CR 2017/36 - Fringe benefits tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)

Class Ruling

Fringe benefits tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)

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 provisions dealt with in this Ruling are:

- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- subsection 136(1) of the FBTAA.

All references in this Ruling are to the FBTAA unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are employers who make a contribution to the Australian Construction Industry Redundancy Trust (ACIRT) for an employee who is a member of ACIRT.

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 10 to 23 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

7. This Ruling applies from 1 April 2017 to 31 March 2022. The Ruling continues to apply after 31 March 2022 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).

8. If the relevant provisions to which this ruling applies substantively change, the part of this ruling dealing with the changed law(s) ceases to apply.

Previous Rulings

9. This ruling replaces Class Ruling CR 2012/84 *Fringe benefits tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)* which applied to the payment of contributions by an employer to ACIRT during the period from 1 April 2012 to 31 March 2017.

Scheme

10. 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:

- class ruling application from DLA Piper Australia dated 3 March 2017
- a copy of ACIRT Redundancy Fund Trust Deed (ACIRT Trust Deed) as last amended as at 24 June 2014
- an example Deed of Adherence between ACIRT and an Employer
- a copy of clause 17 of the Building and Construction General On-site Award 2010 (BCGOA)
- a copy of an extract from an Enterprise Bargaining Agreement (EBA) containing examples of typical redundancy clauses (EBARC) involving redundancy contributions to ACIRT
- additional information provided by DLA Piper Australia dated 12 April 2017.

11. Employers are required to provide redundancy entitlements for their workers pursuant to various awards and agreements of which the BCGOA is the predominant award. Employers may choose to meet their obligation to fund worker redundancy entitlements by the payment of contributions to ACIRT.

12. ACIRT is an Australian resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

13. The trustee of ACIRT is ACIRT Pty Ltd ABN 317 736 023 07 (ACIRT Trustee), an Australian resident company.

14. ACIRT accepts contributions from employers to fund each worker's individual redundancy benefit. ACIRT and the employers execute an agreement called a 'Deed of Adherence' which sets out the amount to be contributed by the employer in respect of each worker. This can be calculated by reference to the greater of either:

- the 'minimum contribution' rate (as defined in the ACIRT Trust Deed), or
- the rate provided for in an industrial instrument.

15. An employer's obligation to participate in ACIRT may be required under an industrial agreement or an employer may elect to join voluntarily. Employers can participate in ACIRT by making application to the Trustee for admission, completing a Deed of Adherence, and meeting the terms of the fund.

16. Clause 17 in the BCGOA deals with redundancy matters and how contributions are to be made. Clause 17.3(a) of the BCGOA states:

> A redundant employee shall receive redundancy/severance payments, calculated as follows ...

17. Clause 17.4 in the BCGOA states the following in relation to Redundancy pay schemes:

> 17.4(a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.
>
> 17.4(b) Provided that where the employment of an employee is terminated and:
>
> (i) (the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this clause and the amount of the redundancy pay scheme benefit the employee receives is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 17.3 then the employee will receive no redundancy payment under clause 17.3; or
>
> (ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 17.3, and payment to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both.
>
> 17.4(c) the redundancy pay scheme must be an Approved Worker Entitlement Fund …

18. The EBARC deals with both the payment by the employer to a fund and also the payments that are required to be made to an employee being made redundant. It is worded in the following manner:

> Redundancy or redundant means the termination or cessation of employment of an Employee for any reasons.
>
> In respect of redundancy benefits:
>
> a) The Company agrees to make redundancy contributions in respect of Employees covered by this Agreement to the Australian Construction Industry Redundancy Trust (ACIRT) in accordance with Appendix C of this agreement.
>
> The entitlement for apprentices will be in accordance with Appendix D of this Agreement.

The contributions shall be paid monthly into ACIRT in accordance with the requirements of the Trust.

b) Employees will be entitled to a redundancy benefit for each week of service with the Company being the greatest of the following amounts:

(i) the amount payable by the Company to ACIRT in accordance with this Agreement or

(ii) the amount prescribed by the relevant Award and or

(iii) any amount prescribed or awarded by a relevant industrial tribunal.

Where there is a higher entitlement under (b)ii) and or (b)iii) of this clause the Employee will be paid direct this entitlement minus the balance that has already been paid into ACIRT by the Company for this period of employment.

19. The trustee of ACIRT establishes and maintains a Member Account in respect to each employee admitted to the membership of ACIRT. This account shows contributions to the fund for that employee by the employer and amounts credited or debited to the account.

20. Payments can be made out of the income or the capital of ACIRT to satisfy the objects of ACIRT.

21. Payments from amounts received by ACIRT as contributions from employers can only be applied for specific purposes, including paying entitlements to employees or death benefits to dependants, reimbursing employers who have paid entitlements direct to employees in respect of whom contributions are made, returning contributions to employers, to pay an employment termination payment, to transfer contributions to another worker entitlement fund or to pay reasonable administrative expenses of the fund.

22. Payments from ACIRT to employees will be payable where the employee is made redundant and to dependants of the employee in the event of the employee's death.

23. In practical terms, payments of benefits from ACIRT to employees will be made in one of, or both, of the following ways:

- from ACIRT directly to the employees, and/or
- from ACIRT to the employer in order to reimburse the employer who has made a payment to an employee in respect of their entitlement, and the employer has already made a contribution to ACIRT representing that employee's entitlement.

Ruling

24. The payment of a contribution to ACIRT by an employer under the terms of the BCGOA, for the same or similar reasons as

described in paragraph 17 of this Ruling, will be an exempt benefit under section 58PA.

25. The payment of a contribution to ACIRT by an employer under the terms of other 'industrial instruments' (as that term is defined in subsection 136(1)), for the same or similar reasons as described in paragraph 18 of this Ruling, will be an exempt benefit under section 58PA.

Commissioner of Taxation
21 June 2017

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.

26. Section 58PA of the FBTAA states:

> **EXEMPT BENEFITS – WORKER ENTITLEMENT CONTRIBUTIONS**
>
> If:
>
> (a) a person makes a contribution to an approved worker entitlement fund; and
>
> (b) the contribution is made under an industrial instrument; and
>
> (c) the contribution is either:
>
> (i) made for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or
>
> (ii) for the reasonable administrative costs of the fund;
>
> the contribution is an exempt benefit.

27. Exemption under section 58PA requires that all paragraphs contained therein are met and, consequently, a failure to meet the requirements of one or more of those paragraphs means the exemption under the provision does not apply.

28. Therefore, to determine whether the payment of a contribution to ACIRT is an exempt benefit under section 58PA, it is necessary to consider the following questions:

(a) Is ACIRT an approved worker entitlement fund?

(b) Is the contribution made under an industrial instrument?

(c) Is the contribution made to ensure that an obligation to make leave payments, or payments when an employee ceases employment, is met or for the reasonable administrative costs of the fund?

(a) Is ACIRT an approved worker entitlement fund?

29. Section 58PB sets out the conditions that must be met in order for ACIRT to be an 'approved worker entitlement fund'. Subsection 58PB(2) states:

> A fund is also an ***approved worker entitlement fund*** if:

> (a) the fund is endorsed as an approved worker entitlement fund under subsection (3); ...

30. Subsection 58PB(3) states:

> The Commissioner must endorse a fund as an approved worker entitlement fund if:
>
> (a) the fund is entitled to be endorsed as an approved worker entitlement fund (see subsection (4)); and
>
> (b) the fund has applied for the endorsement in accordance with Division 426 in Schedule 1 to the *Taxation Administration Act 1953*.

31. ACIRT has been taken to be endorsed as an approved worker entitlement fund since 28 June 2011 pursuant to the transitional provisions under *Tax Laws Amendment (2011 Measures No. 2) Act 2011*. It has further been determined that the fund is still entitled to be endorsed as an approved worker entitlement fund pursuant to the conditions outlined in subsection 58PB(4).

32. As the requirements of subsection 58PB(2) are met, ACIRT is an approved worker entitlement fund.

(b) Is the contribution made under an industrial instrument?

33. Paragraph 58PA(b) requires that the contribution to an approved worker entitlement fund 'is made under an industrial instrument'.

34. In the 'Detailed explanation of new law' section of the Explanatory Memorandum (EM) to Tax Laws Amendment (2005 Measures No. 2) Bill 2005, which removed the previous conditions in paragraphs 58PA(b) and 58PA(c), that contributions to an approved worker entitlement fund must be 'required' under an industrial instrument, it is stated:

> 8.10 Industrial instruments, such as awards, may include an obligation for employers to provide leave or redundancy payments for employees based on the length of an employee's service. Employers may have the option of providing for the payments themselves, or by way of making contributions to a worker entitlement fund. Thus the wording of these industrial instruments may make contributions to a worker entitlement fund optional. The industrial instruments may not require employers to meet their obligation to provide those payments by way of a contribution to a worker entitlement fund.
>
> 8.11 Prior to these amendments, contributions needed to be 'required under an industrial instrument' in order for the contribution to be eligible for an exemption from FBT. As a result, employers may be liable to pay FBT on their contributions to approved worker entitlement funds in cases where the contributions are optional, but not required, under the relevant industrial instrument.

35. The above EM indicates that although current paragraph 58PA(b) (and also current paragraph 58PA(c)) no longer specify that the relevant industrial instrument contain a legal requirement for the contribution to be made to an approved worker entitlement fund, there still has to exist, for the purposes of the aforementioned paragraphs, some logical link between the industrial instrument and the subsequent contribution to the fund.

36. The Administrative Appeal Tribunal (AAT) case of *Eldersmede Pty Ltd & Ors v. FCT* [2004] AATA 710; 2004 ATC 2129; (2004) 56 ATR 1179 examined what the word 'under' may mean in various legislative and contractual contexts. After examining various earlier court decisions the AAT stated (at ATC 2158, ATR 1210):

> The authorities to which we have referred indicate that, in various contexts, the word 'under' in the expression 'under a scheme' in s 270(10)(1) of the [*Income Tax Assessment Act 1936*] may mean 'pursuant to', 'in accordance with', 'provided for in', 'by virtue of', 'authorised or required by', 'directly effected by' or 'through the operation of, as a matter of legal effect'. In saying this though, we are mindful of the High Court's warning in *Minister for Immigration and Ethnic Affairs v. Guo* [1997) 144 ALR 567] that it is dangerous to treat a word phrase as synonymous with a statutory term and we do not propose to do so. What is common to all these authorities is that there must be a sufficient nexus or connection between two matters so that one may be said to be under the other or to have occurred under the other.

37. As such, for a contribution to an approved worker entitlement fund to be said to have been 'made under an industrial instrument', for the purposes of paragraph 58PA(b), there must exist a 'sufficient nexus or connection' between that contribution and an industrial instrument.

38. The Full Federal Court in *J & G Knowles and Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402; (2000) 44 ATR 22; 2000 ATC 4151, in the course of examining the question of whether on the facts of the case there was a sufficient or material connection or relationship between a 'benefit' and 'employment', stated (at FCR 410, ATR 30, ATC 4158):

> 29. To put the matter another way, although the process of characterising the benefit provided in a particular case can involve questions of fact and degree, it is not sufficient for the purposes of the Act merely to enquire whether there is some casual connection between the benefit and the employment: see *FC of T v. Rowe* 95 ATC 4691 at 4703 and 4710; (1995) 60 FCR 99 at 114 and 123. Although Brennan, Deane and Gaudron JJ observed in *Technical Products* (at Aust Torts Reports 68, 622; CLR 47), that the requisite connection will not exist unless there is 'some discernible and rational link' between the two subject matters which the statute requires to be linked, as was pointed out by Dawson J (at Aus Torts Reports 68,624; CLR 51), the connection must be 'material'.

39. It is considered, therefore, that for a 'sufficient nexus or connection' to exist between a contribution and the relevant industrial instrument the link between the two must have 'some discernible and rational link' that is 'material' in its extent.

40. Subsection 136(1) of the FBTAA defines 'industrial instrument' as meaning:

> ... a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law.

41. Employees engaged under the terms of awards, orders, determinations, enterprise or industrial agreements, have their rights either sanctioned directly by Commonwealth, State or Territory legislation or by an industrial court authorised by statute to make and enforce such employee rights. The ensuing obligations of employers towards such employees are similarly legislatively or court sanctioned.

42. There is a ready nexus between an employer's obligations arising under an industrial agreement and the subsequent meeting of such obligations by that employer. Consequently, contributions by employers to an approved worker entitlement fund in such circumstances can, indeed, be said to have been 'made under an industrial instrument' (up to the extent of the contribution authorised by that instrument) and the requirements of paragraph 58PA(b) will be met.

43. Provided such contributions are therefore made for one of the specific purposes required under paragraph 58PA(c), the payment of contributions to ACIRT under either the BCGOA or EBARC will be exempt under section 58PA of the FBTAA as the requirements of all the paragraphs of that section have been met.

(c) Is the contribution made for the required purposes?

44. Paragraph 58PA(c) requires that the contribution is either for:

- the purpose of ensuring that an obligation that arises under the industrial instrument to make leave payments or payments when an employee ceases employment is met, or
- for the reasonable administrative expenses of the fund.

45. This requirement will be met where the employer makes a payment of a contribution to ACIRT to enable the obligation to make a payment when an employee ceases employment under the relevant industrial instrument to be met. Employers make the contributions to ACIRT for this purpose under the BCGOA or EBARC.

Conclusions

46. As the three conditions in section 58PA have been met the payment of a contribution to ACIRT by an employer under the terms of the BCGOA, for the same or similar reasons as described in paragraph 17 of this Ruling, will be an exempt benefit.

47. Further, the payment of a contribution to ACIRT by an employer under the terms of other 'industrial instruments' (as that term is defined in subsection 136(1)), for the same or similar reasons as described in paragraph 18 of this Ruling, will be an exempt benefit under section 58PA.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2012/84

Legislative references:

- FBTAA 1986
- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 58PB
- FBTAA 1986 58PB(2)
- FBTAA 1986 58PB(3)
- FBTAA 1986 58PB(4)
- FBTAA 1986 136(1)
- TAA 1953
- Tax Laws Amendment (2011 Measures No. 2) Act 2011
-

Case references:

- Re Eldersmede Pty Ltd and Federal Commissioner of Taxation [2004] AATA 710; 2004 ATC 2129; (2004) 56 ATR 1179; [2005] ALMD 1375; [2005] ALMD 1385
- J and G Knowles and Associates Pty Ltd v. Federal Commissioner of Taxation [2000] FCA 196; 2000 ATC 4151; (2000) 96 FCR 402; (2000) 44 ATR 22

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005

ATO references

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