


CR 2013/33 - Income tax: treatment of transfer payments to employees of Eraring Energy following the sale of business to a private sector entity

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Class Ruling

Income tax: treatment of transfer payments to employees of Eraring Energy following the sale of business to a private sector entity

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

Relevant provision

2. The relevant provision dealt with in this Ruling is section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997). All subsequent references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The Class of entities to which this scheme applies are all business sale divisions employees of Eraring Energy who:

- cease employment with Eraring Energy;
- take up employment with the successful purchaser of the business (by one of the options outlined in paragraph 14); and
- receive a 'transfer payment' from Eraring Energy under the scheme described in paragraphs 10 to 20 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 in accordance with the scheme described in paragraphs 10 to 20 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 the issue date of this ruling to 30 June 2014. This Ruling continues to apply after 30 June 2014 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 information provided by the applicant.

10. Eraring Energy (Eraring) is a statutory State Owned Corporation (SOC) under the *State Owned Corporations Act 1989* (NSW) (SOC Act), the *Energy Services Corporation Act 1995* (NSW) and Energy Services Corporation (Eraring Energy) Regulation 2000 (NSW).

11. The New South Wales Government (NSW Government) intends to sell the business undertaking conducted by Eraring Energy to a private sector entity.

12. The principals carrying out the scheme include Eraring and the NSW Government.

13. The NSW Government is currently considering the method of sale of the business of Eraring under the *Electricity Generator Assets (Authorised transition) Act 2012* (NSW).

14. Two alternative sale options are under consideration. Both options involve the conversion of Eraring from a SOC governed under the NSW legislation into a corporation governed by the Corporations Act 2001 (Cth) and regulated by the Australian Securities and Investments Commission. The possible alternatives are as follows:

1. The employees will cease employment with Eraring and be transferred directly to the primary employing entity of the private sector purchaser. The private purchaser will acquire the shares in Eraring, or
2. The employees will cease employment with Eraring and be transferred to a newly established employment services company initially held by the NSW Government or Eraring. The private sector purchaser will acquire the shares in the employment services company either directly or by acquiring shares in Eraring.

15. The class of entities to which this arrangement applies are all business sale divisions employees of Eraring who:

- cease employment with Eraring;
- take up employment with the successful purchaser of the business (by one of the options outlined in paragraph 14); and
- receive a 'transfer payment' from Eraring under the scheme described in paragraphs 10 to 20 of this Ruling.

16. Upon the sale of Eraring, all permanent (full or part-time) employees with more than one year's service with Eraring, who cease employment with Eraring and take up employment with the purchaser of Eraring (by one of the options outlined in paragraph 14) will receive a 'transfer payment' from Eraring.

17. The 'transfer payment' reflects compensation for the loss of certain public sector employment conditions that will be lost following cessation of employment with Eraring (notwithstanding that same or similar employment conditions may be obtained with the new employer) such as:

- no forced redundancies and voluntary redundancy provisions of public sector management policies;
- access to redeployment provisions, including salary maintenance (a period up to 12 months on full salary if an employee's position is made redundant) and professional career transition support with external providers;
- paid maternity leave provision;
- broader range of paid leave and leave without pay provisions;
- mandatory flexible working hours arrangements;
- access to provisions regarding the management of conduct and performance; and
- access to provisions regarding the advertising, eligibility, selection and appointment to positions.

18. The 'transfer payment' will be calculated by reference to each employee's years of service as set out in the table below:

Length of service	Transfer payment Week's ordinary time base rate of pay
Less than one year	0
1 year or more, but less than 2 years	7.5
2 years and more but less than 3 years	13.125

Length of service	Transfer payment Week's ordinary time base rate of pay
3 years and more but less than 4 years	18.75
4 years and more but less than 5 years	22.5
5 years and more but less than 6 years	26.25
6 years or more	30

19. The 'transfer payment' will be paid by Eraring on:

- employees ceasing employment with Eraring and being employed by the purchaser; or
- transfer of the employment services company to the purchaser, immediately following the cessation of employees' employment with Eraring and employment with the new employment services company.

20. There are no conditions attached to the payment regarding continued employment with the new entity. The employee could retire in the week following the transfer of their employment to the purchaser and not forfeit their 'transfer payment'.

Ruling

21. The proposed transfer payment made in accordance with the scheme described in paragraphs 10 to 20 of this Ruling is in consequence of the termination of employment. Unless the employee is covered by a determination exempting them from the 12 month rule, the payment must be received within 12 months of the employee's termination of employment to qualify as an employment termination payment under section 82-130.

Commissioner of Taxation

5 June 2013

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.*

Employment termination payment

22. A payment made to an employee is an employment termination payment if the payment satisfies all the requirements in section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997), and is not specifically excluded under section 82-135 of the ITAA 1997.

23. Section 995-1 states that an employment termination payment has the meaning given by section 82-130.

24. 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 persons death, in consequence of the termination of the other persons employment;
- (b) it is received no later than 12 months after that termination (but see subsection (4)); and
- (c) it is not a payment mentioned in section 82-135.

25. Section 82-135 lists payments that are not employment termination payments. These include (among others):

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

26. For a transfer payment to constitute an employment termination payment, all the conditions in subsection 82-130(1) of the ITAA 1997 must be satisfied. Failure to satisfy any of the three conditions under subsection 82-130 (1) will result in the payment not being considered an employment termination payment.

27. Even where all the conditions in subsection 82-130(1) of the ITAA 1997 have been satisfied, generally, to qualify as an employment termination payment, the payment must be received by the person within 12 months of termination (paragraph 82-130(1)(b)). Generally, any termination payments received outside of the 12 months will be assessable at the person's marginal tax rates (section 83-295), unless the person is covered by a determination exempting them from the 12 month rule (subsection 82-130(4)).

Is there a termination of employment?

28. Paragraph 9 of *Taxation Ruling IT 2152 Income tax: retiring allowances paid to employees upon restructuring of a business*, states:

Where a company or other employer ceases carrying on a business which has been transferred to an associated entity, it will be accepted that the employees of the company have had their employment terminated. This will apply in cases similar to the *Paklan* Case where it is clear that the business in question has been transferred to another entity and it is also clear that the employee's employment has, in fact, been terminated...

29. The facts in *Paklan Pty Ltd and others v. Federal Commissioner of Taxation (Cth)*¹ (*Paklan*) can be summarised as follows:

- The taxpayers were directors and shareholders of a company (the old company) which carried on business as consulting engineers;
- On 30 June 1977 the old company ceased to carry on business and the next day sold the business to another company (the new company) also controlled by the taxpayers;
- The new company commenced carrying on the business from the same premises and subject to the same arrangements for occupancy as the old company;
- All the old company's employees, including the taxpayers, became employees of the new company; and
- Six months later, it was decided to pay a lump sum to former directors. The payments were actually made a year after the company ceased business and out of outstanding fees received after the business had ceased.

30. The taxpayers in *Paklan* did not succeed in having the lump sums in question treated as a 'payment in consequence of termination' as they were paid under circumstances and at a time too remote to the termination. However, the Full Federal Court did not dispute the fact that employment had terminated when the old company had ceased business on 1 July 1977.

¹ (1983) 14 ATR 457; (1983) 67 FLR 238; (1983) 83 ATC 4456.

31. The facts in Board of Review Case Q118² are similar to those in *Paklan* and again involved the sale of a company's business as a going concern to a new company. All the employees of the old business were transferred across to the new company. The Board of Review did not dispute the fact that employees of the old company had ceased to be employees of the old company immediately before taking up employment with the new company.

32. Board of Review Case K76³ involved a taxpayer who ceased work with a subsidiary company due to a corporate restructure and immediately re-commenced work with the parent company on the same terms and conditions. It was held by the Board of Review that the taxpayer's employment with the subsidiary company had been terminated.

33. The relevant facts in respect of Eraring indicate that employees who take up positions with the purchaser will cease employment with Eraring. Therefore, there is a termination of employment for the purposes of subsection 82-130(1) of the ITAA 1997.

Is the making of the transfer payment 'in consequence of the termination of employment'?

34. A payment can be considered to be in consequence of termination where it follows from the termination, or the termination is a condition precedent to the payment. In *Reseck v. Federal Commissioner of Taxation*⁴ (*Reseck*) Justice Gibbs said:

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.

35. In the same case, Justice Jacobs said that 'in consequence of' did not import causation but rather a 'following on'.

36. The decision in *Reseck* was considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation*⁵ (*McIntosh*). The case concerned a taxpayer who became entitled to a payment subsequent to his retirement. In finding that the payment was in consequence of the taxpayer's termination, Justice Brennan said:

...if the payment is made to satisfy a payee's entitlement, the phrase 'in consequence of retirement' requires that the retirement be the occasion of, and a condition of, entitlement to the payment. A sufficient causal nexus between the payment and the retirement is thus established.

² (1983) 83 ATC 610; (1983) 27 CTBR (NS) 312.

³ (1978) 78 ATC 703; (1978) 23 CTBR (NS) 24.

⁴ (1975) 133 CLR 45; (1975) 75 ATC 4213; (1975) 5 ATR 538.

⁵ (1979) 45 FLR 279; (1979) 79 ATC 4325; (1979) 10 ATR 13; (1979) 25 ALR 557.

37. The phrase 'in consequence of' and the decisions in *Reseck* and *McIntosh* were also considered more recently by the Federal Court in *Le Grand v. Federal Commissioner of Taxation*⁶ (*Le Grand*).

38. *Le Grand* involved a payment by the taxpayer as a result of accepting an offer of compromise in respect of claims brought by him against his former employer, in relation to the termination of his employment. The taxpayer had made claims for common law damages for breach of the employment agreement and for statutory damages for misleading and deceptive conduct to procure the taxpayer's employment with the employer. The payment was found to be in consequence of the taxpayer's termination. Justice Goldberg said:

I do not consider that the issue can simply be determined by seeking to identify the 'occasion' for the payment. The thrust of the judgments in *Reseck* and *McIntosh* is rather to the effect that payment is made 'in consequence' of a particular circumstance when the payment follows on from, and is an effect or result, in a causal sense, of the circumstance. ... there need not be identified only one circumstance which gives rise to a payment before it can be said that the payment is made 'in consequence' of that circumstance. ... it can be said that a payment may be made in consequence of a number of circumstances and that, for present purposes, it is not necessary that the termination of the employment be the dominant cause of the payment so long as the payment follows in the causal sense referred to in those judgments, as an effect or result of the termination.

39. The Commissioner of Taxation has issued Taxation Ruling 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'*.

40. In paragraphs 5 and 6 of TR 2003/13, the Commissioner, after considering the judgments referred to in paragraphs 34 to 38 above, stated:

... 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. 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.

⁶ [2002] FCA 1258; (2002) 124 FCR 53; (2002) 2002 ATC 4907; (2002) 51 ATR 139.

41. In the present case, whilst the transfer payment is payable only to the relevant transferring employees who take up employment with the purchaser, the transfer payment is payable only on the condition that the employees have terminated their employment with Eraring. The payment follows as an effect or result of the termination and the payment would not have been made to the employees but for the termination of their employment with Eraring.

42. The following aspects of the arrangement reinforce the characterisation of the transfer payment as an employment termination payment (as distinct from, for example, a transfer or sign-on fee):

- the payment will be made by Eraring;
- the payment is calculated by reference to each transferring employee's years of service with Eraring; and
- there are no obligations imposed on the relevant transferring employees to continue their employment with the purchaser for any particular period after the sale of the business.

43. The transfer payment is only payable on the condition that employees have terminated their employment with Eraring. Although the transfer payment is payable to those who take up employment with the purchaser, it more directly relates to the termination of employment with Eraring.

44. In view of the above, the transfer payment is in consequence of the termination of employment and is therefore an employment termination payment under section 82-130 of the ITAA 1997. Unless the employee is covered by a determination exempting them from the 12 month rule, the payment must be received within 12 months of the employee's termination of employment to qualify as an employment termination payment under section 82-130.

Appendix 2 – Detailed contents list

45. 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:

IT 2152; TR 2003/13; TR 2006/10;

Subject references:

- eligible termination payments
- employment termination
- superannuation business line
- superannuation retirement & employment termination
- Sydney CBD ATO

Legislative references:

- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(4)
- ITAA 1997 82-135
- ITAA 1997 83-295
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968
- Fair Work Act 2009

Case references:

- Case K76 (1978) 78 ATC 703; (1978) 23 CTBR (NS) 24
- Case Q118 (1983) 83 ATC 610; (1983) 27 CTBR (NS) 312
- Le Grand v. Federal Commissioner of Taxation [2002] FCA 1258; (2002) 124 FCR 53; (2002) 2002 ATC 4907; (2002) 51 ATR 139
- McIntosh v. Federal Commissioner of Taxation (1979) 45 FLR 279; (1979) 79 ATC 4325; (1979) 10 ATR 13; (1979) 25 ALR 557
- Paklan Pty Ltd and others v. Federal Commissioner of Taxation (1983) 14 ATR 457; (1983) 67 FLR 238; (1983) 83 ATC 4456
- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; (1975) 75 ATC 4213; (1975) 5 ATR 538

ATO references

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