


# ***CR 2016/86 - Income tax: assessable income: payments received under the South Australian Stolen Generations Reparations Scheme***

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## Class Ruling

# Income tax: assessable income: payments received under the South Australian Stolen Generations Reparations Scheme

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>17</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b><i>Explanation</i></b>	<b>20</b>
<b>Appendix 2:</b>	
<b><i>Detailed contents list</i></b>	<b>37</b>

### **📌 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)
  - section 6-10 of the ITAA 1997
  - section 104-25 of the ITAA 1997, and
  - section 118-37 of the ITAA 1997.

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

## **Class of entities**

3. The class of entities to which this Ruling applies are eligible applicants who receive an ex-gratia payment from the South Australian Government under the Stolen Generations Reparations Scheme (SGRS).

## **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 8 to 16 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.

## **Date of effect**

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7. This Ruling applies from 19 November 2015 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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**

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

9. The Stolen Generations Reparations Scheme (SGRS) was announced on 19 November 2015 by the South Australian Government (the SA Government), and provides an opportunity for eligible individuals to apply to receive a reparation payment.

10. The SGRS reparation payments are not legislated or part of any court order. The payments are provided for under the discretionary power of the SA Government to make ex-gratia payments and may be in addition to payments which have already been made.

11. Individuals may be eligible to apply for a payment under the SGRS if:

- they are an Aboriginal person;
- they were removed from their family as a child, prior to 31 December 1975, without a court order, and
- either their usual place of residence at the time of removal was South Australia, or they were removed by South Australian authorities.

12. The SGRS will accept applications from eligible individuals from 31 March 2016 to 31 March 2017.

13. The Minister for Aboriginal Affairs and Reconciliation (the Minister) will make:

- a determination on the eligibility of an applicant
- a determination of the amount of the payment to be offered to an eligible applicant, and
- a payment offer to an eligible applicant (which may or may not be accepted).

14. An eligible applicant who accepts a payment offer from the Minister must sign a Deed of Discharge and Release as a condition of accepting a payment offer.

15. By signing the Deed of Discharge and Release, the applicant releases and discharges the Minister and the State of South Australia from any past, current or future actions, proceedings, claims, demands, costs and expenses arising from the applicant's removal from their family.

16. The Minister may pay a SGRS reparation amount either as a single lump-sum or as an advance and a final payment to each eligible applicant who accepts the Ministers offer and signs a Deed of Discharge and Release.

## **Ruling**

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### **Income according to ordinary concepts**

17. A lump sum payment made by the South Australian Government to eligible applicants under the Stolen Generations Reparations Scheme (SGRS) is not assessable as ordinary income under section 6-5.

### **Capital gains tax**

18. Capital gains tax (CGT) event C2 under section 104-25 happens to the entitlement to receive a payment under the SGRS when the entitlement is satisfied.

# CR 2016/86

19. However, any capital gain or capital loss made as a result of receiving a payment is disregarded under subparagraph 118-37(1)(a)(ii).

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**Commissioner of Taxation**

9 November 2016

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## Appendix 1 – Explanation

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**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.*

20. A payment is assessable income if:
- it is income in the ordinary sense of the word (ordinary income), or
  - it is not ordinary income but through the operation of the legislation it is included in assessable income (statutory income).

### **Income according to ordinary concepts**

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

22. The legislation does not explain the meaning of 'income according to ordinary concepts', however, a substantial body of case law exists which identifies likely characteristics.

23. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*<sup>1</sup>, 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.

24. 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.<sup>2</sup> Amounts paid in substitution for salary or wages foregone or lost may also be ordinary income.<sup>3</sup>

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

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

<sup>3</sup> *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).

25. Ultimately, whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient.<sup>4</sup> The whole of the circumstances must be considered<sup>5</sup> and the motive of the payer may be relevant to this consideration.<sup>6</sup>

26. Payments under the SGRS are made to eligible applicants who accept a payment offer from the Minister, and sign a Deed of Discharge and Release. The payments are not:

- the product of employment or services rendered by the applicant
- in payment of wages foregone or lost, or
- relied upon by the applicant for their regular expenditure or paid for that purpose.

27. The payments do not possess the characteristics of ordinary income, and are not assessable under section 6-5.

## 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.

## Capital gains tax

29. Under section 102-5, the assessable income of a taxpayer includes a net capital gain. In broad terms a net capital gain is the difference between a person's capital gains and capital losses for an income year.

30. Generally a capital gain or capital loss is made when a CGT event happens to a CGT asset.

31. The entitlement to receive a payment under the SGRS is a CGT asset under section 108-5. The entitlement arises when an eligible applicant has done everything necessary to be entitled to the payment including making an application and satisfying the eligibility criteria.

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<sup>4</sup> *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 and *Federal Coke Co Pty Ltd v. FC of T 77* ATC 4255 at 4273; (1977) 7 ATR 519 at 539.

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

<sup>6</sup> *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.

32. CGT event C2 under section 104-25 happens when the entitlement to receive the payment under the SGRS comes to an end which is when the entitlement is satisfied. This is the time when the Deed of Discharge and Release is signed and the Minister makes the payment.

33. However, under subparagraph 118-37(1)(a)(ii), a capital gain or capital loss from a CGT event is disregarded when the CGT event relates directly to compensation or damages received for any wrong, or injury or illness an individual suffers personally.

34. The treatment of compensation receipts for personal wrong or injury, under the capital gains and losses provisions, is discussed in paragraphs 19 to 22 of Taxation Ruling TR 95/35 *Income tax: capital gains: treatment of compensation receipts*. In particular, paragraph 20 of TR 95/35 explains that CGT exemption is available if the taxpayer receives compensation in an undissected lump sum which relates wholly to the personal wrong or injury suffered by the taxpayer.

35. Reparation payments under the SGRS are made to acknowledge an applicant's grief, loss and trauma resulting from their removal from their family. They are not an undissected lump sum but rather a single amount payable in recognition of the personal injury suffered by the applicant. A reparation payment is therefore in the nature of compensation for personal wrong, injury or illness.

36. Any capital gain or capital loss arising from the CGT event is disregarded under subparagraph 118-37(1)(a)(ii) as it relates directly to compensation for personal wrong, injury or illness.

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

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provisions	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>17</b>
Income according to ordinary concepts	17
Capital gains tax	18
<b>Appendix 1 – Explanation</b>	<b>20</b>
Income according to ordinary concepts	21
Statutory income	28
Capital gains tax	29
<b>Appendix 2 – Detailed contents list</b>	<b>37</b>

## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

IT 2424; TR 95/35; TR 2006/10

### *Legislative references:*

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-10
- ITAA 1997 Div 15
- ITAA 1997 Div 20
- ITAA 1997 102-5
- ITAA 1997 104-25
- ITAA 1997 108-5
- ITAA 1997 118-37
- ITAA 1997 118-37(1)(a)(ii)
- TAA 1953

### *Case references:*

- Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation (1977) 34 FLR 375; (1977) 15 ALR 449; (1977) 7 ATR 519; (1977) 77 ATC 4255; [1977] FCA 3
- Federal Commissioner of Taxation v. Dixon (1952) 86 CLR 540; (1952) 26 ALJ 505; (1952) 10 ATD 82; [1953] ALR 17; [1952] HCA 65
- Commissioner of Taxation (Cth) v. Rowe (1995) 60 FCR 99; (1995) 131 ALR 622; (1995) 31 ATR 392; (1995) 95 ATC 4691
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 170 CLR 124; (1990) 64 ALJR 392; (1990) 93 ALR 193; (1990) 21 ATR 1; (1990) 90 ATC 4413; [1990] HCA 25
- Hayes v. Federal Commissioner of Taxation (1956) 96 CLR 47; (1956) 30 ALJ 96; (1956) 11 ATD 68; [1956] HCA 21
- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 40 ALJR 205; [1967] ALR 561; (1966) 14 ATD 286; [1966] LB Co's Tax Serv 79; [1966] HCA 48
- The Squatting Investment Co. Ltd. v. Federal Commissioner of Taxation (1953) 86 CLR 570; (1953) 26 ALR 658; (1953) 10 ATD 126; [1953] ALR 366; [1953] HCA 13

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### ATO references

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