


# ***CR 2015/44 - Income tax: the 'Nyrstar Port Pirie Voluntary Early Retirement Scheme'***

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## Class Ruling

# Income tax: the 'Nyrstar Port Pirie Voluntary Early Retirement Scheme'

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### **ⓘ 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.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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 83-170 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
  - section 83-180 of the ITAA 1997.

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

### Class of entities

3. The class of entities to whom this scheme applies is those employees of Nyrstar Port Pirie Pty Ltd (Nyrstar) shown at paragraphs 15 and 16, who receive a payment under the scheme described in paragraphs 9 to 31 of this Ruling.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. The class of entities defined in the Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described under the heading *Scheme*.
6. If the scheme actually carried out is materially different from the scheme that is described in the Ruling, then:
  - the Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
  - the Ruling may be withdrawn or modified.

## Date of effect

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7. The Ruling applies from 1 July 2015 to 15 October 2015. The Ruling continues to apply after 15 October 2015 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, the 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 the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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8. The following description of the scheme is based on information provided by the applicant.
9. Nyrstar Port Pirie Pty Ltd (Nyrstar) is seeking the Commissioner's approval to implement an early retirement scheme (ERS) in accordance with section 83-180.
10. The scheme will be titled '*Nyrstar Port Pirie Voluntary Early Retirement Scheme*', referred to as the Scheme.
11. Nyrstar made the decision for the business to evolve from being a primary lead smelter to a multi-metals processing facility in December 2014.
12. Nyrstar completed a review of the Port Pirie operation over the last quarter of 2014 and first half of 2015. From the review, the plant structure at Port Pirie had to be redesigned to move away from the lead smelting business model and shift to a value added business model under which the operations are more flexible.

13. As a result of the review, Nyrstar faces a number of key challenges in the coming years which include:

- workforce reskilling in preparation for new technology and upgrade of existing plant conditions
- organisation restructure in preparation of new technology resulting in new plant areas, and
- ongoing viability to identify opportunities to deliver improved profitability at Port Pirie.

14. The Scheme seeks to renew the workforce to bring new skills and technological capacity into the organisation.

15. The class of employees to whom the Scheme applies is all full-time and part-time salaried Nyrstar Port Pirie employees who meet the following criteria:

- are aged 55 years or older, and
- classified as Production staff.

16. The following employees are excluded from participating in the Scheme:

- Support staff (including analytical services)
- Maintenance Award (Tradespeople)
- Port Pirie Transformation project team staff, and
- Blast Furnace Superintendent.

17. The payment to be made to eligible non-award employees under the Scheme is 2 weeks' Total Fixed Remuneration (TFR) per year of service (capped at 40 weeks).

18. The payment to be made to eligible award employees under the Scheme is 2 weeks' wage per year of service (capped at 40 weeks). The relevant wage is expressed in the respective Enterprise Agreement.

19. All employees terminated under the Scheme will receive their accrued annual leave and unused long service leave entitlements in accordance with the relevant enterprise agreement or staff contract. However, they do not form part of the payment made under the Scheme.

20. The number of packages available under the Scheme is limited to 20.

21. If the number of employees who accept the offer is greater than the number of packages available, offers will be made to those eligible employees who apply first, to retire under the Scheme.

22. The Scheme will be launched on site and commence no later than two weeks from 1 July 2015. The launch of the program is expected to take one week, and following the launch all eligible employees will then be able to express an interest to participate in the Scheme over a four week period.

23. Eligible employees will be made an offer from one week after the expressions of interest commenced and not later than two weeks after expressions of interest close.
24. All employees who accept the offer to retire under the Scheme will terminate their employment by 30 September 2015 and receive payment under the Scheme on the date of their termination, or before 15 October 2015.
25. All eligible employees are employed under the '*Nyrstar Port Pirie Enterprise Agreement 2014*'.
26. The payments made under the Scheme do not include any payment in lieu of superannuation benefits.
27. Payments made under the Scheme for staff who have not yet reached 65 years at the date of termination will be processed as an early retirement scheme payment.
28. Payments made to eligible employees who are 65 years or older at the date of termination will not be eligible for tax-free base limits under the early retirement scheme. These payments will be concessionally taxed as employment termination payments (ETPs) up to the ETP cap amount.
29. Payments made under the Scheme will be at arm's length.
30. Any employee who terminates their employment other than under the Scheme, will not be entitled to receive the Scheme payment.
31. There is no agreement in place between the eligible employees and Nyrstar, or between Nyrstar and another person to employ any employee after retirement under the Scheme.

## Ruling

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32. The early retirement scheme to be implemented by Nyrstar is an early retirement scheme for the purposes of section 83-180.
33. Accordingly, so much of the payment received by an employee that exceeds the amount that could reasonably be expected to be received by the employee in consequence of voluntary termination of their employment at the time of the retirement will be an early retirement scheme payment.
34. In addition, so much of the early retirement scheme payment as falls within the threshold calculated in accordance with section 83-170 is not assessable income and is not exempt income.

## Appendix 1 – Explanation

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❶ *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.*

35. A scheme will be an early retirement scheme if it satisfies the requirements of subsection 83-180(3).

36. Subsection 83-180(3) states that:

A scheme is an **early retirement scheme** if:

- (a) all the employer's employees who comprise such a class of employees as the Commissioner approves may participate in the scheme; and
- (b) the employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations by making any change to the employer's operations, or the nature of the work force, that the Commissioner approves; and
- (c) before the scheme is implemented, the Commissioner, by written instrument, approves the scheme as an early retirement scheme for the purposes of this section.

These three conditions are now considered.

### **All employees within a class approved by the Commissioner may participate in the scheme**

37. In order to satisfy the first condition, the scheme must be offered to all employees in a class approved by the Commissioner under paragraph 83-180(3)(a).

38. The class of employees to whom early retirement will be offered under the Scheme is set out in paragraph 15 of this Ruling, subject to paragraph 16.

39. The Commissioner considers that this is an appropriate class of persons for the Scheme to be offered. In approving this class of employees the Commissioner has considered the nature of the rationalisation or re-organisation of the operations of the employer. It is therefore considered that these employees meet the requirements of an approved class of employees for the purposes of paragraph 83-180(3)(a).

### **The employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations in a way approved by the Commissioner**

40. The proposed scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer as described in paragraph 83-180(3)(b).

41. Paragraphs 11 to 14 of this Ruling describe the nature of the rationalisation or re-organisation of the employer's operations. In approving the Scheme, the Commissioner has had regard to the changes in the operations and nature of the work force of the employer.

42. The Scheme will be in operation for approximately 3 months. This is considered appropriate due to the circumstances of the re-organisation.

43. It is considered that the Scheme is to be implemented by the employer with a view to rationalising or re-organising the operations of the employer for the purposes of paragraph 83-180(3)(b). Accordingly, the second condition for approval has been met.

### **The scheme must be approved by the Commissioner prior to its implementation**

44. The Scheme is proposed to operate for a period from 1 July 2015 to 15 October 2015. The approval to be provided by the class ruling will have been granted prior to implementation therefore, for the purposes of paragraph 83-180(3)(c), this condition is satisfied.

### **Other relevant information**

45. Under subsection 83-180(1) so much of the payment received by an employee because the employee retires under an early retirement scheme as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of termination is an early retirement scheme payment.

46. It should be noted that, in order for a payment to qualify as an early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 83-180(2), 83-180(5) and 83-180(6)):

- the retirement occurred before the employee turned age 65 or such earlier date on which the employee's employment would have terminated under the terms of employment because of the employee attaining a certain age or completing a particular period of service (as the case may be)
- if the employee and the employer are not dealing with each other at arm's length (for example because they are related in some way), the payment does not exceed the amount that could reasonably be expected to be made if the retirement was at arm's length
- at the time of retirement there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the retirement

- the payment must not be made in lieu of superannuation benefits, and
- it is not a payment mentioned in section 82-135 (apart from paragraph 82-135(e)).

47. The term 'arrangement' is defined in subsection 995-1(1) as meaning 'any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings'.

48. An early retirement scheme payment that falls within the specified limit is referred to as the 'tax free' amount and will not be assessable income and will not be exempt income.

49. For the 2015-16 income year, the tax-free amount is limited to \$9,780 (base amount) plus \$4,891 (service amount) for each whole year of completed employment service to which the early retirement scheme payment relates. It should be noted that 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation.

50. The total of the amount received on the termination of employment calculated in accordance with paragraph 17 and paragraph 18 of this Ruling may qualify as an early retirement scheme payment.

51. The total payment calculated in accordance with paragraph 17 and paragraph 18 of this Ruling will be measured against the limit in accordance with the formula mentioned in paragraph 49 of this Ruling to determine the 'tax free' amount of the early retirement scheme payment.

52. The 'tax-free' amount will:

- not be an employment termination payment (ETP), and
- not be able to be rolled-over into a superannuation fund.

53. Any payment in excess of this limit will be an ETP where the payment is received no later than 12 months after termination of employment and will be split into tax free and taxable components. The tax free component of an employment termination payment includes the pre-July 83 segment of the payment. The tax free component is not assessable income and is not exempt income.

54. The taxable component of the ETP will be taxed at various rates depending on the person's age. It should be noted that the 'whole of income' cap does not apply to any part of the early retirement scheme payment.



## Appendix 2 – Detailed contents list

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

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## References

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<i>Previous draft:</i>	- ITAA 1997 82-135
Not previously issued as a draft	- ITAA 1997 82-135(e)
	- ITAA 1997 83-170
<i>Related Rulings/Determinations:</i>	- ITAA 1997 83-180
TR 2006/10	- ITAA 1997 83-180(1)
	- ITAA 1997 83-180(2)
	- ITAA 1997 83-180(3)
<i>Subject references:</i>	- ITAA 1997 83-180(3)(a)
- early retirement	- ITAA 1997 83-180(3)(b)
- employment termination	- ITAA 1997 83-180(3)(c)
- redundancy or early retirement	- ITAA 1997 83-180(5)
scheme payment	- ITAA 1997 83-180(6)
	- ITAA 1997 995-1(1)
<i>Legislative references:</i>	- TAA 1953
- ITAA 1997	

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### ATO references

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