TAXATION RULING NO. IT 2274

INCOME TAX : SUPERANNUATION - ASSESSABLE INCOME TO INCLUDE VALUE OF CERTAIN BENEFITS

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1077778	ASSESSABLE INCOME CERTAIN SUPERANNUATION FUND BENEFITS	23F 26AFA

PREAMBLE The Income Tax Assessment Amendment Act (No. 5) 1984 inserted section 26AFA into the Income Tax Assessment Act 1936 (the Act) to subject to tax certain benefits received on or after 7 December 1983 from or in connection with section 23F superannuation funds. The background to, and general operation of, the section is explained at pages 15-19 of the Explanatory Memorandum that accompanied the Income Tax Assessment Bill (No. 5) 1983 (which first proposed the introduction of section 26AFA). This ruling discusses the circumstances in which sub-section 26AFA(2) is to be applied to override the operative sub-section (sub-section (1)) of section 26AFA.

2. The conditions for the application of section 26AFA are set out in sub-section (1). In terms of that sub-section, a benefit is included in the recipient's assessable income where -

- the benefit is received or obtained on or after 7 December 1983 and is a benefit of any kind out of, or attributable to assets of, a superannuation fund to which section 23F applies, or has applied, in relation to any year of income;

- the benefit is either a benefit that the taxpayer has no right to receive from the fund or an "excessive benefit" - i.e. a benefit that is excessive according to the guidelines on permissable benefit levels in relation to section 23F superannuation funds (refer to Taxation Rulings No. IT 294, IT 2026, IT 2067 and IT 2201); and

- the Commissioner is satisfied that the benefit was received or obtained because the taxpayer was, or had been -

  .. a member of the fund;

.. a dependant (as defined) of a fund member;

.. associated with a fund member; or

.. associated with an employer who made deductible contributions to the fund.

Because sub-section (1) refers to a benefit attributable to assets of a fund to which section 23F has applied in any income year, a benefit that, for example, is received from a fund taxed under section 121DA or section 121DAB in the relevant year of income may nevertheless fall within the scope of section 26AFA where all or part of the fund assets had a source in a fund to which section 23F applies or had applied. The question of when a taxpayer has a right to receive a benefit from a fund will be the subject of a further ruling.

3. Sub-section 26AFA(2) provides that sub-section (1) does not apply to the whole or a part of a benefit where -

. sub-section (1) would otherwise apply to an excessive benefit (note that sub-section (2) cannot operate in the case of a benefit that is not excessive, but is included in assessable income under sub-section (1) because it is a benefit that the taxpayer had no right to receive); and

. the Commissioner is satisfied that it would be unreasonable for sub-section (1) to apply, having regard to -

.. the nature of the fund;

.. the circumstances by reason of which the benefit was excessive; and

.. other relevant matters relating to the receiving or obtaining of the benefit.

4. Sub-section 26AFA(2) recognises that there will be cases where the payment of an excessive benefit is made in circumstances in which it would be unreasonable for sub-section (1) to apply to impose a penalty (by subjecting the benefit to tax in the hands of the recipient) additional to that imposed in the form of tax charged on the fund's income.

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5. Provided that it is a bona fide situation, with no tax avoidance connotations, sub-section 26AFA(2) should be applied where the excessive benefit arose fortuitously or in other circumstances beyond the effective control of the recipient or the employer. For example, subject to the proviso mentioned, the sub-section should be applied where -

. the excessive benefit was accumulated during the period immediately preceding the time that the recipient ceased to be a member of the fund and it

arose as a result of an unexpected increase in the rate of return from the fund's normal investments;

- the fund is being wound up following, for example, the sale of the employer's business to an arm's length party and -

  - the recipients of benefits are not predominantly persons associated with the employer; and

  - where there are recipients of benefits who are persons associated with the employer, the recipients of benefits who are not so associated are treated without discrimination of any kind in favour of the associated persons; or

- the benefit is excessive on the basis of the recipient's final average salary because of a reduction in the salary that was being paid over the period during which the substantial part of the benefit was accumulated.

6. Another situation in which sub-section 26AFA(2) may be applied in bona fide circumstances is where excessive benefits are provided from a fund the income of which is taxable under section 121DA or 121DAB - as discussed in paragraph 2 above, a payment from such a fund could fall within the ambit of sub-section 26AFA(1). These funds are commonly used in situations where the superannuation benefits provided for employees are excessive according to the guidelines on permissible benefit levels for section 23F funds and the trustees of the fund decide to no longer seek the exemption afforded by section 23F. In such cases, where there are no tax avoidance connotations and where there has been no interference with the rights to benefits receivable by arm's length employees, sub-section (2) should be applied to override the operation of sub-section (1).

7. While it is expected that sub-section 26AFA(2) would ordinarily be applied in respect of the whole of an excessive benefit, the sub-section does provide for its application to part only of such a benefit. If any case is encountered where, after full consideration, it is concluded that the sub-section should be applied to relieve part only of a benefit from the operation of sub-section 26AFA(1), the case should be forwarded to this Office for consideration together with a recommendation supporting the application of the sub-section to part only of the excessive benefit.

8. Of course, in any case where an excessive benefit is received or obtained pursuant to an arrangement designed to abuse the exemption of the income of a superannuation fund provided by section 23F of the Act or the provisions of the Act under which deductions are allowable for superannuation contributions by employers, sub-section 26AFA(2) is not to be

applied. In those circumstances, the whole of the benefit is to be included in the recipient's assessable income.

COMMISSIONER OF TAXATION
10 APRIL 1986

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