CR 2017/15 - Income tax: assessability of payments from the Victorian Taxi Reform Hardship Fund

Class Ruling

Income tax: assessability of payments from the Victorian Taxi Reform Hardship Fund

Contents Para

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.

Summary – what this ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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 provision dealt with in this Ruling is section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

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

Class of entities

3. The class of entities to which this Ruling applies are individuals who applied for and were granted a payment from the Taxi Reform Hardship Fund prescribed by the Victorian Government after the Media Release on 11 November 2014. In this Ruling, a person belonging to this class of entities is referred to as an 'Applicant'.

Qualifications

4. 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 7 to 16 of this Ruling.

5. 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

6. This Ruling applies from 19 November 2015 to 1 September 2016. The Ruling continues to apply after 1 September 2016 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

7. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- application for Class Ruling from the Victorian Government
- written statement from the Victorian Department of Economic Development, Jobs, Transport and Resources (the relevant Victorian Government department) dated 13 October 2016 providing additional information about the Fund's eligibility criteria and application assessment process information provided at the Taxi Reform Hardship Fund Application Information Session presentation dated 7 December 2015
- 'Application for Access to the Victorian Taxi Reform Hardship Fund' application form

- sample letter from the relevant Victorian Government department notifying successful applicants of the outcome of their application to access the Fund
- Andrews (Premier of Victoria) 2015, *Taxi Hardship Fund open for those hardest hit by Liberal reforms*, media release, Melbourne 19 November
- Frequently Asked Questions for the outcomes of taxi reform hardship fund, Department of Economic Development, Jobs, Transport and Resources website, http://economicdevelopment.vic.gov.au/transport/rail-and-roads/taxis/taxi-reform-hardship-fund/faqs-for-the-outcomes-of-taxi-reform-hardship-fund, accessed 11 January 2017
- Taxi Services Commission, 2012, *A Final Report Customers First: Service, Safety, Choice,* Taxi Services Commission, Melbourne
- Victorian Government, 2013, *Government Response: Taxi Industry Inquiry Final Recommendations,* Victorian Government, Melbourne Victorian Government, Budget Paper No 3 (2015-16.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

8. The taxi industry in Victoria is regulated by a licencing system with a licence for each taxi.

9. On 28 March 2011 the Victorian Government established the Taxi Industry Inquiry, an independent inquiry into the Victorian taxi and car hire industry. The main types of licences that were available prior to this independent inquiry were:

- perpetual, transferrable and assignable licences fixed term (10 year) licences that are transferrable but not assignable
- peak service licences (permitted to operate between 3:00pm and 7:00am) that are neither transferrable nor assignable.[1]

10. The Taxi Industry Inquiry made several key recommendations which were intended to remove the regulatory restriction on licence numbers and issue new licences to approved applicants at annual fees. They also intended to set taxi licence fees at levels that would promote a measured increase in taxi and hire car numbers, allow an increase in the taxi driver's share of fare revenue and provide some

[1] Taxi Services Commission, 2012, *A Final Report Customers First: Service, Safety, Choice,* Taxi Services Commission, Melbourne, 230 [16.1.4].

support for the equity and income positions of existing licence holders.[2]

11. The Victorian Government supported the recommendations arising from the Taxi Industry Inquiry. The 2015-16 Budget Papers confirmed the establishment of a Taxi Reform Hardship Fund (the Fund) to support taxi licence holders suffering severe financial distress following recent significant reform of the taxi industry.[3]

12. The Fund was financed from within the budget of the relevant Victorian Government department. The Fund was not structured as a settled trust.

13. On 19 November 2015 the Minister for Public Transport for the State of Victoria announced that applications were open for the Fund and that a Chair had been appointed to administer the Fund.[4] Applications to the Fund closed on 12 February 2016. The Fund Chair, supported by externally appointed auditors (KPMG), was responsible for assessing applications.

Application eligibility criteria

14. Under the scheme announced on 19 November 2015 Applicants were eligible to apply for a payment from the Fund if they held an ownership interest in a perpetual taxi licence between 28 March 2011 and 1 July 2013 and as a direct result of the Taxi Industry Inquiry and subsequent reforms were currently experiencing both:

- a deficiency in income that would not allow provision for either themselves or their immediate family the necessities of food, shelter, clothing, medical expenses, education for children and other basic requirements, and
- an inability to liquidate assets in order to either meet the costs of those necessities outlined above or to pay outstanding debts as and when they fall due.

15. Applicant eligibility was assessed on a case by case basis against a set of guidelines, which were established by the Chair and externally appointed auditors, to support the criteria outlined above. Those guidelines included an:

- Eligibility Test which involved ensuring Applicants held the eligible licence type (only Applicants who owned a perpetual taxi licence were eligible).

[2] Victorian Government, 2013, *Government Response: Taxi Industry Inquiry Final Recommendations,* Victorian Government, Melbourne, 3.
[3] Victorian Government, Budget Paper No 3 (2015-16) 33.
[4] Andrews (Premier of Victoria) 2015, *Taxi Hardship Fund open for those hardest hit by Liberal reforms*, media release, Melbourne 19 November.

- Income Test which involved Applicants and (where applicable) their partner demonstrating 'severe financial hardship' by means testing their income from all sources against a threshold to determine eligibility for a payment from the Fund.[5]
- Asset Test which involved Applicants and (where applicable) their partners demonstrating 'severe financial hardship' by means testing their liquid asset levels and determining whether they were below a set threshold to determine eligibility for a payment from the Fund.[6]

16. Successful applicants were advised of the outcome of their application in a letter from the Fund dated 1 September 2016. A fixed, once-off lump sum payment was offered to Applicants who met the eligibility criteria. The payment amount was designed such that, for a specified number of weekly periods, the vast majority of successful Applicants would no longer fall below the Income Test threshold once the Fund payment was also taken into account.

Ruling

17. Payments made from the Taxi Reform Hardship Fund are ordinary income in the hands of the Applicants and assessable under section 6-5.

Commissioner of Taxation
15 March 2017

[5] Income subject to the Income Test included (but was not limited to) income from holding the perpetual taxi licence as well as income from employment, running a business, interest, superannuation pension or annuity, overseas pension, rent, compensation or retiring allowances, income payments from other Government departments and maintenance payments for the Applicant or any children in their care.

[6] Assets subject to the Asset test included (but was not limited to) real estate, shares, assets held in a superannuation fund that was vested and was accessible by the Applicant, Government bonds, unsecured notes, money on loan, motor vehicles, house contents, debts owed by the Applicant and their partner (where applicable) and gifts or sale of assets with a value over $10,000 by the Applicant and their partner (where applicable).

Appendix 1 – Explanation

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.

18. Subsection 6-5(1) provides that assessable income includes income according to ordinary concepts (ordinary income). Taxation legislation does not provide a definition of 'ordinary income'.

19. The characteristics of ordinary income have been developed by case law and generally fall into three categories:

- income from providing personal services
- income from property, or
- income from carrying on a business

20. Paragraph 85 of Taxation Ruling TR 2006/3 *Income tax: government payments to industry to assist entities (including individuals) to continue, commence or cease business* provides guidelines to aid determining the nature of a receipt. Including, of relevance here:

- whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient[7]
- regard must be given to all facts,[8] as such a broad view must be taken of a taxpayer's situation and it is necessary to consider the total situation of the taxpayer[9]
- calculation of a payment by reference to expected profits made, or not made by the recipient but that would ordinarily have been expected to have been made, is a factor supporting a conclusion of income[10]
- a payment in a lump sum does not require a conclusion that the payment is capital.[11]

21. The character of a single lump sum payment from the Fund is determined by examining the character of the whole payment in the hands of the recipient. As such, the Commissioner will have regard to all circumstances which give rise to the payment without a

[7] *Scott v. FCT* (1966) 117 CLR 514 per Windeyer J at 526, *Hayes v. FCT* (1956) 96 CLR 47 per Fullagar J at 55 and *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation* (1977) 34 FLR 375 at 402 per Brennan J
[8] *MIM Holdings Ltd v. Commissioner of Taxation* (*MIM* case) (1997) 363 FCA at 13 per Northrop, Hill and Cooper JJ and *Federal Coke* case (1977) 34 FLR 375 at 387 per Bowen J.
[9] *FCT v. Rowe* (1997) 187 CLR 266 at 292 per Gaudron, Gummow and Kirby JJ, *FCT v. Dixon* (1952) 86 CLR 540 at 555 per Dixon CJ and Williams J and *The Squatting Investment Co Ltd v. FCT* (1953) 86 CLR 570 at 627-628 per Kitto J
[10] *Reckitt & Colman Pty Ltd v. FC of T* (1974) 74 ATC 4185 at 4187 per Mahoney J.
[11] *MIM* case (1997) 363 FCA 13 per Northrop, Hill and Cooper JJ.

disproportionate emphasis upon the form in which the transaction was structured.[12]

22. The distinction between income and capital receipts has been likened to the difference between a tree and the fruit of a tree. The High Court in *FC of T v. DP Smith*[13] made the following observations in relation to payments made under a personal disability insurance policy:

> If the ability to earn is the tree, and income the fruit thereof, a policy of insurance against impairment of the fruit-bearing capacity of the tree may well take the form of providing the fruit until such time as the tree recovers its proper role. The degree of correspondence, if any, between the moneys payable under the policy and the actual pecuniary loss of revenue suffered by the insured is a relevant factor, but it is not necessary to look for an indemnity measured with any precision against the loss. Any fruit is better than none, whether or not it represents adequate compensation for the loss.[14]

23. In that case, features of the insurance policy made it unlikely that payments received under the policy would bear any direct correlation to the actual loss of earnings suffered by the insured individual. Despite this, the Court held that the purpose of the policy was to diminish the adverse economic consequences of injury by accident and to provide indemnity against income loss arising from the inability to earn.

24. Applying this case by analogy, the income received by perpetual taxi licence owners could be characterised as fruit while the perpetual taxi licence from which income is derived can be likened to the tree.

25. Whilst the receipt of the Fund payment, being a once-off lump sum receipt, is a factor in reaching a conclusion that the receipt is capital in nature, it is not necessarily a determinative factor.[15] Despite the lump sum nature of the Hardship Fund payment, it has the character of income in the hands of the Applicant for the following reasons:

- the Income Test Criteria to receive payments from the Fund required the provision of evidence by the Applicant that a reduction in income could be demonstrated since the time of the reforms
- the fixed, once-off lump sum was designed to ensure that the vast majority of successful Applicants would no longer fall below the Income Test threshold once the Fund payment was also taken into account

[12] *Northumberland Development Co Pty Ltd v. FC of T* 94 ATC 4717 at 4721.
[13] *FC of T v DP Smith* 81 ATC 4114.
[14] *FC of T v DP Smith* 81 ATC 4114 at 4116 per Gibbs, Stephen, Mason, Murphy and Wilson JJ.
[15] *MIM Holdings Ltd v. Federal Commissioner of Taxation* 97 ATC 4420; (1997) 36 ATR 108 and TR 2006/3.

- having an ownership interest in the taxi licence served as part of the eligibility criteria creating a nexus between the payment and an income generating asset;
- the taxi licence was unaffected by the scheme. The license existed in the same state before and after the Fund payment.

26. It is not necessary that there be a direct correspondence between the once-off lump sum payments made and the actual reduction in licence income suffered. Payments from the Fund are clearly stamped with the characteristic of income.

27. As such, payments made from the Fund are ordinary income in the hands of the recipient and assessable under section 6-5. A payment from the Fund that is ordinary income is assessable under subsection 6-5(1) in the income year of derivation.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/3; TR 2006/10

Legislative references:

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- TAA 1953

Case references:

- *Federal Commissioner of Taxation v. Smith* (1981) 147 CLR 578; (1981) 55 ALJR 229; (1981) 34 ALR 16; (1981) 11 ATR 538; 81 ATC 4114; (1981) HCA 10
- *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540; (1952) 26 ALJ 505; (1952) 10 ATD 82; [1953] ALR 17; [1952] HCA 65
- *Federal Commissioner of Taxation v. Rowe* (1997) 187 CLR 266; (1997) 71 ALJR 624; (1997) 35 ATR 432; (1997) 143 ALR 406; (1997) 97 ATC 4317; [1997] HCA 16
- *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
- *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
- *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47; (1956) 30 ALJ 96; (1956) 11 ATD 68; [1956] HCA 21
- *MIM Holdings Ltd v. Federal Commissioner of Taxation* ; (1997) 36 ATR 108; 97 ATC 4420
- *Northumberland Development Co Pty Ltd v. Federal Commissioner of Taxation* (1994) 126 ALR 97; (1994) 29 ATR 395; (1994) 94 ATC 4717
- *Reckitt & Colman Pty Ltd v. Federal Commissioner of Taxation* (1974) 23 FLR 58; (1974) 3 ALR 381; (1974) 4 ATR 501; (1974) 74 ATC 4185
- *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

Other references:

- Frequently Asked Questions for the outcomes of taxi reform hardship fund, Department of Economic Development, Jobs, Transport and Resources website, http://economicdevelopment.vic.gov.au/transport/rail-and-roads/taxis/taxi-reform-hardship-fund/faqs-for-the-outcomes-of-taxi-reform-hardship-fund, accessed 11 January 2017
- Taxi Services Commission, 2012, *A Final Report Customers First: Service, Safety, Choice*, Taxi Services Commission, Melbourne
- Victorian Government, 2013, *Government Response: Taxi Industry Inquiry Final Recommendations,* Victorian Government, Melbourne
- Victorian Government, Budget Paper No 3 (2015-16)
- Andrews (Premier of Victoria) 2015, *Taxi Hardship Fund open for those hardest hit by Liberal reforms*, media release, Melbourne 19 November

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