TD 98/D4 - Income tax: what are sufficient instructions to enable a payer to make eligible termination payments and what are the record retention requirements for these instructions?

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Draft Taxation Determination

Income tax: what are sufficient instructions to enable a payer to make eligible termination payments and what are the record retention requirements for these instructions?

1. Regulation 99E of the Income Tax Regulations provides that payment instructions must be sufficient to enable the payer to make an eligible termination payment (ETP). In particular, information for the payer should at least:

- identify the amount and destination of any roll-over payment; and
- identify the amount of any cash amount; and
- identify the ETP components and preservation amounts of each roll-over payment and cash amount; and
- indicate how any 15 February 1990 roll-over balance (if known) is to be distributed.

2. Regulation 99C requires a payer to comply with payment instructions received in accordance with regulation 99E, provided this would not breach:

- a law of the Commonwealth, a State or a Territory (for example, paying a preserved benefit in cash); or
- the terms of any agreement between the payer and the taxpayer (for example, an annuity contract).

3. For instructions to be 'sufficient to enable a payer to make an ETP', the payer may need additional information to that listed in paragraph 1 above. An example is information relating to different investment portfolios that a taxpayer may withdraw.

4. The concept of sufficient instructions does not mean that a payer can make decisions for the taxpayer (for example, regarding the distribution of tax components and preservation amounts between cash and roll-over payments), but neither does it mean that instructions must be highly detailed. For example, an instruction by a taxpayer to roll-over the whole of an ETP to a particular superannuation provider is sufficient for the payer to determine the amount, destination, tax and preservation components (and any known 15 February 1990 roll-over balance) of the roll-over payment.

Default treatment of payments

5. The payer can rely on a standard default treatment of benefits in, for example, distributing undeducted contributions between cash and roll-over amounts in the absence of instructions to the contrary. However, the default policy must be clearly disclosed to the taxpayer.

6. A default policy cannot be 'enforced' by a payer against the instructions of a taxpayer. For example, where a default policy indicates that undeducted contributions are to be allocated to cash and roll-over payments in a particular way, and a member gives sufficient instructions for a different and valid allocation of undeducted contributions, regulation 99C requires the payer to comply with the instructions received.

Record retention requirements

7. Under regulation 99I, both the payer and the taxpayer must keep a copy of the instructions for 5 years after the instructions are given.

8. Where redemption instructions are provided by the taxpayer to the fund by telephone, they must be kept by the fund; for example, on a record completed by the client service operator. This record, together with any redemption contract, satisfies the requirement for a payer to keep a record of instructions received and establishes that the instructions are sufficient for the purposes of regulation 99E. The taxpayer must also keep a record of the telephone instructions given to the fund.

Example 1

9. A superannuation fund processes payments and roll-overs on the basis of instructions provided on a standard form. The fund uses a default policy to allocate undeducted contributions between cash and roll-over payments in the absence of contrary instructions. This policy is clearly explained on the form.

10. The fund receives instructions on the standard form from a taxpayer who has undeducted contributions included in her lump sum benefit. The instructions on the form do not indicate how the fund is to allocate these undeducted contributions.

11. Assuming that the instructions received are otherwise sufficient, the fund can apply the default allocation of undeducted contributions and proceed to make payments.

Example 2

12. A superannuation fund holds unrestricted non-preserved benefits on behalf of a member. The fund and the member establish a written telephone cash redemption contract whereby an account for the member is identified (for depositing of cash redemptions) and the make-up of telephone cash redemptions is agreed. Procedures are established to ensure the taxpayer is correctly identified when making a telephone redemption.

13. The taxpayer subsequently telephones the fund to make a redemption under the contract. Once verification is complete, the taxpayer advises the fund of the amount to be redeemed. The cash payment can then be made by the fund, assuming the instructions are not inconsistent with any other legal or contractual requirements.

14. A record of the telephone redemption instructions is completed by the client service operator and kept by the fund. The taxpayer also keeps a record of instructions given to the fund.

Your comments

15. If you want to comment on this draft Determination, please send your comments by **Friday 3 July 1998** to:

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