

TR 93/D45 - Income tax: approved early retirement scheme and bona fide redundancy payments

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Draft Taxation Ruling

Income tax: approved early retirement scheme and bona fide redundancy payments

other Rulings on this topic

IT 2255; IT 2286; IT 2490; IT 2620

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What this Ruling is about

1. This Ruling outlines the requirements for an approved early retirement scheme under section 27E of the *Income Tax Assessment Act 1936* and the conditions for a payment to qualify as a bona fide redundancy payment under section 27F of the Act.

2. Payments which come within the scope of section 27E or section 27F, together with invalidity payments (section 27G), represent the concessional component of an eligible termination payment (ETP). In addition, payments in respect of unused annual leave and unused long service leave made on termination of employment under an approved early retirement scheme or as a consequence of bona fide redundancy or invalidity qualify as *eligible assessable income* as defined in section 159S and consequently receive concessional tax treatment.

3. This Ruling replaces Taxation Ruling IT 2286 which outlines the conditions for payments to qualify for concessional treatment as approved early retirement scheme payments or bona fide redundancy payments.

Ruling

4. Payments made to employees who are made redundant or are retrenched, whether voluntarily or involuntarily, will invariably qualify as approved early retirement scheme payments or bona fide redundancy payments.

Approved early retirement scheme payments

5. Payments made under voluntary redundancy packages usually qualify for concessional treatment under section 27E of the *Income Tax Assessment Act 1936*. That section applies to approved early retirement scheme payments. Three conditions need to be satisfied for a scheme to qualify as an approved early retirement scheme:

- the scheme must be offered to all employees within a class identified by the employer;
- the scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind; and
- the scheme must be approved by the Commissioner prior to its implementation.

6. The Commissioner has a discretion to overlook any of these requirements in special circumstances. Special circumstances are taken to include circumstances where a scheme has not been approved in advance because, for example, there has been a delay in processing an application made for its approval or because the employer did not realise or was not aware of the implications of failing to seek approval for a scheme in advance.

7. A scheme will fail to satisfy the requirements of section 27E if the employer has an unlimited right of veto on the acceptance of applications under the scheme. If the employer has an unlimited right of veto he or she can effectively choose which employees are to be made redundant. Employees who accept a redundancy offer in these circumstances are usually being retrenched and payments they receive will fall for concessional treatment under section 27F. However, if the employer has a limited right of veto which is outlined under the terms and conditions of the scheme, the scheme will usually qualify as an approved early retirement scheme.

Bona fide redundancy payments

8. Payments made under redundancy packages will qualify for concessional treatment under section 27F if an employee is dismissed by reason of his or her bona fide redundancy.

9. Dismissal carries with it the concept of involuntary (on the employee's part) termination of employment and will ordinarily be instigated by the employer. The involuntary nature of dismissal does not prevent the employer, with a view to maintaining industrial harmony and minimising the disruption to employees, from seeking expressions of interest from those employees who would like to accept a redundancy package. It simply means that the employer ultimately

decides that the number of staff positions will be reduced and determines which employees will actually be made redundant.

10. Dismissal also includes the notion of constructive dismissal. Constructive dismissal arises if the employer places an employee in a position where he or she has little option but to tender his or her resignation.

Date of effect

11. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Approved early retirement schemes

12. Three conditions must be satisfied for a scheme to qualify as an approved early retirement scheme. Those conditions are:

- the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
- the scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind (paragraph 27E(1)(b)); and
- the scheme must be approved by the Commissioner prior to its implementation (paragraph 27E(1)(c)).

Class of employees to whom the scheme is offered

13. The first condition for an approved early retirement scheme is that it must be offered to all employees within one of the categories specified in subparagraphs 27E(1)(a)(i) to (v). The acceptable categories of employees are:

- all of the employees of the employer;
- all employees of a particular age;
- all employees with a particular occupational skill;
- all employees with a particular occupational skill and of a particular age; or

- all employees in a class of employees approved by the Commissioner.

14. If the early retirement scheme is not offered to a class of employees within one of the specific categories, those employees may come within a special class approved by the Commissioner.

Consistent with the specific categories of employees, the Commissioner will have regard to the nature of the rationalisation or re-organisation of the operations of the employer when giving consideration to approving a class of employees.

15. The purpose of the requirement to identify a class of employees is to ensure that the scheme is not limited to a few selected employees. However, the number of employees concerned is not usually relevant. For example, all of a small number of employees in one location might be offered early retirement as an alternative to dismissal or transfer to the place of employment of the majority of the employer's employees. Those employees would usually be approved by the Commissioner as constituting a class of employees for these purposes.

16. On the other hand, an offer of early retirement to a very narrow range of employees (for example, those occupying the position of executive director) would not, in ordinary circumstances, constitute a sufficiently wide class of employees having regard to the fact that an approved early retirement scheme should not be restricted to a select few employees. In any event, such a limited early retirement offer would be unlikely to satisfy the requirements of paragraph 27E(1)(b).

17. In addition, an early retirement scheme will not satisfy the requirements of paragraph 27E(1)(a) if, in light of the terms and conditions of the scheme (particularly the basis on which participation is available) and the way in which it is to be implemented, the scheme is directed mainly at ensuring the retirement of employees who are inefficient. In this context, the fact that employees do not possess relevant technical skills (for example, because of technological advances in their industry) is not of itself to be taken as representing inefficiency.

18. In some cases an employer ostensibly offers an option of early retirement to all employees in one of the relevant categories but retains the right to refuse an application for early retirement in certain circumstances. A common example is if early retirements are restricted by number to the surplus positions arising from a rationalisation or re-organisation of the employer's operations. In other cases employers have, under the terms of the scheme, a right of veto on applications by key personnel who cannot readily be replaced and whose loss would impair the efficiency of the employer's business operations.

19. In considering such cases, it should be kept in mind that section 27E is intended to provide a concession for employees who retire under genuine early retiring arrangements, as opposed to employees who are retrenched (in which case section 27F may apply to provide a similar concession). If an employer has found it necessary to reduce staff numbers or to alter the make-up of the work force following a rationalisation or re-organisation of its operations, the employer will often implement an early retirement scheme as an alternative to retrenchments in order to maintain industrial harmony. The existence of conditions on the acceptance of early retirement applications will not, therefore, necessarily cause an otherwise acceptable scheme to be rejected.

20. However, if an employer retains an unlimited right of veto on acceptance of applications the scheme will not, as a general rule, be approved. On the other hand, if a right of veto is clearly expressed under the terms and conditions of the scheme as being limited in an acceptable way (such as ensuring that the scheme does not result in the retirement of all employees in particular key areas to the detriment of the employer's operations) the scheme will be approved.

21. If a scheme has been approved on the basis that a veto will have limited application (as expressed under the terms and conditions of the scheme) and that veto is exercised in a way that is inconsistent with its stated purpose or the stated purpose for which the scheme was implemented, approval of the scheme will be withdrawn.

Purpose of implementing the scheme

22. The second condition for approval of an early retirement scheme is that the scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer with an objective of the type mentioned in subparagraphs 27E(1)(b)(i) to (vi) in mind. Acceptable objectives of the scheme are:

- the replacement of employees possessing a particular occupational skill with those possessing a different skill;
- the replacement of employees of a particular age or ages (not less than 55 years) with younger employees;
- the cessation of, or the reduction in output of, the whole or part of the employer's operations;
- the relocation of the whole or part of the employer's operations;
- the introduction of new technology, processes or systems or productivity increases; or

- any other change to the employer's operations or to the nature of the employer's work force approved by the Commissioner.

23. Section 27E does not extend to early retiring arrangements that are part and parcel of the employees' ordinary terms of employment. For instance, some employers have as part of their ordinary conditions of employment arrangements that give employees an option to retire before attaining what might be regarded as the normal retiring age of 65. Retirees under such arrangements would usually be replaced by employees of a younger age as subparagraph 27E(1)(b)(ii) envisages. However, such arrangements are not early retirement schemes of the type contemplated by section 27E because they fail the test that they are for the purpose of the rationalisation or re-organisation of the employer's operations.

24. That is not to say that an employer who has instituted such arrangements could not, with a view to achieving a specific short-term objective connected with a rationalisation or re-organisation of its operations, implement a separate approved early retirement scheme offering early retirement to those employees who have passed the optional retirement age on a basis more advantageous than for the ordinary retirement available to them at that time.

25. Although the nature of the rationalisation or re-organisation of the employer's operations might not fit within one of the specific objectives identified in subparagraphs 27E(1)(b)(i) to (v), they may still be implemented with a view to a restructuring, of some kind, of the work force or the operations of the employer. For example, an employer may decide that employee numbers are excessive having regard to seasonal variations in the level of operations and, to effect a suitable reduction in numbers, the employer might offer all employees an early retirement incentive. Such an objective would be consistent with the specifically identified objectives for rationalisation or re-organisation and could form the basis of approval of the employer's early retirement scheme.

26. A common feature of most early retirement schemes is that the offer of early retirement remains open only for a specified period (usually not in excess of 12 months) connected with the rationalisation or re-organisation objective. If there is no period specified or the period specified is excessive, the scheme will be subjected to careful scrutiny. However, provided the employer has a specific objective of rationalisation or re-organisation that is to be attained, the scheme will be approved if the early retirement option remains open to employees until the desired objective is achieved.

Approval by the Commissioner

27. The final requirement for qualification as an approved early retirement scheme is that the scheme be approved by the Commissioner before it is implemented.

Commissioner's discretion under subsection 27E(2)

28. Subsection 27E(2) allows the Commissioner to overlook the failure to comply with any of the three conditions if special circumstances exist in relation to the scheme. Special circumstances include circumstances where:

- a scheme is implemented before approval has been obtained because, for example, there has been a delay in processing an application made for its approval; or
- a scheme is implemented without approval because the employer did not realise that section 27E could affect the income tax treatment of payments made under the scheme.

29. However, if an employer has implemented a scheme and represented it to employees as being an approved scheme even though approval had not been sought, subsection 27E(2) will not apply unless other extenuating circumstances exist. The fact that a scheme has already been implemented is not, of itself, to be taken as constituting a special circumstance.

Application for approval of schemes

30. Applications for approval of early retirement schemes should be sent to the Taxation Office at which the employer lodges income tax returns. If an employer is not required to lodge income tax returns, applications should be sent to the Taxation Office in the capital city of the State in which the relevant operations of the employer are carried on. If the operations are carried on in more than one State, they should be sent to the Taxation Office in the capital city of the State in which the employer resides or, in the case of a company, has its place of central management and control.

31. Documentation accompanying an application should include:

- the terms and conditions applying under the scheme;
- any advice or information regarding the scheme given by the employer to employees;
- relevant industrial agreements or awards;
- a description of the class of employees to whom the scheme will be offered; and

- an outline of the purpose for implementing the scheme.

Bona Fide Redundancy

32. Redundancy arrangements do not have to be approved in advance for bona fide redundancy payments to qualify for concessional taxation treatment under section 27F. The one test to be satisfied for a payment to qualify as a bona fide redundancy payment is that the taxpayer was dismissed by reason of his or her bona fide redundancy.

Meaning of dismissal

33. *Dismissal* carries with it the concept of the involuntary (on the employee's part) termination of employment. That is, the termination of an employee's employment will usually be instigated or initiated by the employer.

34. It will often be the case that an employee will agree to be dismissed. For instance, if the employer decides that the number of employee positions has to be reduced, in the interests of maintaining industrial harmony and minimising disruption to employees, he or she may consult with and seek expressions of interest from those employees who wish to accept a redundancy package. The fact that the employees who are dismissed by the employer volunteer to accept the redundancy package does not change the character of the termination of employment as a dismissal. The point is that the decision to terminate employment is ultimately that of the employer. The termination of employment will be a dismissal because it is instigated or initiated by the employer rather than the employee.

35. Consultation between the employer and affected employees when an employer is implementing a redundancy process merely reflects prudent industrial practice. The Full Bench of the Australian Conciliation and Arbitration Commission referred to the need for consultation as being a necessary part of the redundancy process when formulating general standards relating to redundancy in the *Termination, Change and Redundancy Case* (1984) 8 IR 34; (1984) 294 CAR 175 and the *Termination, Change and Redundancy Case; Supplementary Decision* (1985) 9 IR 115; (1984) 295 CAR 673. The Full Bench indicated that if an employer has made a definite decision which may lead to an employee's job becoming redundant, the employer must hold discussions with the employees and unions concerned. The discussions should take place as soon as practicable after the decision has been made. They should cover any reasons for the proposed terminations, measures to avoid or minimise the

terminations and measures to mitigate any adverse effects of the terminations on the employees concerned.

36. The consultative process which is undertaken in a bona fide redundancy process is different to the offer made to a class of employees when implementing an approved early retirement scheme. In a bona fide redundancy situation, the employer merely seeks expressions of interest from those employees who would like to accept a redundancy package. That expression of interest does not necessarily result in the dismissal of the employee. While the employer will undoubtedly take any expressions of interest into account when he or she is considering which employees are to be dismissed, ultimately it is the employer who decides which employees will actually be dismissed.

37. Under an approved early retirement scheme, on the other hand, the employer makes an offer to a class of employees. If that offer is accepted by an employee, the employee's employment will be terminated in accordance with the scheme. In this case the decision to terminate employment is made by the employee.

Constructive Dismissal

38. Dismissal also includes the notion of constructive dismissal. Constructive dismissal arises if an employer places an employee in a position in which the employee has little option but to tender his or her resignation. For example, an employer may be reducing the size of its operations and may offer a voluntary redundancy package to a selected employee. If the employee refuses the offer he or she may be forced to accept another position which may not be commensurate with his or her qualifications and experience or may involve a lower level of remuneration. Alternatively, the employee may consider that if he or she does not accept the package, he or she will be dismissed without the benefits available under the package. The termination of employment in these circumstances would amount to constructive dismissal.

Meaning of redundancy

39. Redundancy can be described as the situation where an employer no longer requires employees to carry out work of a particular kind or to carry out work of a particular kind at the same location. Bray CJ in *R v. The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd & Ors* (1977) 44 SAIR 1202 at page 1205 defined redundancy as follows:

"A job becomes redundant when an employer no longer desires to have it performed by anyone."

40. An employee's job is considered to be redundant if:

- an employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by any one;
- that decision is not due to the ordinary and customary turnover of labour;
- that decision led to the termination of the employee's employment; and
- that termination of employment is not on account of any personal act or default of the employee.

41. It follows that redundancy is a situation where the dismissal of an employee is not caused by any consideration peculiar to the employee. In some cases, redundancy arrangements may have a purpose similar to those mentioned in subparagraphs (i) to (v) of paragraph 27E(1)(b). Redundancy does not, however, extend to a situation where an employee is dismissed for personal or disciplinary reasons or because the employee was inefficient.

42. Generally, the bona fide redundancy of an employee will be evidenced by the accompanying dismissal of other employees of the employer in similar occupational groups, although the number of employees concerned is not, of itself, necessarily significant. If a dismissed employee is replaced by another employee with a similar occupational skill, it is likely that the employee was dismissed for reasons other than bona fide redundancy.

Requirements for approved early retirement scheme payments and bona fide redundancy payments to qualify for concessional tax treatment

43. The requirements (contained in sub-sections 27E(4) and 27F(1)) for a payment to qualify as an approved early retirement scheme payment or a bona fide redundancy payment can be summarised as follows:

(a) there must be an ETP made in relation to the taxpayer:

- in consequence of the taxpayer's employment being terminated under an approved early retirement scheme; or

- in consequence of the taxpayer being dismissed from employment because of his or her bona fide redundancy;

(b) the time of termination or dismissal must be before:

- the date on which the taxpayer attained age 65; or
- such earlier date on which the taxpayer's employment would necessarily have had to terminate under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service;

(c) if the taxpayer and employer were not at arm's length in relation to the termination of employment, the amount of the ETP must not be greater than the amount that could reasonably be expected to have been paid if the parties had been at arm's length; and

(d) there must not be, at the termination time, any agreement between the taxpayer and employer, or between the employer and another person, to employ the taxpayer after that time.

44. Generally speaking, so much of an ETP received by a taxpayer under an approved early retirement scheme or as a consequence of bona fide redundancy that exceeds the amount that could reasonably be expected to have been received on ordinary termination of employment at the same time qualifies for concessional tax treatment. From 1 July 1994 the amount that will qualify for concessional treatment will be limited to a maximum of \$4000 plus \$2000 for each completed year of service. These amounts will be indexed by movements in average weekly ordinary times earnings.

45. Payments made in respect of unused annual leave on termination of employment under an approved early retirement scheme or as a consequence of bona fide redundancy are included in the employees' assessable income in full and subject to tax at a rate not exceeding 30% plus medicare levy. Similarly, the post-15 August 1978 component of payments made in respect of unused long service leave on termination of employment under an approved early retirement scheme or as a consequence of bona fide redundancy are included in the employee's assessable income in full and subject to tax at a rate not exceeding 30% plus medicare levy.

Examples

Example 1

46. Yarran Pty Ltd needs to substantially reduce its staff numbers because of a reduction in the size of its operations. It offers a

redundancy package to all employees. Prior to the implementation of the scheme Yarran Pty Ltd sought approval for an approved early retirement scheme. The scheme meets the requirements of section 27E and therefore approval as an approved early retirement scheme is granted.

47. The ETP paid over and above the amount paid on ordinary retirement by Yarran Pty Ltd to employees who accept the redundancy package will qualify as approved early retirement scheme payments and will therefore receive concessional tax treatment. Payments in respect of unused annual leave and the post-15 August 1978 component of payments in respect of unused long service leave will be included in the employee's assessable income in full and subject to tax at a rate not exceeding 30% plus medicare levy.

Example 2

48. Finbar Enterprises is reducing the size of its operations so that a number of employee positions will no longer be required. It decides to implement a redundancy process and dismiss a number of employees equivalent to the number of positions that are being made redundant. With a view to maintaining industrial harmony, Finbar Enterprises enters into discussions with the employees about the redundancy process and seeks expressions of interest from those employees who would like to receive a redundancy package. Following those discussions Finbar Enterprises dismisses the selected number of employees. Most of the dismissed employees had expressed an interest in receiving a redundancy package.

49. The ETP paid over and above the amount paid on ordinary retirement by Finbar Enterprises to employees who are dismissed in these circumstances will qualify as bona fide redundancy payments in terms of section 27F and will therefore receive concessional tax treatment. Payments in respect of unused annual leave and the post-15 August 1978 component of payments in respect of unused long service leave will be included in the employee's assessable income in full and subject to tax at a rate not exceeding 30% plus medicare levy.

Example 3

50. Chloe works as an accountant for Misty Pty Ltd. Misty Pty Ltd decides to engage a professional accounting firm and, consequently, Chloe's job becomes redundant. Misty Pty Ltd offers Chloe a job as a courier with reduced remuneration. Chloe considers that a job as a courier is not commensurate with her qualifications and experience and is concerned about receiving a lower level of remuneration. Consequently, Chloe decides to resign.

51. Chloe's resignation in these circumstances amounts to a constructive dismissal. As her job as the company's accountant has been made redundant, any ETP she receives over and above her ordinary entitlements from Misty Pty Ltd will qualify as a bona fide redundancy payment in terms of section 27F and will therefore receive concessional tax treatment. Any payment Chloe receives in respect of unused annual leave and the post-15 August 1978 component of any payment she receives in respect of unused long service leave will be included in her assessable income in full and subject to tax at a rate not exceeding 30% plus medicare levy.

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legislative references

- ITAA 27E
- ITAA 27F
- ITAA 159S

ATO references

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- approved early retirement scheme payments
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