



# ***CR 2014/20 - Income tax: NSW Ageing, Disability and Home Care, Department of Family and Community Services (FACS), Direct Payment Agreement (DPA)***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *30 September 2015*



## Class Ruling

### Income tax: NSW Ageing, Disability and Home Care, Department of Family and Community Services (FACS), Direct Payment Agreement (DPA)

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>31</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b>Explanation</b>	<b>36</b>
<b>Appendix 2:</b>	
<b>Detailed contents list</b>	<b>62</b>

**1 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.

**[Note:** This is a consolidated version of this document. Refer to the Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

## 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.

### Relevant provision(s)

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

- section 159P of the *Income Tax Assessment Act 1936* (ITAA 1936),
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997),
- section 8-1 of the ITAA 1997,
- section 15-2 of the ITAA 1997, and
- Subdivision 20-A of the ITAA 1997.

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

## Class of entities

3. The class of entities to which this Ruling applies comprises:
- individuals receiving disability funding who are eligible for services under the *Disability Services Act 1993 (NSW)* (DSA 1993), and who are participating in the DPA scheme, and
  - any appointed nominee of a participant.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. 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 8 to 30 of this Ruling.
6. 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.

## Date of effect

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7. This Ruling applies from 1 January 2014. However, this 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 this 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. The following documents, or relevant parts of them form part of and are to be read with the description:
- Class Ruling application dated 21 October 2013,
  - DPA Handbook,
  - DPA Letter, and
  - DPA Individual Plan.
9. The DSA 1993 provides the legislative basis for the funding of disability services.

10. The Principles in Schedule 1 Part 1 of the DSA 1993 have the purpose of ensuring that persons with disabilities are treated with dignity and have the same fundamental human rights as other members of Australian society.

11. The Applications of the Principles are set out at Schedule 1 Part 2 of the DSA 1993. Included in the Applications is the condition that services and programs must be designed and administered so as to ensure 'that persons with disabilities participate in the decisions that affect their lives' and 'to have as their focus the achievement of positive outcomes for persons with disabilities, such as increased independence, employment opportunities and integration into the community.'

12. Section 6 of the DSA 1993 provides that it is the duty of the Minister to provide and fund designated services to persons in the target group, either directly to those persons or indirectly through other persons or bodies, to ensure that the services are provided and funded in conformity with the objects of this Act and the principles and applications of the principles set out in Schedule 1.

### **Direct Payment Agreement**

13. To receive a direct payment from FACS a person with disability must enter into a DPA. A person who enters into a DPA with FACS is hereby referred to as the participant.

14. Under the DPA, FACS agrees to pay funding directly to the participant according to an agreed schedule of payments, and the participant agrees to spend the funding according to the terms and conditions set out in the DPA.

15. The following documents form the DPA:

- DPA letter – a document that contains key terms in relation to the agreement. This includes how long the participant receive funds for, how much funding the participant will receive (the Individual Budget), how often payments will be made, how funds should be used, changes to the DPA, bank account requirements and ending the DPA.
- Individual Plan – a personal plan that identifies the outcomes the participant wants to achieve and the support the participant needs to purchase to achieve these outcomes. It also contains the participant's Individual Budget, which outlines the total amount of funding that has been approved by FACS as a direct payment.
- DPA Handbook – contains the participant's obligations and responsibilities under the DPA and information to help the participant to manage their direct payments. It also includes information on what the participant must do to keep the direct payments and who to talk to if the participant has any questions or problems.

16. The DPA will give the participant choice and control over how individualised funding is spent, the support which they receive and who delivers support.

17. The participant will be responsible for:

- choosing and arranging their support and services,
- checking the quality of the support they receive,
- checking that the invoices from service providers are correct,
- paying the invoices and keeping receipts, and
- providing reports to FACS on how their funding is spent.

The participant can decide to directly employ their own staff, such as a support worker.

### **Assigning a nominee**

18. To enter into a DPA, a person with disability must be able to understand their rights and responsibilities under the DPA. A nominee can be appointed to act on their behalf. A nominee can be a parent, family member, friend, carer or other trusted person.

19. A person acting as a nominee will be responsible for managing the direct payments of the person with disability and must comply with the responsibilities set out in the DPA Handbook. The nominee must be the signatory to the DPA so that they can act on behalf of the person with disability.

### **Direct payments**

20. Direct payments can only be used to achieve the goals and outcomes identified in the participant's Individual Plan and cannot be used for any other purpose, including any illegal purpose or anything else not permitted by the DPA Handbook.

### **Bank account**

21. FACS transfers funds directly to a bank account set up by the participant to receive the direct payment. The participant must have a separate bank account, with the characteristics described in the DPA Handbook, to receive direct payments. The participant cannot make 'top up' contributions to this account from the participant's personal funds to purchase support.

22. Any interest earned in the bank account becomes part of the participant's funds, which can be used to buy support.

23. [Omitted.]

**Work health and safety**

24. The participant must fulfil the participant's work health and safety obligations as described in the DPA Handbook. These obligations apply whether the participant engages service providers, employs people directly or receives assistance of volunteers.

**Paying family members**

25. The participant cannot use the direct payments to employ, contract or pay family members to provide the support and services, except after receiving FACS' express written consent to do so.

**Reporting**

26. The participant must keep records of how the direct payments are used. These records must be kept for seven years after the end of the DPA. The records the participant must keep are described in the DPA Handbook.

**Unspent funds**

27. If the participant decides, or if FACS decides, to end the DPA before the end of the financial year, the participant must return any unspent funds to FACS. The participant must also pay back to FACS any unspent funds remaining after the end of the financial year, unless they have requested to keep \$1,500 or 5% of the total of the direct payments received during the financial year (whichever is the greater amount) into the next year. In that case, the participant must pay the remaining balance of the unspent funds back to FACS.

28. Before paying back unspent funds to FACS, the participant may use them to pay for outstanding invoices, wages or entitlements related to the approved support.

**Contractual relationship**

29. The DPA creates a contractual relationship between FACS and the participant, or the nominee on behalf of the participant. The arrangements between the participant and the people or organisations that the participant employ or engage using direct payments are completely independent of FACS.

30. The DPA Letter and DPA Handbook do not apply to any other support the participant may receive from FACS. These documents only relate to direct payments paid to the participant under a DPA.

## Ruling

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31. The payments received under the DPA are not ordinary income and do not form part of a participant's assessable income under section 6-5.

32. The interest earned on payments deposited into a participant's bank account under the DPA is not ordinary income and does not form part of the participant's assessable income under section 6-5.

33. The payments received under the DPA are not statutory income and do not form part of a participant's assessable income under section 6-10 because they:

- are not given or granted to participants in relation to employment or services rendered under section 15-2, and
- are not assessable recoupments of a participant under Subdivision 20-A.

34. Any losses or outgoings incurred in managing or obtaining the disability services under the DPA are not deductible under section 8-1 or any other provision of the ITAA 1997.

35. For relevant medical expenses which are met from payments under the DPA, the rebatable amount for the purposes of the medical expenses tax offset in section 159P of the ITAA 1936 will be nil.

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**Commissioner of Taxation**

12 February 2014

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## 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.*

36. A payment or other benefit received by a taxpayer is assessable income if it is:

- income according to ordinary concepts (ordinary income), or
- an amount or benefit that through the operation of the provisions of the tax law is included in assessable income (statutory income).

### Ordinary income

37. Under subsection 6-5(1) an amount is assessable income if it is ordinary income.

38. In determining whether an amount is ordinary income, the courts have established the following principles:

- what receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as a statute dictates otherwise
- whether the payment received is income depends upon a close examination of all relevant circumstances, and
- whether the payment received is income is an objective test.

39. Relevant factors in determining whether an amount is ordinary income include:

- whether the payment is the product of any employment, services rendered, or any business
- the character of the payment in the hands of the participant
- the form of the payment; that is, whether it is received as a lump sum or periodically, and
- the motive of the person making the payment. Motive however, is rarely decisive as in many cases a mixture of motives may exist.

40. A participant does not receive payments under the DPA as an employee of FACS or in relation to the carrying on of a business. Therefore, the payments are not the product of any employment or any business.

41. However, whether the payments under the DPA have been received for services rendered must be examined, as payments to a taxpayer for services rendered are assessable income, even though the taxpayer does not provide those services as an employee or in carrying on a business.

42. Under the DPA, while a participant obtains and manages the goods and services, they do not receive any amount as a reward for taking on this role. The DPA permits the payments to be used only for purchasing care, support or assistance the participant may need and meeting the direct costs of managing support as set out in their Individual Plan.

43. The participant must account for the use of the payments and at the end of the financial year, a participant is required to repay to FACS any unspent payments, unless they have requested to keep a portion to be used in the next financial year.

44. In these circumstances, the payments received under the DPA are not the product of any services rendered.

45. With respect to the character of payments received under the DPA, in *Federal Commissioner of Taxation v Rowe* (1997) 187 CLR 266 at 279, Brennan CJ, Dawson, Toohey and McHugh JJ held:

The character of a receipt is assessed by reference to its character in the hands of the taxpayer, not the character of the expenditure which produces the payment to the taxpayer. And this is so in the case of a voluntary payment.

46. The character of a payment in the hands of a participant in the present case is a payment for a specific purpose; namely, for the purpose of obtaining the care, support or assistance the person with the disability may need. The participant has to repay any amount that is unspent at the end of the year. The payments under the DPA in the hands of the participants do not have the character of income.

47. As to the form of payments under the DPA, there is an element of periodicity in the receipt of the payments. However, in *Federal Commissioner of Taxation v Dixon* (1952) 86 CLR 540 at 568, Fullagar J held that this factor while not unimportant is not decisive of whether or not payments are characterised as ordinary income.

48. With respect to motive, a primary motive of the FACS in providing an Individual Budget via direct payments is to give participants non-material benefits such as increased dignity, self-determination and capacity to integrate into the life of the community.

49. Consideration of the relevant circumstances of the payments, and the relevant factors for determining whether the payments are ordinary income in the hands of a participant for the purposes of section 6-5, leads to the conclusion that the payments are not ordinary income of the participants.

**Statutory income**

50. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts are called statutory income. A list of the statutory income provisions can be found in section 10-5. That list includes references to section 15-2 and Subdivision 20-A.

***Employment or services rendered***

51. Section 15-2, provides that assessable income shall include:

... the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you ...

52. As discussed above, the participants do not receive the payments under the DPA for any employment or services rendered. Therefore, the payments to the participants are not statutory income under section 15-2.

***Assessable recoupment***

53. Subdivision 20-A operates to include in assessable income amounts received as recoupments of specified losses or outgoings allowed or allowable as deductions. As the payments under the DPA are not being made by way of insurance or indemnity, the relevant provision is subsection 20-20(3) which provides that an amount is an assessable recoupment of a loss or outgoing if a taxpayer:

- receives the amount (except by way of insurance or indemnity), and
- can deduct an amount for the loss or outgoing in the current year or has deducted or can deduct an amount for it in an earlier year under a provision listed in the tables at section 20-30.

54. As the payments under the DPA are not made by way of insurance or indemnity and no deduction is allowable or would be allowable to the participant in respect of the expenditure incurred for the disability services (see paragraph 34 of this Ruling), the payments under the DPA are not assessable recoupments and therefore, no amounts are included in participants' assessable income under Subdivision 20-A.

**Interest earned**

55. Interest earned on money held in a bank account (bank interest) is usually ordinary income and assessable to the owner or owners of the bank account.

56. In the present case, however, any bank interest accrued on payments under the DPA, deposited in a separate bank account, forms part of the payments and, for the reasons referred to in paragraphs 37 to 49 of this Ruling with respect to the payments themselves, is not ordinary income.

57. As there is no provision listed in section 10-5 which includes bank interest as statutory income (see paragraph 51 of this Ruling), bank interest accruing to payments under the DPA in a participant's bank account is not statutory income of the participant.

## **General deductions**

58. As the payments under the DPA received by the participants are not assessable as either ordinary or statutory income, the losses and outgoings that are incurred in connection with those payments are not allowable as deductions under section 8-1 or any other provision of the ITAA 1997. Consequently, expenses incurred by a participant in acquiring the goods and services in accordance with their approved Individual Plan are not deductible.

## **Medical expenses tax offset**

59. Section 159P of the ITAA 1936 provides that an amount paid by a taxpayer as medical expenses less any amount paid, or entitled to be paid, to the taxpayer or any other person in respect of those medical expenses, is a rebatable amount for the purposes of the medical expenses tax offset.

60. Medical expenses include:

- payments to a legally qualified medical practitioner, nurse or chemist, or a public or private hospital, in respect of an illness or operation,
- payments for therapeutic treatment administered by direction of a legally qualified medical practitioner, and
- payments made as remuneration of a person for services rendered by him as an attendant of a person who is blind or permanently confined to a bed or invalid chair.

61. Some or all of the expenses of the participants incurred for the acquisition of goods or services under the DPA may qualify as medical expenses. However, for the purposes of section 159P of the ITAA 1936, any medical expenses must be reduced by any payment received or receivable in respect of those expenses to determine the rebatable amount. For relevant medical expenses which are fully met from payments under the DPA, the rebatable amount for the purpose of the medical expenses tax offset will be nil.

## **Appendix 2 – Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
Direct Payment Agreement	13
Assigning a nominee	18
Direct payments	20
Bank account	21
Work health and safety	24
Paying family members	25
Reporting	26
Unspent funds	27
Contractual relationship	29
<b>Ruling</b>	<b>31</b>
<b>Appendix 1 – Explanation</b>	<b>36</b>
Ordinary income	37
Statutory income	50
<i>Employment or services rendered</i>	51
<i>Assessable recoupment</i>	53
Interest earned	55
General deductions	58
Medical expenses tax offset	59
<b>Appendix 2 – Detailed contents list</b>	<b>62</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- assessable income
- assessable recoupments
- deductions and expenses
- disabled care expenses
- income
- medical expenses
- medical expenses rebates
- rebates and offsets

*Legislative references:*

- ITAA 1936
- ITAA 1936 159P
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6 5(1)
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5

- ITAA 1997 15-2
- ITAA 1997 Subdiv 20-A
- ITAA 1997 20-20(3)
- ITAA 1997 20-30
- TAA 1953
- Disability Services Act 1993 (NSW)
- Disability Services Act 1993 (NSW) 4
- Disability Services Act 1993 (NSW) Sch 1
- Disability Services Act 1993 (NSW) Sch 2

*Case references:*

- Federal Commissioner of Taxation v Dixon (1952) 86 CLR 540; [1952] HCA 65
- Federal Commissioner of Taxation v Rowe (1997) 187 CLR 266; (1997) 97 ATC 4317; (1997) 143 ALR 406; (1997) 35 ATR 432; (1997) 71 ALJR 624; [1997] 7 LegRep 2

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ATO references

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