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## Taxation Determination

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Income tax: is the application of a deceased member's benefits in a regulated superannuation fund to commence a superannuation income stream from that fund for each of one or more dependant beneficiaries of the deceased member (in accordance with regulation 6.21 of the *Superannuation Industry (Supervision) Regulations 1994*) a transfer of an amount between superannuation interests in that fund for the purposes of subsection 307-5(8) of the *Income Tax Assessment 1997*?

**❶ 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.

### Ruling

1. No. The application of a deceased member's benefits in a regulated superannuation fund to commence a superannuation income stream from that fund for each of one or more dependant beneficiaries of the deceased member (in accordance with regulation 6.21 of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations)) is not a transfer of an amount between superannuation interests in that fund for the purposes of subsection 307-5(8) of the *Income Tax Assessment Act 1997* (ITAA 1997).

# TD 2013/10

## **Date of effect**

2. This Determination applies from 1 July 2007. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

26 June 2013

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## Appendix 1 – Explanation

**①** *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.*

### Explanation

3. Subsection 307-5(8) of the ITAA 1997 operates to treat the transfer of an amount from one superannuation interest in a superannuation plan to another superannuation interest in the same plan as a 'payment' in determining whether the transfer of the amount is a superannuation benefit or a roll-over superannuation benefit under the ITAA 1997.

4. 'Superannuation plan', as relevantly defined (for present purposes) under paragraph (a) of the definition in subsection 995-1(1) of the ITAA 1997, means 'a superannuation fund'. 'Superannuation fund' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 10 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

5. 'Superannuation interest', as relevantly defined (for present purposes) under paragraph (a) of the definition in subsection 995-1(1) of the ITAA 1997, means 'an interest in a superannuation fund'.

6. The term 'interest' is not relevantly defined in the ITAA 1997, either on its own or in relation to a superannuation fund.

7. The *Encyclopaedic Australian Legal Dictionary* (LexisNexis) describes 'interest' as meaning:

Rights, advantages, duties, titles and liabilities with respect to a specific thing. An interest may be legal or equitable; it may be present, future or potential; it may be vested, conditional or contingent; and it may be direct or indirect.

8. As 'interest' is a very broad term capable of many different meanings (even in a legal context), the courts have held that if any precise conclusions are to be founded on its use, it must be placed in a 'setting' and must be considered in, and draw its meaning from, that context.<sup>1</sup>

9. The ITAA 1997 provides income tax concessions to regulated superannuation funds that comply with the regulatory provisions of the SIS Act and the SIS Regulations. The ITAA 1997 also provides income tax concessions to the members and the beneficiaries of deceased members of those complying regulated superannuation funds. Consequently, the context or 'setting' extends from the directly relevant provisions of the ITAA 1997 to the provisions of the SIS Act and SIS Regulations that, amongst other things, regulate the payment of superannuation benefits.<sup>2</sup>

<sup>1</sup> *Gartside v. Inland Revenue Commissioners* [1968] AC 553; *CPT Custodian Pty Ltd v. Commissioner of State Revenue (Vic)* (2005) 224 CLR 98; [2005] HCA 53; *Collins & Anor v. AMP Superannuation Ltd (Trustee Maritime Officers Superannuation Fund) & Ors* (1997) 75 FCR 565.

<sup>2</sup> Subsection 280-5(5) and section 280-40 of the ITAA 1997, being part of Division 280 of the ITAA 1997, the Guide to the superannuation provisions, specifically acknowledge the relevance of the SIS Act.

10. Part 6 of the SIS Regulations governs the payment of benefits by reference to 'a member's benefits in a fund'.<sup>3</sup> That is, it applies in relation to the benefits that are personal to a particular individual. Further, the circumstances in which a trustee of a regulated superannuation fund is entitled, or required, to pay a member's benefits are defined by reference to events that happen in relation to that particular individual.<sup>4</sup> For example, subregulation 6.21(1) of the SIS Regulations provides that:

Subject to subregulation (3), a member's benefits in a regulated superannuation fund must be cashed as soon as practicable after the member dies.

11. This focus on a particular individual is reflected in the definition of 'superannuation benefit' in subsection 307-5(1) of the ITAA 1997. For example, item 1 of the table in subsection 307-5(1) refers to:

- 'a payment to you from a \*superannuation fund because you are a fund member', and
- 'a payment to you from a superannuation fund, after another person's death, because the other person was a fund member'.

12. The ITAA 1997 is clearly concerned with whether an individual is paid a benefit because the individual is a member of a superannuation fund or because another individual was a member of the superannuation fund. The SIS Regulations contain rules for the payment of a member's benefits and those rules continue to refer to the payment of a member's benefits after the member's death. It is, therefore, apparent that the ITAA 1997 and SIS Regulations are concerned with the benefits that are payable in respect of the interest of a particular member in a fund.

13. Various Australian cases<sup>5</sup> indicate that prior to a superannuation fund member's death, a member has, in a legal sense, an interest in the superannuation fund of which they are a member. Prior to the member's death, a beneficiary of the member also holds an 'interest' in relation to, or in respect of, the member's interest in the fund. The 'interest' held by the beneficiary may be, in the circumstances, a mere expectancy. It may be more than a mere expectancy. Whatever the beneficiary's 'interest' is during the member's life, that 'interest' is personal to a particular beneficiary and co-exists with the member's interest in the superannuation fund during the member's life.

14. On the member's death, the member's personal interest in the fund ceases. At a particular point in time on or after the member's death, the 'interest' of a beneficiary to whom all or some of the member's 'benefits in the fund' are to be cashed vests in possession. That is, the beneficiary has a right to be paid all or some of the deceased member's benefits in the fund.

15. Exactly when a beneficiary's interest vests in possession will depend on a number of variables, including the governing rules of the fund. The interest may vest in possession at the time of the member's death or at some later point in time, for example on the exercise of the trustee's discretion to distribute the member's benefits in the fund in favour of the beneficiary.

<sup>3</sup> See subregulation 6.17(2) of the SIS Regulations.

<sup>4</sup> See Division 6.3 of the SIS Regulations and the definition of 'condition of release' in subregulation 6.01(2) of the SIS Regulations. Division 6.3 contains the rules specifying when a member's benefits in a fund may, or must, be paid (cashed) from the superannuation system. The definition of 'condition of release' states that a condition of release is satisfied "if the event specified ... has occurred in relation to the member".

<sup>5</sup> See for example, *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 270; [2010] HCA 36 at [30] per French CJ, Gummow, Heydon, Crennan and Bell JJ, *Wayne v Commissioner of Stamp Duties* [1966] 2 NSW 309; (1966) 85 WN (Pt 1) (NSW) 301; *Caboche v Ramsay* (1993) 119 ALR 215; [1993] FCA 611; *Katz v Grossman* [2005] NSWSC 934; *Moss Super Pty Ltd & Anor v Hayne & Anor* [2008] VSC 158.

16. Although the interest of the member prior to their death and a dependant beneficiary's interest vested in possession are separate interests, the rights attaching to each interest are in respect of the same thing, being, as the SIS Regulations put it, the member's benefits in the fund and, as the ITAA 1997 puts it, the superannuation interest or interests of the member in the fund. The cashing of the member's benefits to the beneficiary in the form of a pension in accordance with regulation 6.21 of the SIS Regulations is made in satisfaction of the beneficiary's right to be paid all or some of the member's benefits, or superannuation interest or interests, in the fund.

17. Where, immediately before the death of the member, a superannuation income stream was not payable to the member, what relevantly occurs as a result of the member's death is:

- the cessation of the member's personal interest in the fund on the member's death; and
- the vesting in possession of the 'interest' of one or more beneficiaries on the member's death or at some time later.

18. Those things also occur as a result of the member's death where, immediately before their death, a superannuation income stream was payable to the member and that superannuation income stream does not automatically transfer on the death of the member to another individual. In that case, on the member's death the situation effectively becomes the same as where immediately before the death of the member a superannuation income stream was not payable to the member.

19. That does not involve a 'transfer' of any 'amount' between the interest of the deceased member and the 'interest' of any beneficiary for the purposes of subsection 307-5(8) of the ITAA 1997.

20. Where, immediately before the death of the member, a superannuation income stream was payable to the member and that superannuation income stream automatically transfers on the death of the member to another individual who is eligible to be paid that superannuation income stream in accordance with subregulation 6.21(2A) of the SIS Regulations, the superannuation interest that immediately before the death of the member was supporting the superannuation income stream payable to the member continues after the death of the member to support that superannuation income stream (which on death became payable to another individual). As such, that does not involve a transfer of any amount between superannuation interests in the same superannuation plan for the purposes of subsection 307-5(8) of the ITAA 1997.

21. In conclusion, the application of a deceased member's benefits in a regulated superannuation fund to commence a superannuation income stream from that fund for each of one or more dependant beneficiaries of the deceased member (in accordance with regulation 6.21 of the SIS Regulations) is not a transfer of an amount between superannuation interests in that fund for the purposes of subsection 307-5(8) of the ITAA 1997.

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- Death benefits – superannuation benefits
- Superannuation benefits
- Superannuation income stream
- Superannuation interest

*Legislative references:*

- ITAA 1997
- ITAA 1997 Div 280
- ITAA 1997 280-5(5)
- ITAA 1997 280-40
- ITAA 1997 307-5(1)
- ITAA 1997 307-5(8)
- ITAA 1997 995-1(1)
- SIS Act
- SIS Act 10
- SIS Regulations
- SIS Regulations Pt 6
- SIS Regulations 6.01(2)
- SIS Regulations 6.17(2)
- SIS Regulations Div 6.3
- SIS Regulations 6.21

- SIS Regulations 6.21(1)
- SIS Regulations 6.21(2A)
- TAA 1953

*Case references:*

- *Caboche v. Ramsay* (1993) 119 ALR 215; [1993] FCA 611
- *Collins & Anor v. AMP Superannuation Ltd (Trustee Maritime Officers Superannuation Fund) & Ors* (1997) 75 FCR 565
- *CPT Custodian Pty Ltd v. Commissioner of State Revenue (Vic)* (2005) 224 CLR 98; [2005] HCA 53
- *Finch v. Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36
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- *Katz v. Grossman* [2005] NSWSC 934
- *Moss Super Pty Ltd & Anor v. Hayne & Anor* [2008] VSC 158
- *Wayne v. Commissioner of Stamp Duties* [1966] 2 NSW 309; (1966) 85 WN (Pt 1) (NSW) 301

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- Encyclopaedic Australian Legal Dictionary (LexisNexis)

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