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'

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This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*

Taxation Ruling

Income tax: eligible termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'

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Preamble

*The number, subject heading, **What this Ruling is about** (including **Class of person/arrangement** section), **Date of effect**, and **Ruling** parts of this document are a 'public ruling' for the purposes of **Part IVAAA of the Taxation Administration Act 1953** and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling discusses the meaning of the phrase 'in consequence of' in the context of the expression 'in consequence of the termination of any employment' as used in Subdivisions A and AA of Division 2 of Part III of the *Income Tax Assessment Act 1936* ('ITAA 1936').

2. The meaning of the phrase is relevant for determining whether:

- a severance payment, such as a 'golden handshake', made in respect of a taxpayer by a former employer of the taxpayer is an eligible termination payment pursuant to paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936;
- a payment made in respect of a taxpayer as a result of settlement of litigation arising out of the termination of the taxpayer's employment is an eligible termination payment pursuant to paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936;

- a commuted invalidity pension paid to a taxpayer is an invalidity payment pursuant to section 27G of ITAA 1936; and
- a lump sum commuted workers' compensation payment made in relation to a taxpayer is an eligible termination payment pursuant to paragraph (a) of the definition of 'eligible termination payment' in subsection 27A(1) of the ITAA 1936.

3. This Ruling does not consider the circumstances that may constitute a termination of employment.

Previous Rulings

4. The following Taxation Rulings were withdrawn on 18 December 2002: Taxation Ruling IT 243: Commutation of a pension entitlement to a lump sum; Taxation Ruling IT 2060: Commuted lump sum pension entitlements; and Taxation Ruling TR 96/13 Income tax: eligible termination payments (ETP): payments in consequence of the termination of any employment: meaning of the words 'in consequence of'. Taxation Rulings IT 2060 and TR 96/13 were withdrawn on the basis that this Ruling provides a comprehensive explanation of the meaning 'in consequence of'. Taxation Ruling IT 243 conflicted with this view and was withdrawn.

Ruling

5. The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. Whilst there are divergent views as to the correct interpretation of the phrase, the Commissioner considers that 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.

6. 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.

7. The greater the length of time between the termination of employment and the payment, the more likely that the causal connection between the termination and the payment will be too remote for a conclusion that a payment was made in consequence of the termination of employment. However, length of time will not be determinative when there is a presently existing right to payment of the amount at the time of termination. Accordingly, if at the time of termination of employment the taxpayer has the right to commute a pension to a lump sum amount at a later date, the subsequent exercise of that right will be considered to be in consequence of the termination of employment.

8. Where, after the date of termination, a taxpayer obtains the right to commute a pension to a lump sum, the payment resulting from exercising that right would not be one that is made in consequence of the termination of employment. The payment does not 'follow on as an effect or result of' the termination. The obtaining of the right to commute is an intervening event which makes the causal link between the termination and payment too remote.

Date of effect

9. 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).

Explanation

Meaning of 'in consequence of' any termination of employment

10. The term 'eligible termination payment' (ETP) as defined in subsection 27A(1) of the ITAA 1936 includes any payment made in respect of a taxpayer 'in consequence of the termination of any employment' of the taxpayer, other than certain specified payments.

11. The phrase 'in consequence of the termination of any employment' has been considered on a number of occasions by the High Court and the Federal Court. Two divergent views on the meaning of the phrase have emerged from the judgments in those cases.

12. The Full High Court of Australia considered the expression 'in consequence of the termination of any employment' in the context of former paragraph 26(d) of the ITAA 1936 in *Reseck v FCT*.[1] The relevant issue in that case was whether amounts paid to a taxpayer by his employer at the end of two periods of employment, to which the taxpayer was entitled under an agreement between the employer and the taxpayer's union, were an allowance paid in a lump sum 'in consequence of retirement from, or the termination of, any office or employment…' Gibbs J concluded that the amounts were an allowance within section 26(d) of the ITAA 1936 and were made in consequence of the termination of the taxpayer's employment. His Honour said at 4216-17 that:

> '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… In the present case the allowance was paid in consequence of a number of circumstances, including the fact that the taxpayer's service had been satisfactory and that the industrial agreements provided for the payment, but it was none the less paid in consequence of the termination of the taxpayer's employment.' (emphasis added)

13. Jacobs J also concluded that the amounts constituted an allowance that was paid in consequence of the termination of the taxpayer's employment. His Honour said at 4219:

> 'It was submitted that the words 'in consequence of' import a concept that the termination of the employment was the dominant cause of the payment. This cannot be so. A consequence in this context is not the same as a result. It does not import causation but rather a 'following on'.'

14. Although Jacobs J and Gibbs J agreed that the termination of employment need not be the dominant cause of the payment, they adopted different interpretations to the phrase 'in consequence of'. These different interpretations were considered by the Full Federal Court in *McIntosh v. FC of T*.[2] The matter before the court in *McIntosh* concerned a taxpayer who one week after retirement commuted part of the pension, to which he became entitled upon his retirement, into a lump sum. The commuted payment was made out of a provident fund established by a bank for the payment of benefits to bank officers on their retirement. The issue being considered by the court was whether the commuted lump sum payment came within former paragraph 26(d) of the ITAA 1936.

[1] (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538
[2] 79 ATC 4325; (1980) 10 ATR 13

15. Brennan J considered the judgments of Gibbs J and Jacobs J in *Reseck* and concluded that their Honours were both saying that a causal nexus between the termination and payment was required, though it was not necessary for the termination to be the dominant cause of the payment. Brennan J said at 4328 that:

> 'Though Jacobs J. speaks in different terms, his meaning may not be significantly different from the meaning of Gibbs J… His Honour denies the necessity to show that retirement is the dominant cause, but he does not allow a temporal sequence alone to suffice as the nexus. Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement. In the Supreme Court Andrews J in *McIntosh v. Federal Commissioner of Taxation* [1978] Qd R 354 said:
>
> > 'I think it clear that the statements of Jacobs J. refers to something more than the occurrence of events in a purely temporal progression and that it connotes a relationship between events or states of things and the payment in question to which some persons might apply the adjective causal, while others would see the link in that one or more of such events or states of things must necessarily exist or occur as precedent to the payment, so as to constitute a condition or conditions precedent, both meaning the same thing'.[78 ATC 4324 at p. 4328]
>
> 'It may not be appropriate to speak of conditions if a payment is made voluntarily, but if a 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.'

16. The second judge in *McIntosh*, Toohey J also quoted the views of Gibbs J and Jacobs J. Toohey J did not find that the views on the meaning of 'in consequence of' were inconsistent. After referring to relevant parts of both judgments in *Reseck*, Toohey J continued at 4330-4331:

> 'In the present case it may be true to say that the immediate cause of the payment to the taxpayer of the sum of $27,006.84 was the exercise by him of the right to commute a percentage of the pension to which he was entitled. To say that is not to exclude the notion that the payment was in consequence of the taxpayer's retirement. In my view, the payment followed on the taxpayer's retirement, the only intervening event being the exercise of the option to commute. The connection was not simply temporal; retirement was a prerequisite to payment and in that sense there was a 'following on' as I understand the language of Jacobs J.'

17. In reaching his conclusion, Toohey J relied on the Gibbs' J construction of the meaning of 'in consequence of'. His Honour said at 4331:

> 'The option to commute was simply a right to change one form of payment into another. It was not suggested that the entitlement to a pension was not an effect or result of retirement from employment. Equally the payment of a lump sum produced by commutation was such an effect or result. The fact that the election might be exercised after retirement did not destroy that connection; indeed the prescription of such a short period as one month might be thought to strengthen it.'

18. The third judge in the Full Federal Court was Lockhart J. In turning to the issue of the meaning of 'in consequence of' his Honour first quoted the *Shorter Oxford English Dictionary* meaning of the words 'consequence' and 'antecedent' at 4335:

> '1. A thing or circumstance which follows as an effect or result from something preceding. 2. The action, or condition, of so following; the relation of a result to its cause or antecedent.'
>
> The word 'antecedent' is defined in the same dictionary as a 'thing or circumstance which goes before in time or order, often also implying causal relation with its consequent.'

19. Lockhart J then considered whether the view put forward by Gibbs J on the meaning of 'in consequence of' was fundamentally different from that of Jacobs J. By way of comment on the judgment of Gibbs J his Honour said at 4336:

> 'In my opinion his Honour was saying that the phrase includes the case where retirement or termination is a cause of the payment in question; but he was not excluding from the ambit of the phrase, payments which, although not following as a matter of causation from the termination of employment, nevertheless followed on the termination of employment and had connection therewith.'

20. Lockhart J also commented on Jacobs J's construction of the phrase 'in consequence of'. His Honour said at 4336:

> 'In my opinion his Honour did not use the words 'following on' as referring merely to a temporal progression of events. Rather his Honour had in mind a connection between the retirement from or the termination of employment and the payment in question as well as a temporal progression of events. I do not read the words of his Honour as excluding a connection that is causal in character; rather his Honour enunciated a wider test than one merely of causation and expressed it as a 'following on'; a concept that may in an appropriate case include a relevant causal connection. In other words a payment that is caused by the act of retirement from or termination of employment would fall within the test of a 'following on'; but so would other payments that do not have such causal connection, provided there is a link or connection between the termination of or retirement from employment and the making of the payments. In

> my opinion Gibbs J. and Jacobs J. were not construing the phrase 'in consequence of' differently.'

21. Lockhart J went on to conclude at 4336 that:

> 'In my opinion, although the phrase is sufficiently wide to include a payment caused by the retirement of the taxpayer, it is not confined to such a payment. The phrase requires that there be a connection between the payment and the retirement of the taxpayer, the act of retirement being either a cause or an antecedent of the payment. The phrase used in section 26(d) is not 'caused by' but 'in consequence of'. It has a wider connotation than causation and assumes a connection between the circumstance of retirement and the act of payment such that the payment can be said to be a 'following on' of the retirement.'

22. The phrase 'in consequence of' and the decisions in *Reseck* and *McIntosh* were considered more recently by the Federal Court in *Le Grand v. Commissioner of Taxation.*[3] The issue before the court was whether an amount received by the applicant 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 was in whole, or in part, an ETP. The applicant had made a claim for common law damages for breach of the employment agreement and a claim for statutory damages pursuant to the provisions of the *Trade Practices Act* and the *Fair Trading Act* in respect of the claims for misleading and deceptive conduct. The settlement amount would be an ETP if it was paid in consequence of the termination of the applicant's employment.

23. The applicant argued that the payment was not made in consequence of the termination of employment because the 'occasion' of the payment was not the termination of employment. In making such an argument, the applicant specifically relied upon the words of Brennan J in *McIntosh* that the retirement must be 'a condition of, and the occasion of, entitlement to payment'.

24. The applicant also argued that his circumstances were akin to those relating to the payment of retirement benefits considered in *Paklan Pty Ltd (in liq) v. Federal Commissioner of Taxation.*[4] In *Paklan*, the majority of the Full Federal Court relied on the words of Brennan J in *McIntosh* and concluded that a payment will be made in consequence of the termination of employment if the retirement of the taxpayer is the occasion of the payment.

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[3] (2003) 51 ATR 139; 2002 ATC 4907

[4] (1983) 67 FLR 328; (1983) 14 ATR 457; sub nom. *Freeman and Ors v. FC of T* 83 ATC 4456

25. In *Paklan* Northrop and Fisher JJ found that there was not a sufficient causal nexus between the payment and the retirement to make the retirement the occasion for the payment (at ATC 4472). It is significant that the focus of Northrop and Fisher JJ was on the need for a causal nexus between the termination and the payment. The focus on establishing that the termination is a cause of the payment is consistent with the approach taken by Gibbs J in *Reseck* and Brennan and Toohey JJ in *McIntosh*. The decision of the majority in *Paklan* also highlights that the causal nexus must not be too remote.

26. Goldberg J distinguished *Paklan* on the basis that the facts were quite different to those in *Le Grand* and he also did not accept that the correct test was that expressed by Brennan J in *McIntosh*. In rejecting the applicant's argument, his Honour said at 1270:

> '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 a 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 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.'

27. Goldberg J continued at 1271:

> 'I am satisfied that there is a sufficient connection between the termination of the applicant's employment and the payment to warrant the finding that the payment was made 'in consequence of the termination' of the applicant's employment. I am satisfied that the payment was an effect or result of that termination in the sense that there was a sequence of events following the termination of the employment which had a relationship and connection which ultimately led to the payment.'

28. Goldberg J concluded that the test for determining when a payment is made in consequence of the termination of employment is that which was articulated by Gibbs J in *Reseck*. Thus, for the payment to have been made in consequence of the termination of employment the payment must follow as an effect or result of the termination of employment. There must be a causal connection between the termination and the payment even though the termination need not be the dominant cause.

29. The judgments in *Reseck*, *McIntosh* and *Le Grand* are all consistent in respect of the finding that the termination need not be the dominant cause of the payment for there to be a conclusion that a payment is made in consequence of the termination of employment. However, the judgments do diverge in that there appears to be two different interpretations of the meaning of 'in consequence of the termination of employment': one interpretation being broader than the other. The narrower interpretation requires that there be a causal connection in the sense that the payment follows as an effect or result of the termination of employment. That is, but for the termination of employment the payment would not have been made to the taxpayer. The broader view is that a payment will be in consequence of the termination of employment if the termination is either a cause of the payment or an antecedent event. The Commissioner considers that the narrower view accords more closely with the ordinary meaning of 'consequence' and is therefore to be preferred.

Severance payments such as golden handshakes

30. A severance payment that is made in respect of a taxpayer by a former employer after the termination of the taxpayer's employment, such as a golden handshake, is a payment that follows as an effect or result of the termination. Accordingly, the payment is made in consequence of the termination of employment. In such circumstances there is a causal connection between the payment and the termination of employment in that the payment would not have been made to the taxpayer but for the termination of the employment.

Settlement of litigation proceedings

31. It is clear from the decision in *Le Grand*, that when a payment is made to settle a claim brought by a taxpayer for wrongful dismissal or claims of a similar nature that arise as a result of an employer terminating the employment of the taxpayer, the payment will have a sufficient causal connection with the termination of the taxpayer's employment. The payment will be taken to have been made in consequence of the termination of employment because it would not have been made but for the termination.

32. The Federal Court in *Raymond Joseph Dibb v. FC of T*[5] adopted the approach of Goldberg J in *Le Grand*. At issue was whether a payment received by the taxpayer under a deed of release, following the settlement of Federal Court proceedings against his former employer, was an ETP. In deciding the payment was an ETP, Heery J held that the length of time between the termination of

[5] (2003) 53 ATR 290

employment, the commencement of court proceedings and payment following settlement did not sever the causal connection between the termination and the payment. It was sufficient that the subject matter of the litigation was the termination. Heery J found at 296 that:

> 'The various causes of action whether breach of contract, conspiracy, breach of fiduciary duty or contravention of the Trade Practices Act were, as Goldberg J would say (Le Grand at [36]), 'interwoven and intertwined' with the termination. The payment was a consequence of the settlement, which was a consequence of the Federal Court proceeding, which in turn was a consequence of the termination.'

Invalidity payments

33. A payment will be an invalidity payment within the meaning of section 27G if it is an ETP that is made in relation to a taxpayer in consequence of the termination of any employment of the taxpayer and the termination of the taxpayer's employment occurred because of invalidity.

34. The issue of whether a payment made to a taxpayer several years after the termination of employment is an invalidity payment within the meaning of section 27G was considered by the AAT in *Seabright v. FC of T.*[6] In that case a taxpayer terminated her employment on 16 October 1984 on medical grounds. The relevant documentation was provided in accordance with section 27G of the ITAA 1936 and confirmed that the taxpayer's disability was likely to result in her being unable ever to be employed in a capacity for which she was reasonably qualified because of education, training or experience. On termination, the taxpayer commenced to receive an invalidity pension from the employer. The pension was commuted on 9 May 1996.

35. The issue before the Tribunal was whether the lump sum payment included an invalidity payment which was exempt from tax. For there to be an invalidity payment, section 27G of the ITAA 1936 requires that the lump sum payment be an ETP that was made in consequence of the termination of employment of the taxpayer. The Commissioner contended that the payment was not an ETP to which the section applied as it had not been paid in consequence of the termination of employment by reason of invalidity. Rather, the Commissioner argued that the receipt of the lump sum was the consequence of the offer by the Victorian Superannuation Board to commute the entitlement to a pension into a lump sum payment.

[6] (1998) 40 ATR 1160; 99 ATC 2011

36. Ms Seabright claimed she was injured at work and the injury resulted in the termination of her employment. The termination, in turn, entitled Ms Seabright to a superannuation pension and she commuted her entitlement twelve years later in accordance with the fund rules. Consequently, the commuted lump sum payment was an ETP in consequence of the termination of employment.

37. Although the fund rules permitted the commutation of Ms Seabright's pension to a lump sum, the agreed facts on which the decision was based did not disclose whether the right to commute existed at the date of her termination of employment. The Commissioner therefore did not seek to argue that the lump sum had not been paid 'in consequence of' the termination of employment for that reason. The case was argued on the basis of the lack of direct causation and the elapse of time between the termination of employment and the commutation of the pension.

38. The Tribunal concluded that the payment was made in consequence of the termination of employment because the payment 'followed on' from the termination of employment. The Tribunal, in making its conclusion relied on the Jacobs' J construction of the phrase 'in consequence of'. The Tribunal found that the test was a broad one and concluded at 2015 that:

> 'If the termination of employment can be seen as either a cause or an antecedent of the payment of the lump sum it can be said that the payment is made 'in consequence' of that termination.'

39. The Commissioner does not accept that a payment will be made in consequence of termination simply because the termination of employment was antecedent to the payment. There must be a causal connection between the termination and the payment. In *Seabright* the termination was a cause of the payment of the commuted lump sum amount and the causal connection was sufficient for a finding that the payment was made in consequence of the termination of employment. The facts in *Seabright* show that but for the termination of employment the taxpayer would not have received the commuted lump sum payment.

Commuted workers' compensation payments

40. The decision in *Seabright* was relied on by the Tribunal in the AAT decision in *Gillespie v. Federal Commissioner of Taxation.*[7] The Tribunal held that a lump sum workers' compensation payment was made in consequence of the termination of employment because the termination of employment of the taxpayer was antecedent to the payment of the lump sum.

[7] 2002 ATC 2006

41. In *Gillespie* the taxpayer was injured in the work place while in the employ of the Commonwealth Public Service. He retired from employment in 1986 on the grounds of total incapacity for work. The taxpayer received weekly compensation payments from Comcare, initially under the *Compensation (Commonwealth Employees) Act 1971*, and then the *Safety Rehabilitation and Compensation Act 1988* (the Compensation Act). In 1998, he applied to have his weekly compensation payment redeemed into a lump sum pursuant to section 137[8] of the Compensation Act. The taxpayer argued before the Tribunal that the lump sum payment was an ETP.

42. The Senior Member considered that the reasoning in *Seabright* applied in *Gillespie*. He said at 2008 that:

> 'It is difficult to see that a redemption of a superannuation pension receivable as a consequence of retirement from employment is an ETP but that a redemption of weekly compensation payments is not where it can be said that the compensation payments followed on retirement from employment.'

43. The Senior Member found that the lump sum payment was an ETP because the incapacity caused the retirement and also resulted in the weekly compensation payments. The Senior Member also thought it relevant that section 137 of the Compensation Act provides for redemption of weekly compensation payments for former employees only. He therefore concluded that payment of the commuted lump sum was in consequence of the termination of employment.

44. The Commissioner is of the view that the Tribunal erred in finding that the commuted lump sum payment was made in consequence of the termination of employment. Although the termination of employment of the taxpayer was antecedent to the payment of the lump sum, the termination had no causal connection with the payment. The payment was a consequence of the injury and not the termination of employment. It could not be said in that case that but for the termination of employment the payment would not have been made. This is to be contrasted with the facts in *Seabright* where the injury at work caused the termination which in turn entitled the taxpayer to an invalidity pension. There is a clear causal nexus in the latter case between the termination and the payment which arguably does not exist in Gillespie.

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[8] Section 137 provides that if:

(a) a relevant authority is liable to make weekly payments of compensation to a former employee in respect of an injury resulting in an incapacity;
(b) the amount of those payments if $62.99 per week or less; and
(c) the relevant authority is satisfied that the degree of the former employee's incapacity is unlikely to change;

the relevant authority must, on written request by the former employee, make a determination that its liability to make further payments to the former employee be redeemed by the payment to the former employee of a lump sum.

45. The fact that commuted compensation payments are made to former employees under one provision in the Act and another provision for current employees[9] is not relevant. The taxpayer would be entitled to commute his weekly compensation payments into a lump sum regardless of whether his employment was terminated if the relevant conditions are met. Therefore, in terms of the test proposed by Gibbs J, it could not be said that but for the termination of employment the payment would not have been made.

46. It is interesting to note that Deputy President Muller did not follow the decision in *Gillespie* in his recent decision in *Deborah Odile Brackenreg v. FC of T.*[10] The facts in *Brackenreg* were similar to those in *Gillespie*. The taxpayer retired due to injury and upon retirement became entitled to a weekly pension payable by Comsuper. Nine years later, entitlement to the weekly payments was redeemed pursuant to section 137 of the Compensation Act and a lump sum redemption payment was made to the taxpayer. In considering whether the payment was made in consequence of the termination of employment and therefore an ETP, Deputy President Muller found at paragraph 7 that:

> 'There is no connection at all between the lump sum redemption payment to Ms Brackenreg in the 1996 financial year and the termination of her employment in 1987. Ms Brackenreg's payment was not an 'eligible termination payment'

Examples

Example 1

47. Fred Brown was dismissed from his employment. He believed that he had been treated unjustly and took legal action against his former employer for unfair dismissal. Approximately 18 months later, Fred and his former employer agreed to an out of court settlement and a lump sum was paid to Fred soon after.

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[9] Section 30 of the Compensation Act provides that where:

(a) Comcare is liable to make weekly payments under section 19, 20, 21 or 21A to an employee in respect of an injury resulting in an incapacity;
(b) the amount of those payments is $50 per week or less; and
(c) Comcare is satisfied that the degree of the employee's incapacity is unlikely to change;

Comcare shall make a determination that its liability to make further payments to the employee under that section be redeemed by the payment to the employee of a lump sum.

[10] [2003] AATA 824

48. The payment was made in consequence of the termination of employment. Although the dominant cause of the payment was the claim brought by Fred against his former employer, there is still a causal connection between the termination and the payment of the settlement. But for the termination of employment, Fred would not have brought legal action against his former employer. The legal action, the termination and the payment are intertwined.

Example 2

49. George Bromley had a degenerative back condition and could no longer perform his duties as a carpenter for a construction company. George's employment was terminated due to invalidity. Just prior to termination, George obtained two medical certificates from legally qualified medical practitioners confirming that the disability was likely to prevent him from ever being able to be employed in a capacity for which he was reasonably qualified because of education, training or experience. Upon termination, George commenced receiving an invalidity pension from his employer-sponsored fund. The pension satisfied the definition of death or disability annuity/pension in section 159SJ of the ITAA 1936 and qualified for the rebate under section 159SM. George had the right to commute the pension at any time on or after the time entitlement to the pension came into existence.

50. Five years later George turned 55 and commuted the pension into a lump sum. A portion of the commuted lump sum amount paid would be taken to be an invalidity payment under section 27G of the Act. The commuted lump sum amount would be an ETP that was made in consequence of the termination of employment because there is a causal connection between the termination of employment and the payment of the pension which has been commuted. But for the termination of employment George would not have been entitled to the payment of the pension.

Example 3

51. BigSuper paid a lump sum resignation benefit to a member, Pedro Marrocini upon his early retirement. Two months later, Pedro, came to the view that he had actually been entitled to an invalidity benefit rather than a resignation benefit. Pedro commenced a campaign to have BigSuper recognise that he had been entitled to an invalidity benefit upon retirement. After four years, Pedro was successful in his campaign and the BigSuper Board of Review agreed that he should have been paid an invalidity benefit upon his termination from employment. As a result, Pedro received an additional lump sum.

52. Assuming that the additional requirements of section 27G were met, the original ETP and the additional ETP would both be taken to include an invalidity component because they were both paid as a consequence of the termination of employment. There is a causal connection between both payments and the termination of employment because but for retirement, Pedro would not have been entitled to payment. The subsequent payment was made to correct an error in calculating the original payment. But for the error the additional amount would have been paid at the same time as the original payment.

Example 4

53. Bob Jones ceased employment because of incapacity and he immediately commenced receiving a disability pension from his employer-sponsored superannuation fund. The pension meets the definition of death or disability annuity/pension in section 159SJ of the ITAA 1936 and qualifies for the rebate under section 159SM. At the time of termination of his employment, the governing rules of Bob's superannuation fund did not permit all or part of his disability pension to be commuted.

54. Five years after the date of termination, the governing rules of Bob's superannuation fund were amended to allow all or part of a disability pension to be commuted to a lump sum payment. Shortly after the change in the rules, Bob decided to commute half of his disability pension. The superannuation fund promptly paid Bob a lump sum.

55. The lump sum payment is an ETP (see paragraph (d) of the definition of 'Eligible Termination Payment' in paragraph 27A of the ITAA 1936) but it is not an ETP that has been made in consequence of the termination of employment by reason of incapacity. Therefore, section 27G of the ITAA 1936 does not apply. The payment cannot be said to have been made as a consequence of the termination of employment. It was made as a result of Bob obtaining and exercising his right under the governing rules of the superannuation fund. The right to commute did not exist at the time of termination therefore the termination and payment are not part of the same occasion. The causal connection is too remote.

Example 5

56. Sarah Martin retired from her job as a machinist because she had a long-term illness. Upon retirement, Sarah became entitled to, and was paid a disability pension from her superannuation fund. The governing rules of the superannuation fund permitted a pension recipient to commute all or part of the pension into a lump sum at any

time from the date of retirement. Six months after retirement Sarah elected to commute all of her pension and was paid a lump sum (the first commutation payment). Sarah used the lump sum to purchase an allocated pension. Three years later, Sarah commuted the allocated pension and was once again paid a lump sum (the second commutation payment). Sarah then purchased another allocated pension.

57. The first commutation payment would be taken to be an ETP that was paid in consequence of the termination of employment by reason of incapacity. But for the termination Sarah would not have been entitled to the disability pension. The right to commute the pension existed at the time of termination. Therefore the termination, the right to commute and the payment are interwoven. The requisite causal connection between the termination and the payment is present. Section 27G will apply to the payment if Sarah obtains two medical certificates confirming that the illness is likely to prevent Sarah from ever being able to be employed in a capacity for which she is reasonably qualified because of education, training or experience.

58. The second commutation payment would not be taken to be an ETP that has been paid in consequence of the termination of employment by reason of incapacity. Although it could be concluded that, but for, the termination the second commuted payment would not be made, the causal nexus between the termination and the payment is too remote for a conclusion that the payment was made in consequence of the termination of employment. The purchase of the first allocated pension is an intervening event which severed the connection between the termination and subsequent events. Put another way, the purchase of the first allocated pension and the resulting commutation payment are not interwoven with the termination, and do not form part of the same occasion.

Example 6

59. Peter Bowler was involved in a serious accident. The injuries incurred in the accident rendered Peter permanently incapacitated and he was unable to continue working as a pilot. As a result Peter resigned from his employment. At the time of his resignation, Peter obtained two medical certificates confirming that his incapacity was likely to prevent him from ever being able to be employed in a capacity for which he was reasonably qualified because of education, training or experience.

60. Also, prior to Peter's retirement from employment, the taxpayer consolidated his superannuation by rolling over monies from his employer-sponsored superannuation fund to a self managed superannuation fund. The governing rules of the self managed superannuation fund provide for payment of a disability pension to

beneficiaries who are permanently incapacitated and unable to work. The rules also permit the disability pension to be commuted to a lump sum upon election by the beneficiary. When Peter became entitled to a disability pension from the self managed superannuation fund, he elected to commute the pension and was paid a lump sum.

61. The lump sum payment is an ETP that has been paid as a consequence of the termination of employment and section 27G would apply. But for the termination by reason of incapacity, Peter would not have been entitled to a disability pension and there would not have been a right to commute the pension, and Peter would not have received the lump sum. The events are closely related to the extent that they are interwoven and form part of a single occasion. Therefore, there is a sufficient causal nexus between the termination and the payment for a conclusion that the payment was made as a consequence of the termination. The fact that the payment was made by a self managed superannuation fund and that part of the lump sum payment was sourced from amounts rolled-over from his employer-sponsored fund is not relevant in considering whether section 27G applies to an ETP.

Example 7

62. Pauline Smith suffered an injury at work which resulted in Pauline resigning from her employment soon after. At the time Pauline terminated her employment, Pauline was diagnosed by her doctor as being temporarily incapacitated by reason of the injury. Shortly after Pauline's resignation, Pauline purchased an annuity by rolling over unrestricted non-preserved monies from a non-employer sponsored fund.

63. Pauline's condition did not improve. Three years after the injury, Pauline obtained two medical certificates from legally qualified medical practitioners confirming that her incapacity was likely to prevent her from ever being able to be employed in a capacity for which she was reasonably qualified because of education, training or experience. At the same time, Pauline elected to commute her annuity into a lump sum.

64. The causal nexus between the termination of Pauline's employment and the payment of the commuted lump sum to her is too remote. Therefore the payment was not made as a consequence of the termination of employment by reason of incapacity. Although it could be concluded that the termination was the result of incapacity it cannot be said that but for the termination the payment would not have been made. The payment is the consequence of Pauline commuting an annuity she purchased after retirement.

Example 8

65. James Shaw was injured at his workplace and could no longer work. As a result, his employment was terminated. James was a member of the employer-sponsored superannuation fund, and as such qualified for a lump sum disability benefit under the terms of the fund's trust deed. James obtained certification from two legally qualified medical practitioners as required under section 27G at the time of qualifying for the disability benefit.

66. Initially James elected to retain the disability benefit in his superannuation fund. Five years later, James changed his mind and withdrew the benefit from his fund. The payment of the benefit was an ETP that was made as a consequence of the termination of employment by reason of incapacity. The termination of James' employment, qualifying for the disability benefit and the subsequent payment of the benefit are interwoven even though the payment was made five years after the other two events. In other words, they can be viewed as part of the same occasion and it is reasonable to conclude that the termination by reason of incapacity was a cause of the payment by the superannuation fund.

Detailed contents list

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Commissioner of Taxation
22 October 2003

Previous draft:

Previously released as TR 2002/D12

Related Rulings/Determinations:

TR 97/16; TR 92/1; TR 92/20; TR 96/13; IT 243; IT 2060

Subject references:

- eligible termination payments
- in consequence of
- termination of employment
- termination payments
- commutation
- workers compensation

Legislative references:

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- ITAA 1936 26(d)
- ITAA 1936 27A(1)
- ITAA 1936 27G
- ITAA 1936 Div 2 Pt III A
- ITAA 1936 Div 2 Pt III AA
- ITAA 1936 159SJ
- ITAA 1936 159SM
- Compensation (Commonwealth Employees) Act 1971
- Safety Rehabilitation and Compensation Act 1988 (the Compensation Act)
- the Compensation Act 1988 19
- the Compensation Act 1988 20
- the Compensation Act 1988 21
- the Compensation Act 1988 21A
- the Compensation Act 1988 137
- Trade Practices Act
- Fair Trading Act

Case references:

- Deborah Odile Brackenreg v. FC of T [2003] AATA 824
- Raymond Joseph Dibb v. FC of T (2003) 53 ATR 290
- Gillespie v. FC of T 2002 ATC 2006
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ATO references:
NO: 2002/020435
ISSN: 1039-0731