

JOINT SUBMISSION BY

Tax and Super Australia, Chartered Accountants Australia and New Zealand,
The Tax Institute, Institute of Public Accountants and CPA Australia

***Draft Taxation Determination TD 2016/D1 – Income tax: is a redemption
payment received by a worker under the Return to Work Act 2014 (SA)
assessable income of the worker?***

Date: 9 September 2016

The Professional Bodies welcome the opportunity to comment on Draft Taxation Determination TD 2016/D1 (“the draft Determination”) which deals with the assessability of a lump sum redemption payment received by a worker under the *Return to Work Act 2014 (SA)* (RWA).

GENERAL COMMENTS

1. Overall, the Professional Bodies agree with the Commissioner’s preliminary view that payments covered by the draft Determination are assessable as ordinary income to the recipient worker.
2. In particular, we agree that a “redemption payment” as defined in paragraph 2 of the draft Determination:
 - is properly characterised as ordinary income; and
 - would not *ordinarily* be characterised as an employment termination payment.

SPECIFIC COMMENTS

Explanation of ATO change of view

1. Paragraph 3 acknowledges that the view expressed in the draft Determination is significantly different to that expressed in previously issued private rulings.
2. Examples of those private rulings are private binding ruling numbers 64944, 10223, 75040, 8099 and 88728. The rulings consider the income/capital characterisation of lump sum payments received by workers under the *Workers Rehabilitation and Compensation Act 1986 (SA)* (WRCA), which is the predecessor to the RWA that is the subject of the draft Determination.
3. Broadly, these rulings conclude that the lump sum redemption payments are payments of a capital nature because they are received in satisfaction of giving up rights to weekly income maintenance payments and rights to compensation for future medical expenses. In other words, the position taken by the ATO in these rulings is that the taxpayer receives the lump sum as consideration for relinquishing *capital rights* (ie. capital character) and not as compensation for *loss of earnings* (ie. income character).
4. We welcome the proposal in paragraph 4 that the application of the final Determination should be prospective only. However, a brief explanation of the change of view should be included.
5. Paragraph 3 states that the amounts considered in the private rulings are “substantially similar” to those covered by the draft Determination. Based on a high level comparison of the WRCA and the RWA, we agree that the applicable payments under each Act are indeed similar in relevant aspects – ie. that the payments are

income replacement amounts paid in a lump sum form.

6. This indicates that the ATO had made an error in assigning a capital character to the payments the subject of the private rulings. If this is the case, we recommend that the final Determination includes a brief statement to this effect or that the conflicting private rulings are removed from the register or annotated by referring to the final Determination.
7. Alternatively, if the change in the ATO's view is partially or wholly due to technical differences between the former WRCA and the RWA and not due to previous mischaracterisation of the payments by the ATO, then this should be made clear in the final Determination.
8. An explanation of the reasons behind the change in the ATO's position will reassure taxpayers and their advisers that the different tax treatment that applies to what appears to be substantially similar payments is fair.
9. Taxpayers and their advisers may refer to the private rulings and the draft or final Determination in the course of exercising reasonable care in determining the correct tax treatment for an amount received under the RWA or the former WRCA. A clear statement regarding the reason for the conflicting views would greatly assist them.
10. There are potentially broader implications from the change in ATO view than just being limited to payments made under the RWA, most likely for similar payments made under equivalent legislation (if any) in other States and Territories.

Timing of recognition and taxation of payments

11. It would be useful if the ATO could address the timing of assessability eg whether there are potential implications from *Arthur Murray (NSW) Pty Ltd v FC of T* (1965) [114 CLR 314](#) in the context of these payments.

Variations to weekly payment entitlements

12. Sections 45 to 48 of the RWA provide that weekly payments may be varied under specified circumstances.
13. We pose two relevant questions:
 - (i) Once the lump sum redemption payment has been calculated and 'fixed' pursuant to s53, can sections 45 to 48 still apply to effect an adjustment to the statutory weekly entitlement amounts?
 - (ii) Can such an adjustment result in a renegotiation of the s53 lump sum amounts?
14. (The two questions above may perhaps be more appropriately answered by occupational health and safety experts than by taxation specialists.)
15. *The following two paragraphs proceed on the assumption that the answer to the two questions posed above is "yes".*
16. We recommend that paragraph 4 be expanded to clarify that where the original agreement was entered into prior to 10 August 2016 and an increasing adjustment subsequently takes effect, the increase will be treated in the same way as the original agreed amount. Where the taxpayer had treated the original lump sum as a capital amount in calculating their tax liabilities, any upward variation should be treated the same.
17. Further, the final Determination should clarify whether, where a downward variation or

discontinuation of weekly payments under sections 45 to 48 results in a reduction to the originally agreed lump sum amount, that reduction can be claimed as a general deduction under s8-1 of the *Income Tax Assessment Act 1997* or whether it would be of a capital nature.

Definition of redemption payment – practical example

18. Please include a practical example after paragraph 35. The example should illustrate an appropriate dissection of a capital payment into its redemption payment and non-redemption payment parts for the purposes of the Determination. This may perhaps only need to be a simple example clearly showing that a breakdown of the s54(3) payment between the s33 and the s44 components needs to be obtained, and that the s40 component is the only part subject to the Determination.
19. We agree that the definition of “redemption payment” for the purposes of the draft Determination should only include (i) a s53(1) payment (relating to income replacement) and (ii) the s40 portion of a s54(3) payment (relating to supplementary income support). It is appropriate that a redemption payment does not include the s33 portion of a s54(3) amount (relating to medical expenses).
20. However, because a s54(3) lump sum payment can include both a s40 portion and a s33 portion, a simple practical illustration of an apportionment that would be acceptable for the purposes of the final Determination would greatly assist taxpayers in understanding and complying with their tax obligations.

Other matters for the ATO's consideration

21. *Apportionment* (paragraph 35) – Is the ATO correct in asserting that apportionment will always be available for an undissected lump sum? We do not have sufficient knowledge to advise what we believe is the correct treatment, but suggest the ATO should look into this matter. If there are circumstances under which a precise apportionment would be impractical or impossible for some or all of the lump sum, please include a statement on the ATO's preferred approach. For example, would the entire undissected lump sum then be treated as a redemption payment the subject of the Determination?
22. *PAYGW and SCG obligations* – are there any PAYGW and SGC obligations to be met in relation to these payments? If so, which party will be liable for meeting the PAYGW and SGC obligations, in particular if the payments are made from the insurer via the employer? We do not have sufficient knowledge to advise what we believe is the correct treatment, but suggest the ATO should look into this matter.
23. *Employment termination payments* – is the ATO aware of any common scenarios in which a redemption payment would constitute an employment termination payment? We are reasonably satisfied that a redemption payment would *ordinarily* not be an ETP, based on TR 2003/13. However we do not have sufficient knowledge of the operation of the RWA to determine whether there are circumstances under which the payment would be an ETP.