

TR 2013/5EC2 - Compendium



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Public advice and guidance compendium – TR 2013/5

❗ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Ruling TR 2013/5DC1 *Income tax: when a superannuation income stream commences and ceases*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Issue number	Issue raised	ATO response
1	The outcome at paragraphs 20 and 101 of the draft Ruling that satisfying the rules or standards in the following year effectively results in the commencement of a new pension appears inconsistent with other ATO and Treasury guidance on this issue, as follows: - In the ATO's fact sheet Transfer balance account (QC 54354), under the heading 'Failure to comply with pension or annuity standards', in the Example dealing with Yukari, the ATO advises that if the self-managed superannuation fund (SMSF) trustee wishes to claim the pension exemption in relation to Yukari's pension in the 2019 year, Yukari must cease her income stream and start a new account-based income stream that complies with the relevant pension rules or standards. - Note that, in this case, no debit to Yukari's transfer balance account would arise for the commutation of her pension, as a debit would have already arisen on 30 June 2018 as a result of Yukari's pension no longer	In the final update of the Ruling, amendments have been made (paragraphs 20, 101 and Example 6) to clarify the ATO view, consistent with the web content referred to. The consolidated Ruling now clearly states that where a superannuation income stream ceases for income tax purposes because it did not meet the requirements of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (SISR 1994), a new superannuation income stream cannot automatically commence in a future year. It will not be a superannuation income stream for income tax purposes from the time of cessation, even if the member remains entitled to receive payments from the superannuation fund. This is because the SISR 1994 states that the rules relating to a pension must 'ensure' the requirements are met. If they have not been met in a particular year, they can no longer 'ensure' that the requirements will be met. For the member to receive a superannuation income stream, any income stream payable from the superannuation interest must cease (for example, by commutation) and a new superannuation income stream must commence under the principles in paragraphs 9 to 13 of the Ruling.

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	being in retirement phase. Furthermore, when Yukari commences her new pension, a credit would arise to her transfer balance account. The above approach (that is, in the ATO's fact sheet) is also supported by the Explanatory Memorandum (EM) to the <i>Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016</i> (that is, the Bill that introduced the transfer balance cap) – refer to paragraphs 3.141 and 3.142 of the EM.	
2	Based on paragraphs 18 and 20 (and paragraphs 96 to 102) of the draft Ruling, a superannuation income stream ceases for income tax purposes at the beginning of an income year in which any of the rules or standards for the income stream (in the SISR 1994) are not satisfied during the year (for example, where a fund fails to pay the minimum annual pension amount in respect of a member's pension during the year). Furthermore, paragraphs 20 and 101 of the draft Ruling advise that if the relevant rules or standards are complied with in respect of an income stream (or pension) in the following income year, this effectively results in the commencement of a new pension and the proportioning rule must be applied to that new pension when it commences. The ATO's Ruling does not make it clear as to what the commencement time of the (deemed) new pension (or income stream) is in the following income year – we suspect that the commencement time of the new pension in the following income year would be 1 July (that is, at the beginning of the year). In this regard, we suggest that the ATO makes this clear in its final Ruling.	See the response to Issue 1 of this Compendium. The ATO view is that a new superannuation income stream will only commence if and when any income stream payable from the superannuation interest ceases (for example, by commutation) and a new superannuation income stream is commenced under the principles in paragraphs 9 to 13 of the final consolidated Ruling.
3	Where a superannuation income stream ceases at the beginning of an income year in which the minimum pension standards have not been satisfied for that pension, it has been traditionally accepted that when the pension ceases (for example, on 1 July) for income tax purposes, the entire	The final consolidated Ruling states (at paragraph 100) that if the minimum payments are not met for an income year, the superannuation income stream is taken to have ceased for income tax purposes at the beginning of that income year.

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	pension is effectively commuted and rolled back into accumulation phase. In this case, the commuted lump sum benefit that arises and which is effectively rolled-back into accumulation phase will have a tax-free and taxable component calculated by reference to the tax-free and taxable component of the pension from which the commutation occurred. Refer to section 307-125(3)(c) and the National Tax Liaison Group Superannuation sub-group minutes of meeting dated 8 December 2010. However, based on the ATO's more recent guidance in order to regain access to the pension exemption in the following income year, the recipient member is required to fully commute their existing pension and then commence a new retirement phase pension. In these circumstances it would appear the same pension would end up being commuted twice – firstly, on 1 July of the income year in which the pension does not satisfy the pension standards, and secondly, when the member actually commutes the pension in order to gain access to the pension exemption (that is, by commencing a new pension). We suggest that this issue is clarified in the final Ruling on when a superannuation income stream commences and ceases.	It should be noted, however, that the cessation for income tax purposes is not a commutation of the pension. Even though the superannuation income stream may have ceased the member may still be entitled to receive payments from the superannuation fund in respect of the income stream under the governing rules of the superannuation fund, or under general trust law concepts. These payments will be superannuation lump sums for the purpose of determining the tax-free and taxable components, and the income from assets supporting the income stream will not qualify as exempt current pension income. As explained above at the response to Issue 1 of this Compendium, for there to be a superannuation income stream that complies with the relevant SISR requirements in future years, any income stream that is still payable from the interest which supported the superannuation income stream must cease. This may occur via commutation of the income stream. A new income stream must then be commenced that meets all of the relevant SISR requirements.
4	In relation to the content on successor fund transfers (SFTs), at paragraph 120B of the draft Ruling, it states '... entitlements in their current superannuation fund will be provided by a different trustee from the date of transfer'. It is not uncommon for the trustee of the seed fund to also be the trustee of the successor fund.	Paragraph 120B of the final consolidated Ruling gives an example of when an SFT 'may' take place. In addition, the paragraph states that the member will 'usually' be advised that their entitlements will be provided by a different trustee from the date of the transfer. We think that the wording used in the paragraph leaves it open to include an SFT where the trustee of the original fund is also the trustee of the successor fund, and note that the trustee would still be acting in a different capacity in that context.

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5	We submit that the ATO view in the revised draft Ruling is difficult to reconcile with the relevant SFT provisions in the <i>Superannuation Industry (Supervision) Act 1993</i> (SISA) and the SISR 1994. Those provisions allow for the transfer of a member's interest in a superannuation fund without the member's consent, but do not allow for the commutation of an income stream being paid to a member without the member's consent. Two possible interpretations of the operation of the SFT provisions appear open: • there is no power to transfer an income stream member as part of an SFT, and thus consent would be required from each and every income stream member (to allow the commutation of his or her commutation) as part of the implementation of an SFT, or • the relevant income streams do not cease and recommence. We submit that the first of these interpretations would render most large SFTs unworkable. Further, the second interpretation gives rise to significant uncertainty as to the tax treatment of amounts paid by the closing fund to the ongoing fund in an SFT that reflect the value of an income stream member's liabilities. In light of this, we consider that the ATO view as expressed in the draft Ruling represents an appropriate compromise. However, we submit that, as part of finalising the draft Ruling, the ATO should liaise with the Australian Prudential Regulation Authority (APRA) to provide broader guidance to the industry that better reconciles the provisions in the SISA and the SISR 1994 and the tax legislation. This guidance could, for example, make clear that APRA considers the member's income stream in the closing fund can cease (or be commuted) without the member's consent in the context of an SFT.	This issue falls outside the scope of this update to the Ruling. This Ruling sets out the Commissioner's view that under an SFT a member's superannuation income stream will cease for income tax purposes in the original fund. APRA would be the appropriate agency to seek guidance from on the SFT implications under the SISA and SISR 1994.

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6	The proposed ATO view about SFTs triggers various reporting obligations for both the closing and ongoing superannuation funds under the Member Account Transaction Service (MATS) and Member Account Attribution Service (MAAS). These include reporting of the: • commutation of the existing income stream by the closing fund, and • commencement of the new income stream by the ongoing fund. Subject to the 2 funds carefully monitoring the quantum of income streams paid in the period up to the SFT date and after the SFT date, the ATO view may also result in issues in relation to the minimum pension requirements. Based on acceptance of the views expressed in relation to SFTs in the revised TR, we recommend that the ATO provides additional commentary in the revised TR or in other guidance issued at the same time as the revised TR that: (a) specifically notes the additional reporting and minimum pension implications that arise from the ATO view, and (b) provides administrative relief (in the SFT protocol or similar) that – relieves the closing fund and ongoing fund from any redundant elements of this reporting (while the reporting of the member's closure of account in the closing fund and opening of account in the ongoing fund is important and valuable to the member, the reporting of the 'commutation value' by the closing fund and the 'commencement value' by the ongoing fund would appear redundant), and – for retirement phase income streams, ensures that where the combined income stream payments made by the 2 funds in the year in	Law Companion Ruling LCR 2016/9 <i>Superannuation reform: transfer balance cap</i> addresses the transfer balance cap implications of a superannuation income stream commencing and ceasing. Further clarification in relation to superannuation income streams that have ceased due to failure to comply with the pension standards will be considered at the next review of that Ruling. The Successor and intra fund transfer reporting page (QC 56421) on our website addresses the implications for an SFT of the minimum payment requirements for a superannuation income stream. Requests for administrative relief are outside the scope of this update to the Ruling.

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	which the SFT occurs exceeds the minimum pension requirement had the closing fund continued to exist until year-end, both the closing fund and the ongoing fund will be entitled to treat the income streams as retirement phase income streams for the purposes of their respective exempt current pension income calculations for the period up to the SFT date (for the closing fund) and for the period from the SFT date to the ongoing fund's year-end (for the ongoing fund). We submit that such relief is appropriate, in that it would remove unnecessary compliance costs (and potential income tax liabilities) for funds and fund members.	
7	We welcome the government's announcement on 26 October 2023, which seeks to address the specific negative consequences that may flow from the ATO view in relation to defined benefits income streams. We look forward to working with Treasury and the ATO on any practical aspects once proposed legislation for this announcement is released. We note that this legislation may have implications for some of the comments in the draft Ruling. In order to ensure consistency, we suggest that the ATO defers finalisation of the draft Ruling until the approach adopted in this proposed legislation is known.	The proposed amendments announced by the government on 26 October 2023 would apply to capped defined benefit income streams to address potential unintended transfer balance cap implications of a capped defined benefit income stream ceasing in a SFT and commencing in a new fund. The final consolidated Ruling applies to pensions that satisfy subregulation 1.06(1) and paragraph 1.06(9A)(a) of the SISR 1994, which are referred to as 'account-based income streams'. As both capped defined benefit income streams and the transfer balance cap implications of a superannuation income stream commencing and ceasing are outside the scope of this Ruling, we do not consider it necessary to delay publication of the final Addendum. We also note that the exposure draft Explanatory Statement for the Treasury Laws Amendment Instrument 2024 <i>Successor fund transfers and capped defined benefit income streams</i>, released for public consultation on 3 April 2024, acknowledges that the original superannuation income stream ceases and a new one commences in the successor fund.

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