


CR 2012/40 - Income tax: ex gratia payment - Stolen Wages Reparation Scheme WA

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Class Ruling

Income tax: ex gratia payment – Stolen Wages Reparation Scheme WA

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	19
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	21
Appendix 2:	
Detailed contents list	31

ⓘ 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 provisions identified below apply to the defined class of entities who take part in the scheme to which this Ruling relates.

Relevant provisions

2. The relevant provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
 - Part 3-1 of the ITAA 1997.

All subsequent references in this Ruling are to the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies comprises individuals who receive a payment from the Western Australian Government under the Stolen Wages Reparation Scheme WA being administered from 7 March 2012 to 6 September 2012.

Qualifications

4. The Commissioner makes this Ruling 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

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

9. The Western Australian Government has announced a proposal to offer monetary compensation to individual Aboriginal and Torres Strait Islanders whose income was controlled or withheld by the Western Australian Government due to the provisions of *The Aborigines Act 1905 (WA)* and the *Native Administration Act 1905-1947 (WA)*.

10. Ex gratia payments will only be made under this scheme if the individual is a living person who:

- (a) is an Aboriginal or Torres Strait islander person born before 1958;
- (b) from the age of 14 years or older was resident at a Government Native Welfare Settlement in Western Australia;
- (c) while resident at one or more Western Australian Government Native Welfare Settlements in Western Australia experienced direct government control over the individual's income and all or part of the income was withheld from the individual; and
- (d) was never repaid the outstanding monies owed by the Western Australian Government.

11. If an individual considers they meet the eligibility criteria they can lodge an application. The Department of Indigenous Affairs will then assess the application to ensure that the applicant meets the eligibility criteria. Once the application is approved, the individual will receive a one off, lump sum ex gratia payment of \$2,000.

12. The payment is an ex gratia payment made as an expression or regret by the Western Australian Government, it is not deemed to be a full reparation.

13. The payment is being made to compensate individuals for the impact of past wage control under *The Aborigines Act 1905 (WA)* and *Native Administration Act 1905-1947 (WA)*. It is not intended to be a replacement of income.

14. Lodgement of an application or receipt of the ex gratia payment, will not in any way affect the legal rights which the applicant may otherwise have.

15. Applications can be lodged from 7 March 2012 to 6 September 2012 inclusive.

16. An individual can lodge one application for a payment only.

17. If an applicant dies after his or her application has been lodged, but before a payment has been approved, then subject to the application being complete and subsequently approved, an ex gratia payment will be made to the nominated bank account set out in the application and in accordance with the *Administration Act 1903 (WA)* and the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

18. The quantum of the ex gratia payment cannot be the subject of a complaint by the applicant. An applicant can however make a complaint on the following grounds:

- (a) an error of process occurred; and/or
- (b) an error of fact was made.

Ruling

19. Lump sum payments made to eligible persons by the Western Australian Government under the Stolen Wages Reparation Scheme WA is not ordinary income under section 6-5.

20. There are no CGT consequences under Part 3-1 when an eligible person receives a lump sum payment under the Stolen Wages Reparation Scheme WA.

Commissioner of Taxation

13 June 2012

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 or other benefit received by a taxpayer is included in 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

22. Subsection 6-5(1) provides that the assessable income of a taxpayer includes income according to ordinary concepts (ordinary income).

23. The legislation does not provide specific guidance on the meaning of income according to ordinary concepts. However, a substantial body of case law exists which identifies likely characteristics.

24. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*,¹ 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.

25. Amounts that are periodical, regular or recurrent, relied upon by the recipient for their regular expenditure and paid to them for that purpose are likely to be ordinary income, as are amounts that are the product in a real sense of any employment of, or services rendered by, the recipient.² Amounts paid in substitution for salary or wages foregone or lost may also be ordinary income.³

¹ (1990) 170 CLR 124 at 138; 90 ATC 4413 at 4420; (1990) 21 ATR 1 at 7.

² *Federal Commissioner of Taxation v. Rowe* (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392.

³ *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540 at 568; (1952) 10 ATD 82 at 92; (1952) 5 AITR 443 at 456 (per Fullagar J).

26. Ultimately, whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient.⁴ The whole of the circumstances must be considered⁵ and the motive of the payer may be relevant to this consideration.⁶

27. Payments made under the scheme are one-off lump sum payments in the nature of compensation. Furthermore, payments are not being made as a substitute for any loss of earnings of the eligible individual, but are payments made by the Western Australian government to express regret for past treatment. They do not possess the characteristics of ordinary income. Therefore the payments will not be assessable as ordinary income.

Statutory income

28. An amount that is not ordinary income may still be assessable income as a result of the operation of section 6-10 which includes statutory income in assessable income.

29. Payments made under the scheme are not assessable as statutory income under any of the provisions in Division 15 or Division 20.

Capital gains tax

30. There are no CGT consequences when an eligible person receives a payment under the Stolen Wages Reparation Scheme WA.

⁴ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 375; *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73; (1956) 6 AITR 248 at 254; *Federal Coke Co Pty Ltd v. FC of T* 77 ATC 4255 at 4273; (1977) 7 ATR 519 at 539.

⁵ *Squatting Investment Company Limited v. Federal Commissioner of Taxation* (1953) 86 CLR 570 at 627-628 per Kitto J.

⁶ *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 527, 528; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 376.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	9
Ruling	19
Appendix 1 – Explanation	21
Ordinary income	22
Statutory income	28
Capital gains tax	30
Appendix 2 – Detailed contents list	31

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital gains tax
- ex gratia payments
- statutory compensation scheme

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10
- ITAA 1997 Div 15
- ITAA 1997 Div 20
- ITAA 1997 Pt 3-1
- TAA 1953
- Aboriginal Affairs Planning Authority Act 1972 (WA)
- Administration Act 1903 (WA)
- Native Administration Act 1905-1947 (WA)
- The Aborigines Act 1905 (WA)
- Copyright Act 1968

Case references:

- Federal Coke Co Pty Ltd v. FC of T 77 ATC 4255; (1977) 7 ATR 519
- Federal Commissioner of Taxation v. Dixon (1952) 86 CLR 540; (1952) 10 ATD 82; (1952) 5 AITR 443
- Federal Commissioner of Taxation v. Rowe (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; 90 ATC 4413; (1990) 21 ATR 1
- Hayes v. Federal Commissioner of Taxation (1956) 96 CLR 47; (1956) 11 ATD 68; (1956) 6 AITR 248
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 14 ATD 286; (1966) 10 AITR 367
- Squatting Investment Company Limited v. Federal Commissioner of Taxation (1953) 86 CLR 570

ATO references

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