voluntary separation program: Queensland Government employees

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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.

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What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way the provision(s) identified below apply to payments made to employees whose employment with the Queensland Government is terminated by participation in the 'Voluntary Separation Program'.

Relevant provision(s)

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

- section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- section 83-175 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are those Queensland Government employees who participate in the scheme known as the 'Voluntary Separation Program' (VSP). The scheme is described in paragraphs 9 to 18 of this ruling.

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 18 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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 known as the 'VSP' is based on information provided by the applicant.

10. As a consequence of a budget review, the Queensland Government announced the introduction of a VSP as part of a number of measures to deliver budget savings and reprioritise spending. The VSP is intended to achieve savings by targeting 'non-frontline' service areas in corporate services and service support. Individual participation in the VSP will be voluntary. No employees will be forced to accept offers made under the VSP.

11. The VSP is designed to provide flexibility to Chief Executive Officers (CEOs). They have discretion in how the VSP will operate within their respective departments. Each department will apply the program in a manner that best suits its staffing needs and operational requirements. Departments with commercialised business areas or areas which are not funded by the Queensland budget will be able to include or exclude particular work areas in the VSP by agreement between the CEO, the responsible Minister and the Queensland Treasury. Budget funded statutory agencies will also have an option to participate in the VSP.

12. The program will operate from 1 July 2011 and conclude in the first half of the 2012-2013 income year. The VSP will be progressively rolled out across departments and service agencies.

13. A CEO will invite expressions of interest from eligible employees to participate in the VSP. Expressions of interest may be requested from work areas targeted for business change and / or service reductions in non-front line services. In addition some CEOs may invite expressions of interest from across the agency more broadly. The CEO will have regard to the business requirements in assessing applications. A relevant consideration may be that the skills and capabilities of the employee are no longer contemporary for the role and they are not seen to have the potential to acquire the necessary skills. The decision to exclude particular individuals from participation is non-appealable but may be subject to internal review. The final decision on who may participate in the VSP rests with each CEO.

14. Eligibility for participation in the VSP is determined by the following:

- In general no 'front line' employees are eligible. CEOs may consider individual circumstances but offers of separation packages to front line staff will be only be made where service delivery is not compromised.
- Employees must be permanent staff members prior to 1 January 2010. Non-ongoing employees are excluded.
- Permanent part time employees may receive offers and the entitlements will be apportioned.
- Employees who received a voluntary early retirement package or similar payment (for example redundancy) after 1 January 2005 are ineligible.

- Senior Executive Service (SES) officers on contracts of employment are excluded.
- Employees engaged under certain fixed term contracts (Section 122¹ contracts) are excluded.
- The exclusions extend to employees who have received significant financial investments in their professional development in the past three years.

15. The final makeup of participants will depend upon the number of employees expressing interest in the program and, of those employees who express interest, the particular individuals who are assessed eligible to proceed in the program.

16. Employees who accept the package will receive a separation payment equivalent to three weeks salary for each year of service up to a maximum of 60 weeks. A base payment of 30 weeks salary is also included. The total payment available is therefore the equivalent of 90 weeks salary. The payments are exclusive of entitlements to accrued annual leave and long service leave which do not form part of a VSP payment.

17. The CEO or nominated delegate must be informed of the employee's decision concerning a VSP offer within 20 working days of the offer being made. If accepted, a termination date will be established and separation will generally occur within weeks of acceptance.

18. No undertakings are given concerning the status of vacated positions. These positions may be left vacant, filled internally or advertised and otherwise filled. Whilst an organisational restructure may occur at some point in the future, this will be a distinct exercise taking into account the operating environment in which each agency will be delivering services at that time.

Ruling

19. A payment received by an employee under the VSP is in consequence of the termination of employment and is an employment termination payment under section 82-130.

20. A VSP payment is not a genuine redundancy payment under section 83-175.

Commissioner of Taxation

4 May 2011

¹ Section 122, *Public Service Act 2008*, Act No 38 of 2008 (Qld).

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.***

21. A payment made on or after 1 July 2007 to an employee is an employment termination payment if the payment satisfies all the requirements contained in section 82-130.

22. An employment termination payment is defined in section 995-1 which states an 'employment termination payment' has the meaning given to it by section 82-130.

23. Subsection 82-130(1) states:

A payment is an employment termination payment if:

- (a) it is received by you:
 - (i) in consequence of the termination of your employment; or
 - (ii) after another person's death, in consequence of the termination of the other person's employment; and
- (b) it is received no later than 12 months after the termination (but see subsection (4)); and
- (c) it is *not* a payment mentioned in section 82-135.

24. Section 82-135 lists certain payments that are not employment termination payments, including amongst others,

- superannuation benefits;
- payments for unused annual leave or unused long service leave (and any other similar leave); and
- the tax free part of a genuine redundancy payment or an early retirement scheme payment.

25. Each of the conditions under subsection 82-130(1) needs to be satisfied in order for the payment to be treated as an employment termination payment.

The payment is made in consequence of the termination of the taxpayer's employment

26. The first requirement is that there must be a payment that is made in consequence of the termination of employment of the taxpayer.

27. It should be noted that the phrase 'in consequence of the termination of your employment' is not defined in the legislation. However, both the Courts and the Commissioner have considered the meaning of this phrase.

28. In Taxation Ruling TR 2003/13² the Commissioner considered the meaning of the phrase 'in consequence of' as interpreted by the Courts. In paragraph 5 of TR 2003/13 the Commissioner states:

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.

29. As further stated by the Commissioner in paragraph 6 of TR 2003/13; there must be 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.

30. The Commissioner also noted paragraph 5 of TR 2003/13 the Courts have considered the meaning of the words 'in consequence of' in several cases. The decisions made by the Full Bench of the High Court in *Reseck v. Federal Commissioner of Taxation*³ (*Reseck*) and the Full Federal Court in *McIntosh v. FC of T*⁴ (*McIntosh*) are particularly relevant.

31. In *Reseck* Gibbs J stated:

Within the ordinary meaning of the words a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination ... It is not in my opinion necessary that the termination of the services should be the dominant cause of the payment.

32. While Jacobs J, in the same case, stated:

It was submitted that the words 'in consequence of' import a concept that the termination of the employment was the dominant cause of the payment. This cannot be so. A consequence in this context is not the same as a result. It does not import causation but rather a 'following on'.

33. In looking at the phrase 'in consequence of' the Full Federal Court in *McIntosh* considered the decision in *Reseck*. In doing so the Full Federal Court emphasised that a payment may be in consequence of the termination of employment even though the termination is not the dominant cause of the payment.

34. Brennan J considered the judgments of Gibbs J and Jacobs J in *Reseck* and concluded that their Honours were both saying that a causal nexus between the termination and payment was required, though it was not necessary for the termination to be the dominant cause of the payment.

² TR 2003/13 Income tax: eligible termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'.

³ (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538.

⁴ 79 ATC 4325; (1979) 10 ATR 13.

35. The view of both Courts was that for a payment to be made in consequence of the termination of employment it had to follow on as a result or effect of the termination of employment. Additionally, while it is not necessary to show that termination of employment is the sole or dominant cause, a temporal sequence alone would not be sufficient.

36. The phrase 'in consequence of' and the decisions in *Reseck* and *McIntosh* were considered more recently by the Federal Court in *Le Grand v. Federal Commissioner of Taxation*⁵ (*Le Grand*), where Goldberg J stated:

I am satisfied that there is a sufficient connection between the termination of the applicant's employment and the payment to warrant the finding that the payment was made in consequence of the termination of the applicant's employment. I am satisfied that the payment was an effect or result of that termination in the sense that there was a sequence of events following the termination of the employment which had a relationship and connection which ultimately led to the payment.

37. Goldberg J concluded that the test for determining when a payment is made in consequence of the termination of employment is that which was expressed by Gibbs J in *Reseck*. Thus, for the payment to have been made in consequence of the termination of employment, the payment must follow as an effect or result of the termination of employment. As noted in both paragraphs 6 and 28 of TR 2003/13, there must be 'a causal connection between the termination and the payment even though the termination need not be the sole or dominant cause of the payment'.

38. Therefore if the payment follows as an effect or a result from the termination of employment, the payment will be made in consequence of the termination of employment for the purposes of subparagraph 82-130(1)(a)(i).

39. From the facts provided by the applicant, employees participating in the VSP must agree to its terms which include the termination of employment. In addition, they are not permitted to be reemployed by the Queensland Government for a minimum period of three years after termination. Payments under the VSP only become payable upon termination of employment. Clearly there is a causal connection between the termination of employment and receipt of payments under the VSP. The condition imposed under paragraph 82-130(1)(a) has been met.

⁵ (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139.

The payment is made no later than 12 months after the termination of employment

40. The second condition for the payment to meet is contained in paragraph 82-130(1)(b). The payment must be paid to an employee no later than 12 months after termination of employment.

41. Employees who take up the VSP offer will generally terminate employment within several weeks of accepting the offer. Payments under the VSP will be made at the time of termination or shortly after. All employees are expected to be paid within 12 months of termination. On the proviso the payments under the VSP are made to employees within 12 months of the termination of employment, the condition under paragraph 82-130(1)(b) is met.

The payment is not a payment specifically excluded under section 82-135

42. The third condition is stated in paragraph 82-130(1)(c). The payment must not be a payment specified in section 82-135.

43. Section 82-135 provides that certain payments are not employment termination payments, including amongst others:

- superannuation benefits;
- payment for unused annual leave or unused long service leave (and any other similar leave);
- the tax free part of a genuine redundancy payment or an early retirement scheme payment.

44. The payments payable under the VSP are not superannuation benefits.

45. Accrued annual leave and accrued long service leave are not included in determining the amount payable under the VSP. They are paid separately and are in addition to the VSP payments.

46. The VSP is not an early retirement program as defined by section 83-180. Early retirement schemes must be approved by the Commissioner. No payments under the VSP will be early retirement scheme payments.

47. As explained below, the VSP payments do not constitute genuine redundancy payments.

48. On the basis of the information provided by the applicant, it is accepted the VSP payments are not payments that are specifically mentioned in section 82-135. The condition contained in paragraph 82-130(1)(c) is therefore also met.

49. As VSP payments made to employees in accordance with the scheme described in paragraphs 9 to 18 of the Ruling satisfy all the conditions contained in subsection 82-130(1), the payments payable under the VSP are employment termination payments for the purposes of section 82-130.

Genuine redundancy payments

50. The requirements to be satisfied before any payment qualifies for treatment as a genuine redundancy payment are discussed in Taxation Ruling TR 2009/2.⁶

51. Subsection 83-175(1) defines the meaning of a genuine redundancy payment. Under subsection 83-175(1), a genuine redundancy is:

...so much of a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.

52. There are four necessary components contained in the basic requirements of genuine redundancy payment. These are:

- The payment must be received in **consequence of an employee's termination**;
- The termination must involve being **dismissed** from employment;
- That dismissal must be caused by **the redundancy of the employee's position**; and
- The payment must be made **genuinely** because of a redundancy.

53. To meet the requirements of a genuine redundancy payment, each of the four elements must be present.

54. Dismissal is a particular mode of employment termination. It requires a decision to terminate employment at the employer's initiative without the consent of the employee. This stands in contrast to employment that is terminated at the initiative of the employee, for example, in the case of resignation. Dismissal is not synonymous with termination but involves an action to terminate employment taken by the employer irrespective of the wishes of the employee.

⁶ TR 2009/2 Income tax: genuine redundancy payments.

55. Based on the information provided, no employee is dismissed by agreeing to participate in the VSP. Employees initially are invited to lodge expressions of interest. The initial expression is taken into account when deciding whether to offer an employee a VSP package. Employees at that point are free to choose whether to accept or reject the offer. Employees who accept continue on with the separation process. Those who reject the offer continue in their employment. The VSP involves no compulsory terminations of employment. There are to be no dismissals.

56. As the essential element of dismissal does not exist in these circumstances, payments under the VSP will not constitute genuine redundancy payments under section 83-175. It is unnecessary to consider the other criteria.

57. As noted in paragraph 49 of this Ruling, payments received under the VSP are employment termination payments. They are not genuine redundancy payments or other payments of the type mentioned in section 82-135.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/13; TR 2006/10;
TR 2009/2

Subject references:

- dismissal of employees
- employment termination
- employment termination payments
- genuine redundancy payments

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(a)
- ITAA 1997 82-130(1)(a)(i)
- ITAA 1997 82-130(1)(b)

- ITAA 1997 82-130(1)(c)
- ITAA 1997 82-135
- ITAA 1997 83-175
- ITAA 1997 83-175(1)
- ITAA 1997 83-180
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968

Case references:

- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538
- McIntosh v. FC of T 79 ATC 4325; (1979) 10 ATR 13
- Le Grand v. Federal Commissioner of Taxation (2002) 124 FCR 53; 2002 ATC 4907; (2002) 51 ATR 139

ATO references

NO: 1-2W697DR

ISSN: 1445-2014

ATOlaw topic: Income tax ~~~assessable income ~~ employment termination payment