CR 2006/44 - Income tax: Approved Early Retirement Scheme - Nissan Motor Co (Australia) Pty Ltd

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

Class Ruling

Income tax: Approved Early Retirement Scheme – Nissan Motor Co (Australia) Pty Ltd

Contents Para

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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 provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

2. This Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for entities receiving payments under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met before relying on this Ruling.

Relevant provision(s)

3. The relevant provisions dealt with in this Ruling are:

- section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 27CB of the ITAA 1936; and
- section 27E of the ITAA 1936.

Class of entities

4. The class of entities to which this Ruling applies is employees of Nissan Motor Co (Australia) Pty Ltd who:

(i) are 55 years of age and over;

(ii) are employed at the General Manager level or are Senior Managers at Levels A, B and C; and

(iii) receive a payment under the scheme described in paragraphs 16 to 33 of this Ruling.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 33 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

9. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Date of effect

10. This Ruling applies from 29 May 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

12. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

13. If the above two conditions do not apply, the relevant class of entities may rely on either which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

14. This Ruling is withdrawn and ceases to have effect after 12 July 2006. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the specified scheme during the term of the Ruling. Thus, the Ruling continues to apply to those entities, even following its withdrawal, for schemes entered into prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

15. The scheme that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- correspondence from representatives of Nissan Motor Co (Australia) Pty Ltd; and
- records of telephone conversation with the representatives of Nissan Motor Co (Australia) Pty Ltd.

16. Nissan Motor Co. (Australia) Pty Ltd (Nissan) is seeking approval for an early retirement scheme (ERS) in relation to a group of employees as part of a re-organisation of the senior management structure.

17. Nissan is a distributor of vehicles and parts imported from Japan and has been incorporated since 1966. It is 100% owned by Nissan Motor Co Ltd of Japan.

18. Nissan has 245 employees with a senior executive group consisting of General Managers, Level A and B managers, totalling 37 people. Also included in the senior executive group are a further 36 employees at the middle management level (Level C).

19. Nissan wishes to re-organise the General Manager and Level A to C senior to middle manager positions with the objective of replacing such employees aged 55 years and over with younger, more qualified employees.

20. The targeted replacement employees have a higher degree of professional qualifications in that they have Honours degrees, double degrees or graduate diploma qualifications. In addition they have superior PC skills and are highly competent in Excel, Microsoft Access and PowerPoint.

21. In the IT area, the incumbent managers have not kept up to date in the advancements in the IT areas of data base management, warehousing and programming. A number of the targeted employees for promotion are part of a development pool of executives in Nissan’s global executive development program. These employees are aged between 32 to 45 years.

22. The existing managers at the above mentioned levels are eligible to work at Nissan after 65 years of age under the Nissan anti-age discrimination rules. This means that these employees can work in the organisation for up to another 10 years unless they are dismissed for employment breaches.

23. The main areas of focus for senior Manager replacements are in Parts, Logistics, Regional Sales and Information Technology. The locations to be affected by the re-organisation are Head Office and will extend to regional offices in Queensland, Western Australia and New South Wales. The number of employees targeted to be offered early retirement is 15 of the senior executive group.

24. Nissan states that the senior managers are experienced but do not have the skill set to be part of the new Nissan organisation in Australia and its new business development plans going forward.

25. Globally, Nissan has announced a Value-up Plan which involves stretch targets for Nissan subsidiaries in terms of model introduction, sales growth, profitability, new business initiatives and efficiency projects. The three critical commitments over each of the three years of the plan are:

- to maintain the top level of operating profit margin among global automakers;
- achieve global sales of 4.2 million unit measures in the 2008 financial year; and
- achieve a 20% return on invested capital on average excluding cash on hand.

26. Human resources have identified a need for additional and more qualified resources to meet the global and local Value-up targets.

27. The conditions of the proposed ERS are as follows:

(a) Employees are over 55 years of age and over who are at the General Manager level or are Senior Managers at Level A, B and C;

(b) No restrictions on any eligible employees who want to retire early under the scheme. All acceptances will be allowed;

(c) Employees must be permanent employees who do not have an employment contract with an expiry date;

(d) Employees are covered by and paid in accordance with the Nissan terms and conditions of employment; and

(e) Offer period is from 29 May 2006 to 29 June 2006. All employees who accept must terminate employment and be paid out by 12 July 2006.

28. The employer will not exercise a veto on applications.

29. The early retirement scheme payment will comprise the following:

(a) four (4) weeks pay at the normal rate of wage for each completed year of employment;

(b) minimum of one month's pay in lieu of notice;

(c) payment of unused sick leave, to a maximum of 30 days, as at the date of retirement; and

(d) severance payment of $1,000 where continuous service exceeds 10 years.

The maximum combined payment of Items (a) and (b) is 64 weeks.

30. The employees will also receive the following payments but these do not form part of the ERS payment:

(a) pro rata payment for accrued unused long service leave for employees with at least seven (7) years service, based on completed months of service; and

(b) all accrued and pro-rated annual leave entitlements will be paid out.

31. No employees in the class to be offered the ERS are associated with the employer.

32. There is no provision under the terms of employment to terminate prior to age 65.

33. No separate agreement is in place between the employees and the employer or any other related employer to employ any employee following termination after accepting the ERS.

34. Nissan previously received a Class Ruling (CR 2004/58) dated 9 June 2004 for approval of an ERS for employees over 55 years of age, primarily in the Marketing and Sales areas.

Ruling

35. The early retirement scheme known as Early Retirement Scheme – Nissan Motor Co (Australia) Pty Ltd is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

36. Accordingly, so much of the ETP as exceeds the amount of an ETP that could reasonably be expected to have been made in relation to the taxpayer if the termination of employment had occurred at the termination time otherwise than in accordance with the approved early retirement scheme, is an approved early retirement scheme payment in relation to the taxpayer.

37. In addition, so much of the approved early retirement scheme payment as falls within the threshold calculated in accordance with subsection 27A(19) of the ITAA 1936 is non-assessable and is ignored in working out whether a capital gain has been made via the operation of section 27CB of the ITAA 1936.

Commissioner of Taxation
24 May 2006

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

38. Where a scheme satisfies the requirements of section 27E of the ITAA 1936 that scheme will be an 'approved early retirement scheme.'

39. The Commissioner has issued Taxation Ruling TR 94/12 Income tax: approved early retirement scheme and bona fide redundancy payments, which sets out guidelines on the application of section 27E of the ITAA 1936.

40. Paragraph 14 of TR 94/12 states that:

> Three conditions need to be satisfied for a scheme to qualify as an approved early retirement scheme. Those conditions are:
>
> (i) the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
>
> (ii) 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
>
> (iii) the scheme must be approved by the Commissioner prior to its implementation (paragraph 27E(1)(c)).

The scheme must be offered to all employees within a class identified by the employer

41. In order to satisfy the first condition, the scheme must be offered to all employees within one of the categories specified in subparagraphs 27E(1)(a)(i) to (v) of the ITAA 1936.

42. The class of employees to which the scheme is proposed to be offered is those employees of Nissan who:

(i) are 55 years of age and over; and

(ii) are employed at the General Manager level or are Senior Managers at Levels A, B and C.

43. This class of employees does not come within any of subparagraphs 27E(1)(a)(i) to (iv) of the ITAA 1936, therefore it must be considered under subparagraph 27E(1)(a)(v), namely, all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph. 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 subparagraph 27E(1)(a)(v).

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

44. The proposed scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer by means of one or more of the objectives set out in subparagraphs 27E(1)(b)(i) to (vi) of the ITAA 1936.

45. The facts provided describe the nature of the rationalisation or re-organisation of Nissan's operations.

46. Globally, Nissan has announced a Value-up Plan which involves stretch targets for Nissan subsidiaries in terms of model introduction, sales growth, profitability, new business initiatives and efficiency projects. The three critical commitments over each of the three years of the plan are:

- to maintain the top level of operating profit margin among global automakers;
- achieve global sales of 4.2 million unit measures in the 2008 financial year; and
- achieve a 20% return on invested capital on average excluding cash on hand.

47. Human resources have identified a need for additional and more qualified resources to meet the global and local Value-up targets.

48. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(ii) of the ITAA 1936; accordingly, the second condition for approval has been met.

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

49. The scheme is proposed to operate for a period from 29 May 2006 to 12 July 2006. Approval will be granted prior to implementation therefore the third condition is satisfied.

50. The scheme will be in operation for one month which is within the period recommended in TR 94/12.

Other relevant information

51. Under section 27E of the ITAA 1936, so much of the payment received by a taxpayer under the approved early retirement scheme, that exceeds the amount that would ordinarily have been received on voluntary resignation or retirement is an approved early retirement scheme payment.

52. It should be noted that, in order for a payment to qualify as an approved early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 27E(4) and (5) of the ITAA 1936):

- the payment must be an eligible termination payment (ETP) made in relation to the taxpayer in consequence of the taxpayer's employment being terminated under an approved early retirement scheme;
- the payment must not be from an eligible superannuation fund;
- the payment must not be made in lieu of superannuation benefits;
- if the taxpayer 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 what would have been paid to the taxpayer had they been dealing at arm's length;
- the date of termination was before 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 (whichever occurs first); and
- there was no agreement at the date of termination between the taxpayer and the employer, or the employer and another person to re-employ the taxpayer after the date of termination.

53. The term 'agreement' is defined in subsection 27A(1) of the ITAA 1936 as meaning:

> any agreement, arrangement or understanding whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings.

54. An approved early retirement scheme payment made on or after 1 July 1994 that falls within the specified limit will be exempt from income tax and called the 'tax-free amount'.

55. For the year ending 30 June 2006, the tax-free amount is limited to $6,491 plus $3,246 for each whole year of completed employment service to which the approved early retirement scheme payment relates. Please note that six months, eight months or even eleven months do not count as a whole year for the purposes of this calculation.

56. The early retirement scheme amount (the payment) received on termination, as calculated in the facts provided, qualifies as an approved early retirement scheme payment.

57. The total of the payment will be measured against the calculated limit, mentioned earlier, to determine the 'tax-free amount'.

58. The tax-free amount will:

- not be an ETP;
- not be able to be rolled over;
- not include any amount from a superannuation fund or paid in lieu of a superannuation benefit; and
- not count towards the recipient's Reasonable Benefit Limit.

59. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

Appendix 2 – Detailed contents list

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

References

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
TR 94/12

Previous Rulings/Determinations:
CR 2004/58

Subject references:
- approved early retirement scheme payments
- eligible termination payments
- eligible termination payments components

Legislative references:
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- ITAA 1936 27A
- ITAA 1936 27A(1)
- ITAA 1936 27A(19)
- ITAA 1936 27A(20)
- ITAA 1936 27CB
- ITAA 1936 27E
- ITAA 1936 27E(1)(a)
- ITAA 1936 27E(1)(a)(i)
- ITAA 1936 27E(1)(a)(ii)
- ITAA 1936 27E(1)(a)(iii)
- ITAA 1936 27E(1)(a)(iv)
- ITAA 1936 27E(1)(a)(v)
- ITAA 1936 27E(1)(b)
- ITAA 1936 27E(1)(b)(i)
- ITAA 1936 27E(1)(b)(ii)
- ITAA 1936 27E(1)(b)(iii)
- ITAA 1936 27E(1)(b)(iv)
- ITAA 1936 27E(1)(b)(v)
- ITAA 1936 27E(1)(b)(vi)
- ITAA 1936 27E(1)(c)
- ITAA 1936 27E(4)
- ITAA 1936 27E(5)
- Copyright Act 1968

ATO references
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